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COMMENT

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WHAT IS THE RULE OF RECOGNITION  
IN THE UNITED STATES?

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INTRODUCTION.....	1162
I. HART, DWORKIN, AND INCLUSIVE POSITIVISM:	
THE DEBATE IN THE BACKGROUND .....	1165
A. <i>Hart and the Rule of Recognition</i> .....	1165
B. <i>Dworkin’s Critique</i> .....	1168
C. <i>Inclusive Positivism: The Positivist Answer to             the Problem of Morality</i> .....	1170
II. PREVIOUS ACCOUNTS OF THE U.S. RULE OF RECOGNITION:	
GREENAWALT AND HIMMA.....	1175
A. <i>Kent Greenawalt’s The Rule of Recognition and             the Constitution</i> .....	1176
B. <i>Kenneth Einar Himma’s U.S. Rule of Recognition</i> .....	1180
C. <i>Objections to Himma’s Rule</i> .....	1183
1. Empirical Objections .....	1184
2. Philosophical Objections.....	1188
III. THE RULE OF RECOGNITION FOR THE UNITED STATES:	
A PROPOSAL AND DEFENSE .....	1192
CONCLUSION.....	1197

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## INTRODUCTION

Debates in legal philosophy tend to take place in rarified air, involving highly theoretical and abstract arguments about conceptually possible legal systems, while rarely concerning themselves with the actual governments and legal systems that we mortals encounter here on earth. Still, it can be helpful—both for the legal philosophers and the more general legal community—to drag these theoretical arguments down from the stratosphere and see how they can be adapted to describe and explain the workings of an actual legal system. Through such an exercise, legal philosophers may “check their work,” so to speak, uncovering the flaws that become apparent when their theories are put through the rigors of reality, and practitioners can see how the underlying theoretical framework of the nature of law itself might help them to understand, and perhaps even improve, the functioning of their particular legal system.

The positivist account<sup>1</sup> of law provided by H.L.A. Hart in his seminal work, *The Concept of Law*,<sup>2</sup> provides an obvious choice for application to an existing legal system. It is no exaggeration to say that Hart’s work has set the context, terminology, and structure of the central debates in jurisprudence over the last fifty years.<sup>3</sup> In addition, almost all of the most important contributions to legal philosophy over that period have been either rejections of Hart’s theory<sup>4</sup> or attempts to re-

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<sup>1</sup> Positivism is a broad concept containing many variations on a theme, but it may be defined generally as “[t]he theory that legal rules are valid only because they are enacted by an existing political authority or accepted as binding in a given society, not because they are grounded in morality or in natural law.” BLACK’S LAW DICTIONARY 906 (7th ed. 1999). The positivists attempt to explain the law in a value-neutral, empirical manner, in an effort to divorce jurisprudential thought from what they perceive to be the limitations of natural law and its normative (or moral) explanations of the nature of law. The central debate among contemporary positivists concerns the severity of this separation between law and morality, with some positivists arguing that certain laws may be valid because of their moral character, while others claim that law can always be identified by social practice without reference to morality. See *infra* Section I.C.

<sup>2</sup> H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

<sup>3</sup> See, e.g., Jules L. Coleman, *Preface to HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW*, at v (Jules Coleman ed., 2001) (“*The Concept of Law* is the most influential and important book in the analytic tradition of jurisprudence written in the second half of the twentieth century.”).

<sup>4</sup> See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* (1986); RONALD DWORKIN, *The Model of Rules I*, in *TAKING RIGHTS SERIOUSLY* 14 (1977) [hereinafter DWORKIN, *The Model of Rules I*]; RONALD DWORKIN, *The Model of Rules II*, in *TAKING RIGHTS SERIOUSLY*, *supra*, at 46 [hereinafter DWORKIN, *The Model of Rules II*]; JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

fine, modify, or develop it.<sup>5</sup> Hart's most important contribution to legal theory is arguably the introduction of the concept of "the rule of recognition"<sup>6</sup>—the ultimate criteria of legal validity in a given legal system—which fundamentally altered the longstanding clash between legal positivists and natural-law theorists about the nature of law.<sup>7</sup> The rule of recognition is a complex idea, but it may be described most simply as the rule that is used to identify those other rules that are valid as law in a given legal system.<sup>8</sup>

To bring Hart's theory outside of a purely theoretical debate, then, one must show how his understanding of law itself can provide an individual in a given legal system with some articulation of that system's rule of recognition; that is, it must provide the individual with a rule, whether complex or simple, that would allow that individual to determine whether a given norm is or is not a law in that system. Therefore, for it to be practically useful, Hart's concept of the rule of recognition should be applicable to an existing legal system. In applying this theory to reality, one will hopefully be able, first, to uncover some of the strengths and weaknesses of Hart's highly influential account of the nature of law, and, second, to provide the legal theorists of a given legal system with a better understanding of how their system works.

Hart at least made a passing attempt to tether his theory to reality by suggesting, by way of example, that the rule of recognition for the United Kingdom is "what the Queen in Parliament enacts is law."<sup>9</sup> Whether or not this statement is an accurate description of that legal

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<sup>5</sup> See, e.g., JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY* (2001); JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979).

<sup>6</sup> HART, *supra* note 2, at 94-110.

<sup>7</sup> This argument can be traced back through the history of political philosophy, with a list of important contributors that includes such luminaries as Plato, Aristotle, St. Thomas Aquinas, Thomas Hobbes, John Locke, Jeremy Bentham, and John Stuart Mill.

<sup>8</sup> Hart himself explains that

[t]he existence of . . . a rule of recognition may take any of a huge variety of forms, simple or complex. It may, as in the early law of many societies, be no more than that an authoritative list or text of the rules is to be found in a written document or carved on some public monument. . . .

In a developed legal system the rules of recognition are of course more complex; instead of identifying rules exclusively by reference to a text or list they do so by reference to some general characteristic possessed by the [valid] primary rules. This may be the fact of their having been enacted by a specific body, or their long customary practice, or their relation to judicial decisions.

HART, *supra* note 2, at 94-95.

<sup>9</sup> *Id.* at 107.

system, it has proven much harder to provide a similarly succinct rule for the United States. Due to the myriad complications inherent in the United States legal system,<sup>10</sup> Hart's supposedly simple positivist description of the law has proven quite difficult to apply. In his famous and powerful critique of Hart's theory, Ronald Dworkin asserts that the difficulties that arise when trying to apply the Hartian model to the United States demonstrate fatal flaws in the theory.<sup>11</sup> In Dworkin's view, because Hart's positivist thesis fails to account for some of the most essential components of legal systems like America's, positivism ultimately fails as an account of law in general. If Hart's theory is to have any practical effect for citizens of the United States, then, it must answer Dworkin's criticism and account for those parts of the American legal system that Hart's theory seemingly denies or ignores.

A few theorists have attempted to formulate such a rule of recognition for the United States. This Comment will present and critique those previous accounts, ultimately building upon them to suggest a plausible American rule of recognition. Part I focuses on Hart's theory, Dworkin's criticism, and the response to that criticism by the so-called "soft" or "inclusive" positivists. Part II documents and evaluates previous attempts to provide a rule of recognition in the United States, beginning with the work of Kent Greenawalt and then moving to the more recent debate between Kenneth Einar Himma and Matthew Kramer. Finally, Part III presents my own account of the rule of recognition in the United States, and argues that an inclusive-positivist rule of recognition can be created for our legal system, but only if certain controversial empirical assumptions about the nature of law in the United States are correct. Through the process of developing this rule, I uncover some of the deficiencies in Hart's account of the nature of law and present some possible solutions to the problems that these deficiencies present. Furthermore, I explore how certain theories of American constitutional law—most importantly, theories involving some form of popular constitutionalism—may prove to be in-

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<sup>10</sup> These complications include, as just a cursory summary, those involving constitutional amendments, judicial review, the separation of powers both between the three branches of government and between the federal and state governments, and the question of constitutional interpretation, including the problematic idea of popular constitutionalism.

<sup>11</sup> See DWORKIN, *The Model of Rules I*, *supra* note 4 (arguing that Hart's theory of law fails to account adequately for features like judicial discretion in the United States); see also *infra* Section I.B.

compatible with a plausible positivist theory of law for the United States.

I. HART, DWORKIN, AND INCLUSIVE POSITIVISM:  
THE DEBATE IN THE BACKGROUND

A. *Hart and the Rule of Recognition*

In 1961, H.L.A. Hart changed the context of modern jurisprudential debate by introducing his concept of the rule of recognition and the corresponding positivist account of law. Most importantly, Hart argued that law is a social fact and thus can be distinguished from morality.<sup>12</sup> As opposed to moral norms, which are true regardless of social practice or acceptance, legal norms, according to Hart, are explicitly determined by social practice.<sup>13</sup> Thus, Hart offered his own descriptive theory of law, derived from rules of conduct, where a rule is a “kind of complex social practice that consists of a general and regular pattern of behavior among some group of persons, together with a widely shared attitude within the group that this pattern is a common standard of conduct to which all members of the group are required to conform.”<sup>14</sup>

Hart distinguishes between two possible attitudes that can be taken toward such norms, which he calls the “internal” and “external” points of view. If the individual is an observer of the norm but does not actually accept the norm as binding, that individual has an external point of view. If, on the other hand, an individual accepts the norm and uses it as her guide for conduct, then the individual can be said to have taken the internal point of view. The internal point of

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<sup>12</sup> The positivist attempt to explain law in a value-neutral, empirical manner may be summarized by John Austin’s statement that “[t]he existence of law is one thing; its merit or demerit is another.” JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 157 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832). One of Hart’s primary goals was, however, to further positivism’s descriptive aims by advancing past Austin’s limiting description of law as merely orders backed by threats issued from a habitually followed sovereign. Hart argued that Austin’s account fails to describe certain fundamental and necessary varieties of law, such as the power to create obligations through contract and the continuity of law over time. See HART, *supra* note 2, chs. 2-3.

<sup>13</sup> Positivists describe this as the Social Fact Thesis, which “asserts that the existence of law is made possible by certain kinds of social fact.” Kenneth Einar Himma, *Inclusive Legal Positivism*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 125, 125 (Jules Coleman & Scott Shapiro eds., 2002). This Part borrows heavily from Himma’s excellent and insightful summary of Hart’s theory.

<sup>14</sup> Stephen Perry, *Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View*, 75 *FORDHAM L. REV.* 1171, 1171 (2006).

view is useful for determining when a social norm transforms into a “rule” and thus rises above the level of a mere convergent social habit.<sup>15</sup> A social norm becomes a rule “when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great.”<sup>16</sup> Thus, in Hart’s theory, a rule has both a *behavioral* element, with a convergent pattern of conduct, and a *cognitive* element, where participants develop a critical, reflective attitude toward the norm and criticize deviations from that norm by others in the community.<sup>17</sup> This is often called the “conventional” nature of Hart’s account, where “[r]ules are conventional social practices if the general conformity of a group to them is part of the reasons which its individual members have for acceptance.”<sup>18</sup>

According to Hart, every legal system has criteria by which it distinguishes legal rules from nonlegal norms.<sup>19</sup> Hart describes these criteria by first distinguishing between “primary rules,” or rules that require the participants of a legal system to do or abstain from doing certain actions, and secondary rules, which “provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations.”<sup>20</sup> A legal system advances past a “primitive” state and becomes “fully developed” when it moves past primary rules to include secondary rules.<sup>21</sup> The rule of

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<sup>15</sup> Hart’s example of a social convention that does not rise to the level of law is the proposition that all Englishmen go to the cinema on Saturday nights. Because no one would criticize the individual Englishman who stays home on Saturday night, the regular moviegoing practice is merely a convergent social habit and not a “rule.” See HART, *supra* note 2, at 9-10, 55-56.

<sup>16</sup> *Id.* at 86.

<sup>17</sup> Kenneth Einar Himma, *Making Sense of Constitutional Disagreement: Legal Positivism, The Bill of Rights, and the Conventional Rule of Recognition in the United States*, 4 J.L. SOC’Y 149, 153 (2003).

<sup>18</sup> HART, *supra* note 2, at 255. Positivists call this the Conventionality Thesis. Himma, *supra* note 13, at 125.

<sup>19</sup> Positivists call this idea the Differentiation Thesis, where, under Hart’s account, “[i]n every conceptually possible legal system *S*, there is a set of criteria *CoV* [criteria of validity] such that a norm *n* is a law in *S* at a particular time *t* if and only if *n* satisfies the criteria contained in *CoV* at *t*.” Himma, *supra* note 17, at 151.

<sup>20</sup> HART, *supra* note 2, at 81.

<sup>21</sup> For Hart, a legal system is “primitive” if it consists of just a series of primary rules that assign duties and obligations to the citizenry. This is because a society that issues only primary rules suffers from several deficiencies (Hart lists the main deficiencies as uncertainty, a static nature, and inefficiency in enforcement). To make up for those deficiencies, the society must issue secondary rules. These are of three types: rules of change, which allow primary rules to be extinguished or modified; rules of adjudica-

recognition, a special kind of secondary rule, provides the test for validity for all other rules, in that “[t]o say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition.”<sup>22</sup> Such a rule of recognition lies at the foundation of every “fully developed” legal system and thus is a necessary condition for the existence of a legal system. In those systems, it is the ultimate or supreme rule of the system and is not subject to some other test for its own validity.<sup>23</sup> Furthermore, the minimum conditions of a legal system require, first, that those rules of behavior that are deemed valid by the rule of recognition be generally obeyed by the private citizens, and, second and most importantly, that the officials in society adopt the internal point of view with regard to this rule of recognition. Thus, the average citizen need only obey the rules through his or her actions, whereas the officials must hold the rule of recognition “as [the] common standard[] of official behaviour and appraise critically their own and each other’s deviations as lapses.”<sup>24</sup> In summary, then, the rule of recognition is the secondary rule that is accepted and practiced by officials in a given legal system as the ultimate criterion of validity in that system.<sup>25</sup>

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tion, which empower individuals to determine whether a primary rule has been broken; and, most importantly, the rule of recognition, which serves as an authoritative acknowledgment that the primary rules are the proper way of doing things. A legal system that contains these three types of secondary rules is, in Hart’s view, “fully developed.” *See id.* at 91-99.

<sup>22</sup> *Id.* at 103. Therefore, using the example *supra* note 15, the norm that all Englishmen go to the movies on Saturday is neither a valid law nor a legal rule because it was not enacted as law by the Queen in Parliament.

<sup>23</sup> In this way, then, the rule of recognition is a statement of fact about the legal system in question, but it is subject to two types of interpretation depending on the individual’s point of view: the internal point of view (“It is the law that X”) and the external point of view (“In England, they recognize as law X”). These points of view make the rule of recognition both a matter of law (for those who adopt the internal point of view) and a matter of fact (for those who adopt the external point of view).

<sup>24</sup> HART, *supra* note 2, at 117. Matthew Adler stresses the importance of the “critical reflective attitude” of officials to the rule of recognition. Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 732 (2006). Officials must not be merely obeying the rule but must actually accept it as “[a] social rule . . . [that] has determinate content only because there is behavior that some individuals engage in, taking as normative a particular standard (which they can grasp, if perhaps not exhaustively articulate) requiring that behavior.” *Id.* (footnote omitted). This is also what positivists mean by the cognitive element of the Conventionality Thesis. *See supra* notes 17-18 and accompanying text.

<sup>25</sup> It is identifying who, exactly, these officials are that creates some of the most serious difficulties in determining the content of the rule of recognition in the United States.

Hart thus constructs a complex explanation of the nature of law without appealing to moral or normative explanations. Laws, for Hart, are rules of behavior that require subjects and officials to behave according to certain socially determined standards. Deviation from these standards is not “wrong” in a moral sense, especially when viewed from the external point of view. This explanation gives Hart great latitude to recognize all sorts of social orderings as fully developed legal systems—laws must simply be valid according to the system’s rule of recognition to be a law and are not subject to some further, normative test of validity.

### B. Dworkin’s Critique

Hart draws a sharp distinction between morality and law, making clear that morality is not a necessary condition for law, and Dworkin launches the main thrust of his attack against this very proposition. Looking at the problem from the position of a judge in a legal system, Dworkin argues that Hart’s account breaks down in “hard” or difficult cases, where it is not clear what decision the positive law demands. According to Dworkin, Hart is left to argue that, in these instances, the law has “run out” and that judges must “make law” in these hard cases. Neither judges nor the public, however, view the judge’s role as being so discretionary as to allow the judge to make law in hard cases. Instead, Dworkin asserts that the participants believe that judges are restricted by the law in these instances, but a law that is grounded in the very moral norms that Hart supposedly excludes. Dworkin calls these moral norms with the force of law “principles.”<sup>26</sup> Principles, he argues, are distinguished from rules in that they are never officially

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<sup>26</sup> See DWORKIN, *The Model of Rules I*, *supra* note 4, at 41-43 (“[T]here are at least some rules of law that are not binding because they are valid under standards laid down by a master rule but are binding—like a master rule—because they are accepted as binding by the community.”). Dworkin’s favorite example of a principle is that “no man may profit from his own wrong.” *Id.* at 25. As an example of the role that principles play in adjudication, Dworkin often uses the courts’ reliance on this principle to countermand the positive law regarding wills in *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889), which held that a son who murdered his father cannot benefit by inheritance laws that, read literally, would allow the son to inherit the majority of his father’s estate. See DWORKIN, *LAW’S EMPIRE*, *supra* note 4, at 15-20; DWORKIN, *The Model of Rules I*, *supra* note 4, at 23-45 (describing the centrality of principles in his critique of positivism). Positivists have taken to calling this criticism of Hart’s account (namely, that Hart’s theory does not account for the role that principles play in cases like *Riggs*) the Original Problem. See Himma, *supra* note 13, at 138 (attributing the origin of this concept to theorists’ responses to Dworkin’s analysis of *Riggs*).



incorporated into the legal system through any procedure established by a validity criterion (what Dworkin calls “pedigree”), but instead simply exist as law. Additionally, unlike rules, which either apply fully or not at all, principles have “weight,” in that contrasting principles may be weighed against each other in hard cases. The fact that a principle outweighs another principle in a given case does not reduce the subordinated principle’s effect elsewhere.

Dworkin argues that what officials in a legal system (specifically judges in his argument) really do is practice a process of what he calls “constructive interpretation,” whereby they weigh the “preinterpretive data” (positive law and principles) to determine the best decision in a given case. This best interpretation takes into account the twin considerations of “fit” and “justification”—i.e., whether the decision sufficiently “fits” with precedent and the other preinterpretive data of the system, and whether it is the morally best justified decision given considerations of justice, fairness, and procedural due process. Dworkin thus believes that this is a better picture of actual social practice than that provided by Hart, as judges attempt to interpret the law in the best possible light while still considering themselves bound at all times by the law, even when the positive law has “run out.”

But Dworkin’s theory is not conventionalist. It is explicitly both normative and interpretive—a judge is bound to make the best moral decision in a given case, regardless of the acceptance of that interpretation by her fellow officials.<sup>27</sup> However, that decision is necessarily constrained by the notion of fit, and that fit is determined by the *present* interpretation of the relevant past events.<sup>28</sup> For Dworkin, therefore, officials decide hard cases by constructively interpreting the law in a way that both best fits with the current interpretation of the relevant precedent and is best morally justified.

Dworkin’s main criticism of Hart, then, may be summarized as follows: Hart, by ignoring the role that moral norms or principles play in judicial decision making, fails to provide an accurate account of how judges decide hard cases. As a result, Hart’s model sees discretionary

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<sup>27</sup> See DWORKIN, *LAW’S EMPIRE*, *supra* note 4, at 256 (“Different judges will disagree about [the best interpretation] and will accordingly take different views of what the law of their community, properly understood, really is.”).

<sup>28</sup> See *id.* at 227; see also Adler, *supra* note 24, at 738-39 (“[G]enuine U.S. law at present[, according to Dworkin,] is identified by a constructed rule of recognition that integrates considerations of straight moral justifiability with the present, preinterpretive understanding of U.S. law shared by some groups of persons.”).

power where judges are actually and, more importantly, *legally* constrained by moral norms.

C. *Inclusive Positivism: The Positivist Answer to the Problem of Morality*

Dworkin's criticism presents a very real problem for the explanatory power of the positivists' theory. One possible solution is to avoid the criticism altogether by arguing that Hart and Dworkin are really just talking past each other. Hart explicitly states that his is a descriptive model, an attempt to answer the sociological question, "What is law?" The sociological positivist can argue that Dworkin, by contrast, offers a normative model, exploring the more complex, normative question, "What should law be?" Because they are asking different questions, it is logical that they come to different answers.

This response, however, is not compelling. First, Dworkin argues that Hart's account is flawed descriptively *and* normatively. By failing to make a place for the role that moral norms necessarily play in judicial decision making, Hart's model fails to describe what Dworkin asserts to be a necessary feature of any system of law. From Dworkin's perspective, Hart's model fails both sociologically and philosophically. Second, the inclusion of the internal point of view in Hart's account requires at least some inquiry into how law's normativity affects those who take the internal point of view in a given legal system. In other words, to be at all useful to actual participants in a legal system, Hart's account must at least show the committed participant where to look to identify the law in that system.

Recognizing these problems, many positivists (including Hart<sup>29</sup>) have attempted to answer Dworkin's attack by explaining that moral norms, while not necessary for the existence of a legal system, may be included in the rule of recognition of a given legal system. Such a view is called "soft positivism" or "inclusive positivism,"<sup>30</sup> and most of

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<sup>29</sup> Hart's answer to Dworkin was posthumously published as the postscript to *The Concept of Law*. See H.L.A. HART, *Postscript*, in HART, *supra* note 2, at 238.

<sup>30</sup> Along with Hart, notable inclusive positivists include Jules Coleman, Wilfred Waluchow, and Matthew Kramer. This position is contrasted with so-called "exclusive positivism," a position held by such legal philosophers as Joseph Raz and Scott Shapiro. Exclusive positivists generally subscribe to the thesis that the existence of law can always be determined by social fact, without reference to moral norms. This split amongst positivist theorists has important implications for any analysis of Hart's rule of recognition and will be a guiding consideration for the remainder of this Comment. As this Comment, however, only touches upon those elements of the debate between exclusive and inclusive positivists that are directly relevant to issues before us, I will discuss them only as they arise.

its proponents hold to a thesis that says, approximately, that “there are conceptually possible legal systems in which the legality criteria ‘incorporate’ substantive moral norms in the following sense: satisfaction of those norms is a necessary or sufficient condition for a proposition to count as law.”<sup>31</sup> A strong form of this view would be that “morality can be a condition of legality: that the legality of norms can sometimes depend on their substantive (moral) merits, not just their pedigree or social source.”<sup>32</sup> Inclusive positivists, then, adhere to Hart’s argument that there is no necessary connection between law and morality, but they reject the stronger argument that there cannot be a connection between the two.

Most inclusive positivists subscribe to some variation of the Incorporation Thesis, which holds that “there are conceptually possible legal systems in which the validity criteria include substantive moral norms.”<sup>33</sup> The Incorporation Thesis has two possible components, describing the two ways in which a norm’s validity could depend upon its moral content: a sufficiency component and a necessity component.<sup>34</sup> One possible articulation of the sufficiency component would be the following: “[T]here are conceptually possible legal systems in which it is a sufficient condition for a norm to be legally valid that it reproduces the content of some moral principle.”<sup>35</sup> Under this view, an unpromulgated norm may be law simply because of its moral content. This may be seen as a conformity relation—a norm is legally valid if it *conforms* to a moral norm contained within the rule of recognition.<sup>36</sup> This argument is a direct response to Dworkin’s “Original Problem”: if the sufficiency component is true, then a norm such as “no man shall profit from his own wrong” may have legal validity—without needing to pass some test for pedigree—where a similar moral norm has been incorporated into a legal system’s rule of recognition. Thus, some positivists<sup>37</sup> have argued that “Dworkin’s criticism rests on a cari-

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<sup>31</sup> Kenneth Einar Himma, *Final Authority to Bind with Moral Mistakes: On the Explanatory Potential of Inclusive Legal Positivism*, 24 LAW & PHIL. 1, 1 (2005). Himma calls this assertion the Incorporation Thesis.

<sup>32</sup> Jules L. Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, in HART’S POSTSCRIPT, *supra* note 3, at 99-100.

<sup>33</sup> See Himma, *supra* note 13, at 136 (providing a historical overview of the Incorporation Thesis).

<sup>34</sup> See *id.* at 136-41.

<sup>35</sup> *Id.* at 136.

<sup>36</sup> *Id.* at 136 n.21.

<sup>37</sup> See, e.g., David Lyons, *Principles, Positivism, and Legal Theory*, 87 YALE L.J. 415, 423-24 (1977) (reviewing DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 4) (arguing that

capture” of Hart’s view of the rule of recognition, in that positivists are not required to hold that pedigree tests for legal validity necessarily “exclude[] tests of ‘content.’”<sup>38</sup> Under this view, there are “no constraints on the content of a rule of recognition, [and] a rule of recognition can incorporate validity criteria that make moral merit a sufficient condition for legal validity.”<sup>39</sup>

The second possible component of the Incorporation Thesis is the necessity component. One possible articulation of the necessity component would be that “there are conceptually possible legal systems in which it is a necessary condition for a norm to be legally valid that its content be consistent with some set of moral norms.”<sup>40</sup> This component allows for moral norms to constrain promulgated law, in that a duly enacted law will not be valid if its content conflicts with some moral norm contained within the rule of recognition. This is a consistency relation—a norm is legally valid if and only if it is *consistent* with the moral content within the rule of recognition.<sup>41</sup> Under this condition, a law that contradicts some part of the moral content of the rule of recognition will be invalid, even if it was adopted according to valid law-creating procedures.<sup>42</sup> Thus, contra Dworkin, inclusive positivists hold to some form of the Incorporation Thesis, containing either the sufficiency or necessity component (or both), which allows moral norms to be incorporated into the criteria of validity as (1) a constraint on legal validity and/or (2) a sufficient condition for legal validity.

Dworkin, however, anticipated this solution and rejected it, arguing that even an inclusive rule of recognition cannot aid an official or judge in determining how much weight a principle should have in a

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Dworkin’s critique depends upon a “fundamental misconception of legal positivism”); see also Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139, 146-47 (1982) (arguing that Dworkin’s understanding of positivism is untenable).

<sup>38</sup> Himma, *supra* note 13, at 138-39 (quoting Lyons, *supra* note 37, at 423-24).

<sup>39</sup> *Id.* at 139. “Hart is generally taken as accepting the Sufficiency Component [of the Incorporation Thesis, even though he] never clearly and unambiguously endorsed it.” *Id.*

<sup>40</sup> *Id.* at 136.

<sup>41</sup> *Id.* at 136 n.21.

<sup>42</sup> Hart deals directly with constitutions (and the United States Constitution in particular) on this issue. He writes, “[T]here is nothing in my book to suggest that the . . . criteria provided by the rule of recognition must be solely matters of pedigree; they may instead be substantive constraints on the content of legislation such as the Sixteenth or Nineteenth Amendments to the United States Constitution.” HART, *supra* note 29, at 250. This statement suggests that Hart believed that an inclusive-positivist rule of recognition for the United States could be formulated, though he never attempted to do so.

given case.<sup>43</sup> But, the inclusivists respond, there is nothing about the rule of recognition that requires it to provide a test that eliminates uncertainty as to what legally valid norms and principles require. The inclusivists point to Hart's concept of the "open texture" of law, which leaves room for uncertainty in applying the rule of recognition to determine what the law requires in a given case. As Hart notes, "however smoothly [the rule of recognition may] work over the great mass of ordinary cases, [it] will, at some point where [its] application is in question, prove indeterminate; [the rule] will have what has been termed an *open texture*."<sup>44</sup> Thus, according to Hart, Dworkin is incorrect in assuming that "any legal issue arising in any case could simply be solved by mere appeal to the criteria or tests provided by the rule."<sup>45</sup> In the inclusivist's view, the rule of recognition specifically concerns validation conditions, wherein "a legal norm has the property of validity because and only because it satisfies the criteria contained in the rule of recognition,"<sup>46</sup> and does not necessarily also set out identification conditions, as Dworkin assumes.

Similarly, while there must not be disagreement among officials as to law *ascertainment* under the rule of recognition, the rule need not settle all questions of law *application*. In fact, there may be significant disagreement amongst officials as to how the law applies in a given case. According to inclusivists, Dworkin mistakenly assumes in his criticism of judicial discretion that a disagreement between judges and officials about the application of laws is also a disagreement about the ascertainment of the sources of law. Of course, Dworkin is correct in observing that if a significant number of officials in a legal system differ about the sources of law, then, under Hart's definition of the rule of recognition as a conventional social rule (the Conventionality Thesis), there is a breakdown in the legal system. But he fails to see that there are two conceivable types of disagreement about the rule of recognition: "(1) disagreement about what standards constitute the rule of recognition; and (2) disagreement about what propositions satisfy

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<sup>43</sup> DWORKIN, *The Model of Rules I*, *supra* note 4, at 40 ("We argue for a particular principle by grappling with a whole set of shifting, developing and interacting standards . . . . We could not bolt all of these together into a single 'rule', even a complex one, and if we could the result would bear little relation to Hart's picture of a rule of recognition . . .").

<sup>44</sup> HART, *supra* note 2, at 128.

<sup>45</sup> HART, *supra* note 29, at 258.

<sup>46</sup> Himma, *supra* note 13, at 143.

those standards.”<sup>47</sup> As long as the controversy is not over the content of the rule itself (proposition (1)), but “over which norms satisfy the standards set forth in it”<sup>48</sup> (proposition (2)), Hart’s account of the rule of recognition as a social rule is not threatened by the mere existence of official disagreement.

Lastly, it is important to note that many inclusive positivists hold a strong form of the Conventionality Thesis, in which they view the rule of recognition not merely as conventional but also as duty imposing. Emphasizing Hart’s account of the internal point of view of officials as necessitating a critically reflective attitude, inclusive positivists like Jules Coleman argue that the rule of recognition is “most plausibly thought of as being a shared cooperative activity (SCA).”<sup>49</sup> Himma explains,

Coleman identifies three characteristic features of an SCA: (1) each participant in an SCA attempts to conform her behaviour to the behaviour of the other participants; (2) each participant is committed to the joint activity; and (3) each participant is committed to supporting the efforts of the other participants to play their appropriate roles within the joint activity.<sup>50</sup>

Under the SCA account, officials are obligated to apply the rule of recognition in the “discharging [of] their official functions and . . . it is the rule of recognition that autonomously gives rise to this obligation.”<sup>51</sup> The SCA account solves a problem posed by Hart’s weaker conventional account of the rule of recognition, in that Hart’s conventional rule could not give rise to autonomous obligation, as mere convention does not obligate. But, insofar as commitments induce the reliance of others and create justified expectations, they give rise to obligation. Viewing the ultimate rule as an SCA allows for the rule

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<sup>47</sup> *Id.* at 145.

<sup>48</sup> Coleman, *supra* note 37, at 156.

<sup>49</sup> See Himma, *supra* note 13, at 131. For a discussion of SCAs generally, see Adler, *supra* note 24, at 750-65, Michael E. Bratman, *Shared Cooperative Activity*, 101 PHIL. REV. 327 (1992), and Scott J. Shapiro, *Law, Plans and Practical Reasons*, 8 LEGAL THEORY 387 (2002).

<sup>50</sup> Himma, *supra* note 13, at 131-32. Different legal philosophers emphasize different elements of the SCA requirements. For example, Shapiro drops the third component (mutual support) in his account. See Adler, *supra* note 24, at 751.

<sup>51</sup> Himma, *supra* note 13, at 132. In addition, Himma argues that while officials may also be morally obligated to apply the rule of recognition, such an obligation would rely on the rule’s content. Under the stronger version of the Conventionality Thesis, which includes SCAs, it is the rule of recognition itself that gives rise to the obligation. *Id.*

of recognition to have an autonomous obligating power over officials because each official has a joint commitment to the activity governed by the rule. Thus, according to many proponents of inclusive positivism, the rule of recognition is supported by a Strong Conventionality Thesis that views the rule of recognition as a shared cooperative activity that autonomously obligates officials to apply the rule correctly.

In summary, the inclusive positivists address Dworkin's criticisms of Hart by showing that there is nothing in Hart's account that precludes the incorporation of moral norms as either a necessary or sufficient condition within the rule of recognition in a given legal system. Furthermore, they combine Hart's account of the open texture of law with the distinction between law ascertainment and law application in order to address Dworkin's concerns about rule indeterminacy and judicial discretion generally. Arguably, the most effective inclusive-positivist argument combines the Incorporation Thesis with a strong form of the Conventionality Thesis that includes an account of the rule of recognition as an SCA. With such a view in mind, we can now turn to two previously proposed formulations of the rule of recognition in the United States, evaluating how well they take into account Dworkin's criticisms and the inclusivist solutions.

## II. PREVIOUS ACCOUNTS OF THE U.S. RULE OF RECOGNITION: GREENAWALT AND HIMMA

There have been surprisingly few genuine attempts to work out the contents of the rule of recognition in the United States. This is partially due to the fact that jurisprudential philosophy tends to be performed at a highly abstract and removed level, and rarely involves a discussion of any particular legal system.<sup>52</sup> Furthermore, it is extremely difficult to apply Hart's supposedly simple rule to the United States. With myriad complexities (e.g., how to account for state sovereignty, constitutional amendments, popular sovereignty, and judicial review and precedent), the idea that our legal system could be reduced to one simple rule seems prohibitively difficult. Still, some have attempted to develop such a rule, and, in this Part, I will analyze two such attempts: those of Kent Greenawalt and Kenneth Einar Himma. By evaluating these two accounts, I hope to explore the complex nature that any formulation of a rule of recognition would

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<sup>52</sup> Dworkin seems to be the exception to this rule, as he refers primarily to a specifically Anglo-American-type legal system.

have to take in the United States and build upon their insights to provide the foundation for my own rule.

A. *Kent Greenawalt's* The Rule of Recognition and the Constitution

Kent Greenawalt made what may be the first attempt to develop “a fairly comprehensive account of how one might try to state a rule of recognition for someplace in this country.”<sup>53</sup> Greenawalt’s formulation and corresponding discussion provide an invaluable starting point by, first, showing how the complex interaction of different bodies of officials, at both the federal and state level, needs to be recognized in any serious American rule of recognition, and, second, showing how certain portions of Hart’s theory will need to be “amplified” to apply to the United States without distortion.<sup>54</sup> Greenawalt ultimately makes three insights into Hart’s theory: (1) the “relationship between the ‘ultimate rule [of recognition]’ and the ‘supreme criterion [of legal validity]’ may vary from the one Hart supposes”; (2) the ultimate standards of the rule may be uncertain at any given time in a stable legal system, due to the interplay between acceptance by officials and derivation from higher norms; and (3) because of (or, at least, related to) the second insight, “the ultimate standards may shift unnoticed over time.”<sup>55</sup> Furthermore, Greenawalt takes seriously such complications as the Amending Clause<sup>56</sup> and state sovereignty, giving a plausible account of how they might be included in the U.S. rule of recognition. With these insights, Greenawalt provides an excellent starting point for developing a U.S. rule of recognition, noting the effect of certain idiosyncratic qualities of the American legal system on Hart’s general theory and providing a helpful example of how one might deal with them.

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<sup>53</sup> Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 621-22 (1987).

<sup>54</sup> *Id.* at 622. Many of these suggested “amplifications” are more fully developed by inclusive positivism as described *supra* Section I.C. Greenawalt wrote his article almost immediately after the publication of *Law’s Empire*, and though he accurately highlights the fault lines in Hart’s argument that Dworkin’s criticism exposed, he was writing before Hart and the inclusive positivists had developed their reply. His article thus exists in an intermediate zone in the development of the argument between the inclusive positivists and Dworkin, and this proves to be a major weakness. *See infra* text accompanying notes 69-70.

<sup>55</sup> Greenawalt, *supra* note 53, at 622.

<sup>56</sup> U.S. CONST. art. V.



First, Greenawalt notes that the relationship between the Amending Clause and the rest of the Constitution demonstrates how the “supreme criterion” and the “ultimate rule of recognition” may be distinct in a way that Hart had not anticipated, in that the supreme criterion may not necessarily be included in the ultimate rule. For Hart, the rule of recognition “includes an account of a ‘supreme criterion’ which is all or part of the ultimate rule.”<sup>57</sup> Greenawalt’s argument here is complex and subtle, but simply put, he argues that the Amending Clause must be the supreme criterion for law in the United States because the “norms adopted according to it take precedence over norms adopted by any other procedure.”<sup>58</sup> Thus, any amendment added by this procedure is not part of the rule of recognition, because its validity is justified not by reference to the ultimate rule of recognition but by how the amendment comports with the Amending Clause.<sup>59</sup> But, Greenawalt asks, is this supreme criterion necessarily part of the ultimate rule of recognition in the United States? Using a rule of recognition that is comprised of the Ratification Clause,<sup>60</sup> wherein the legal authority of the Constitution is established with reference to the Ratification Clause in the same way that amendments derive their validity in reference to the Amending Clause, Greenawalt notes that “the supreme criterion could derive its own authority from

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<sup>57</sup> Greenawalt, *supra* note 53, at 625. Defining the “supreme criterion,” Hart writes that

a criterion of legal validity or source of law is supreme if rules identified by reference to it are still recognized as rules of the system, even if they conflict with rules identified by reference to the other criteria, whereas rules identified by reference to the latter are not so recognized if they conflict with the rules identified by reference to the supreme criterion.

HART, *supra* note 2, at 106.

<sup>58</sup> Greenawalt, *supra* note 53, at 632.

<sup>59</sup> *Id.* at 637. Greenawalt notes two complications with regard to the Amending Clause being the supreme criterion. First, the clause has an open texture in that some questions are not answered by it (for example, can an amendment declare itself to be unamendable? Amend the Amending Clause? Do away with the entire Constitution?). *Id.* at 632-33. Second, as noted by Bruce Ackerman, there may be extra-Article V amendments that are validated by longstanding official acceptance (for example, the Civil War amendments, which arguably were not enacted by proper Article V procedure) and thus the supreme criterion may need to be reformulated to take account of longstanding acceptance as a valid source of law. *Id.* at 640-42; *see also* Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1065 (1984) (“A candid reappraisal of the use made of Article V by the victorious Republican Party in the aftermath of the Civil War will reveal a series of serious legal problems for any thoughtful formalist.”).

<sup>60</sup> U.S. CONST. art. VII.

enactment in accord with the ultimate rule of recognition rather than constituting a part of that rule.”<sup>61</sup> While “[t]he amending clause would remain the supreme criterion because norms adopted according to it would override other norms,” the supreme criterion itself would be valid *in reference to* the ultimate rule of recognition, not as a *part of* that rule.<sup>62</sup>

Still, based on his second and third insights into Hart’s theory, Greenawalt does not believe that the current ultimate rule of recognition contains the Ratification Clause. While, at the time of enactment, the Ratification Clause may have been the ultimate rule, the Constitution as viewed by officials today no longer “stand[s] in the same relation to the ratification clause as the amendments stand in relation to the amending clause.”<sup>63</sup> Greenawalt notes three “salient and related differences” between the Amending and Ratification Clauses: (1) “the ratification clause is a one-time-only matter”; (2) “the ratification clause had no [legal] status prior to the substance of what was to be ratified by it”; and (3) “[t]he ratification clause cannot be viewed apart from the substance of the Constitution” itself.<sup>64</sup> In addition to these important distinctions, it is an empirical fact that officials in the United States do not look to the Ratification Clause as the test for legal validity. As Greenawalt writes, “[T]he legal authority of the rest of the original Constitution is established by its continued acceptance and . . . the original ratification procedure is no longer directly relevant to tracing what counts as law.”<sup>65</sup> Here, Greenawalt’s observation that the ultimate rule of recognition may shift imperceptibly over time demonstrates how longstanding acceptance may have changed the ultimate rule in the United States from the Ratification Clause to the contents of the Constitution itself.

From these observations, Greenawalt formulates the rule of recognition with regard to the United States Constitution as follows: “Whatever the Constitution contains, the present legal authority of which does not depend on enactment by a procedure prescribed in the Constitution, is law.”<sup>66</sup> This leads to what is, perhaps, Greenawalt’s greatest contribution to the discussion of the U.S. rule of recognition: the United States most likely has a hierarchical rule of recognition

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<sup>61</sup> Greenawalt, *supra* note 53, at 644.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 638-39.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 640.

<sup>66</sup> *Id.* at 642.

that is not one single “rule,” but is comprised of a bundle of rules, each directed at different officials. A complete rule for the United States must, to begin with, include an account of state governments and state constitutions, the powers of which are not *derived* from the Constitution or the acceptance of federal officials but are *limited* by both.<sup>67</sup> Furthermore, Greenawalt recognizes that the ultimate rule must include the power of judicial precedent in statutory and constitutional interpretation.<sup>68</sup>

However, Greenawalt’s account of these components of the ultimate rule proves unsatisfying. Greenawalt hedges his bet somewhere between Hart and Dworkin, providing vague rules where there should be crisp ones.<sup>69</sup> It is here that the timing of his article proves problematic. Written right after the publication of *Law’s Empire* but before the positivists had formulated a systematic response, Greenawalt does not make the important distinction between law ascertainment and law application and grants Dworkin more ground than necessary. While he correctly diagnoses the problems that Dworkin’s critiques present, he merely points the way to resolution. The weaknesses in Greenawalt’s account become apparent through Himma’s formulation of a rule of recognition and Matthew Kramer’s subsequent critique of that formulation, both of which will be addressed more fully below.<sup>70</sup>

These weaknesses, though, do not undermine the considerable strengths of Greenawalt’s formulation of a rule of recognition for the United States. Greenawalt rightly characterizes the United States rule of recognition as a hierarchical “bundle” of rules that necessarily includes state sovereignty and the principles of judicial review, interpretation, and precedent. Additionally, as discussed below, Greenawalt’s account of the ultimate rule with regard to the Federal Constitution requires little reformulation and, with some minor retooling, will be appropriated into my own rule. Lastly, Greenawalt’s insights into the separability of the supreme criterion and the ultimate rule of recognition as well as the shifting nature of the ultimate rule itself provide helpful elaborations to Hart’s theory that are not provided by the general inclusive-positivist account. Keeping these strengths in mind, then, we turn to Kenneth Einar Himma’s account to see what can be

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<sup>67</sup> *Id.* at 645-47.

<sup>68</sup> *Id.* at 647-54.

<sup>69</sup> For example, Greenawalt’s rules on both constitutional and statutory interpretation begin with the evasive phrase, “On matters not clear from the text.” *Id.* at 659.

<sup>70</sup> See *infra* Section II.B-C.

added to Greenawalt's rule in hopes of further developing a truly comprehensive rule of recognition for the United States.

B. *Kenneth Einar Himma's U.S. Rule of Recognition*

The next substantial attempt to develop a rule of recognition for the United States came almost twenty years after the publication of Greenawalt's article, with Kenneth Einar Himma formulating an American rule of recognition in a series of articles.<sup>71</sup> Himma meant for his articles to serve as an attack on inclusive positivism in general. Because of this difference in focus, he omitted some of the more important elements of Greenawalt's work, such as a consideration of the role of state sovereignty. Instead, Himma mainly concentrates on the power of the judiciary (specifically the Supreme Court) to bind all other officials with its mistaken rulings (i.e., rulings in which the Court misinterprets or misapplies the moral norms incorporated into the Constitution).<sup>72</sup> This power, Himma argues, demonstrates that the ultimate rule of recognition in the United States cannot be an inclusive-positivist rule. This is because it is not the moral norms incorporated into the Constitution themselves that determine the legal validity of a given norm, but rather it is what the Supreme Court says those norms are. As we will see, this argument is subject to several objections, both empirical and philosophical, that cause Himma's account ultimately to fail as a comprehensive rule of recognition for the United States.<sup>73</sup> Nevertheless, because Himma does present a thorough and useful analysis of the areas where Greenawalt's argument falls short—namely with regard to the effect of judicial discretion and the nature of judicial authority on the ultimate rule—it is worth careful explication.

Of the particular theses set out as positivism's conceptual foundations, the two most important to Himma's argument here are the Differentiation Thesis<sup>74</sup> and the Conventionality Thesis.<sup>75</sup> These theses contain both a behavioral element (i.e., Hart's conventionality) and a

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<sup>71</sup> Himma, *supra* note 17; Himma, *supra* note 31.

<sup>72</sup> See *infra* text accompanying notes 77-79.

<sup>73</sup> See *infra* Section II.C.

<sup>74</sup> "In every conceptually possible legal system *S*, there is a set of criteria *CoV* [criteria of validity] such that a norm *n* is a law in *S* at a particular time *t* if and only if *n* satisfies the criteria contained in *CoV* at *t*." Himma, *supra* note 17, at 151.

<sup>75</sup> "[T]he criteria of validity in every conceptually possible legal system are determined by a conventional rule of recognition that governs the behavior of persons who function as officials." *Id.* at 153.

cognitive element (i.e., Hart's internal point of view). Himma also adds what he calls the Modeling Constraint, where "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."<sup>76</sup> Thus, one must study the behavior of officials to see what criteria they *actually* use to determine the validity criteria of a given system. An adequate positivist statement of the validity criteria must model itself after those empirically observable methods actually used by officials to determine which norms will be recognized and treated as law.

Himma argues that Greenawalt's rule fails the Modeling-Constraint test because he does not account for the nature of final authority and therefore does not provide an accurate empirical account of how officials in the United States determine the validity of law. For Himma, it is an empirical truth that, in a given legal system, some body must have final authority to decide contested issues of law. This body, Himma argues, is almost always the courts.<sup>77</sup> According to Himma, then, a court has the authority to create an obligation on the part of other officials in the legal system to apply and enforce its decisions, an obligation that is presumptive unless some higher authority nullifies that decision.<sup>78</sup> The highest court in a given legal system has final authority because no other authority can nullify its decisions. In other words, a court with final authority over a decision obligates all other officials by that decision, and, "since there is no possibility of reversal, the obligation is final."<sup>79</sup> Furthermore, the court with final authority obligates the other officials regardless of whether it has made the objectively "correct" decision in a given case—right or wrong, the court's decision is binding and creates a real obligation.<sup>80</sup> As Himma

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<sup>76</sup> *Id.* at 158.

<sup>77</sup> See Himma, *supra* note 31, at 3 ("[T]his much . . . is largely unchallenged among legal theorists and academic lawyers: in most developed legal systems like those in Britain, Canada, and the U.S., the courts are vested with final authority to decide substantive issues of law."). It should be noted that Greenawalt agrees up to a point. See Greenawalt, *supra* note 53, at 653 (making an initial assumption that "there is no doubt that courts are supposed to engage in substantive constitutional interpretation").

<sup>78</sup> See Himma, *supra* note 31, at 4 ("[I]f a court has authority to decide a particular issue, then its decision binds the other officials until an appeal to a higher agency overturns the court's decision.").

<sup>79</sup> *Id.* at 4-5.

<sup>80</sup> *Id.* at 5-6. The binding effect is present whether we speak of the decision as being morally correct or legally correct, as "a court with final authority can legally bind other officials with a decision that is mistaken under a variety of standards that may include . . . both moral standards and legal standards." *Id.* at 5.

writes, "Insofar as a court has final authority to decide a substantive issue of law, it can legally bind the other officials in its jurisdiction, other things being equal, with either of two conflicting decisions on that issue."<sup>81</sup>

Because there is no higher authority in the United States court system than the Supreme Court, Himma argues, the Supreme Court has the sort of final authority that he describes. Himma acknowledges, however, that this final authority is not without bounds, finding two constraints placed upon the Court. First, the Supreme Court's authority is bound by what Himma calls the Plausibility Constraint, wherein the Court's decision must be "based on an interpretation of the Constitution that can rationally be grounded in the text."<sup>82</sup> But this restriction is not really confining for most practical purposes, as it "doesn't amount to much in determining the *outcome* of validity cases" because the limit "operates 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."<sup>83</sup> It is the second constraint, which requires the Court to conform its decisions with the morally best interpretation of the Constitution, that has more practical effect than the first. Under this constraint, "[t]he Supreme Court is obligated to decide the validity of duly enacted norms according to what is, as an objective matter, the morally best interpretation of the Constitution."<sup>84</sup> If the Court makes no apparent effort to ground its judgment in the morally best interpretation, it is, according to Himma, an empirical truth that the decision will not be upheld by other officials.<sup>85</sup> Thus, for Himma,

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<sup>81</sup> *Id.*

<sup>82</sup> Himma, *supra* note 17, at 167.

<sup>83</sup> *Id.* at 169-70.

<sup>84</sup> *Id.* at 183.

<sup>85</sup> Note that this does not mean that the Court must reach the objectively correct decision that reflects the morally best interpretation in a given case, or even in any case. The Court must merely ground its decisions in an attempt to determine the morally best interpretation. The Court's discretion is constrained, but, because of the Conventionality Thesis, it is constrained only "by what the other officials are prepared to accept from the Court in the way of validity decisions." *Id.* at 166. Depending on the actual legal system in question, there may be a wide variety of "interpretations" that are empirically accepted by officials. In the United States, for example, officially accepted interpretations may run from textualist or originalist interpretations to broader nontextualist interpretations. The official acceptance of a variety of interpretations strengthens the Court's power to bind other officials with its moral mistakes, as long as those mistakes are grounded in one of the accepted interpretative methods. This observation is one of the strengths of Himma's account and, as will be explained below, helps eliminate one of the more vague and unsatisfying components of Greenawalt's rule.

the ultimate rule of recognition in the United States is simply that “[a] duly enacted norm is legally valid if and only if it conforms to what the Supreme Court takes to be the morally best interpretation of the substantive protections of the Constitution.”<sup>86</sup>

### C. *Objections to Himma’s Rule*

According to Himma, then, Greenawalt’s formulation of the ultimate rule of recognition fails as an empirical account of the Court’s ability to make mistakes that still bind other officials. Greenawalt considered Himma’s formulation, however, and rejected it:

Since officials generally treat a constitution as saying what the highest judges say it says, the power of courts to make constitutional law by decisions might initially be thought to be an aspect not only of the ultimate rule of recognition but also of the supreme criterion, that is, an aspect of the form of law that takes priority over all other forms of law.

That view would be mistaken, however. Since new constitutional amendments can override judicial interpretations of the Constitution, the legal force of constitutional interpretations is not part of the supreme criterion of law.<sup>87</sup>

Greenawalt’s anticipatory response points to one of two objections to Himma’s proposed rule of recognition: the Supreme Court may not, as an empirical fact, have the final authority that Himma grants to it, because, for example, Congress, with the approval of the states, has

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<sup>86</sup> *Id.* at 186. Himma believes that this formulation, as the only plausible formulation of the rule of recognition in the United States, or any legal system like it, signals the death knell for inclusive positivism. See Himma, *supra* note 31, at 15, 38-39. Himma makes a complicated argument, but essentially asserts that it is a practical and empirical truth that any plausible legal system cannot incorporate moral norms themselves into the rule of recognition, because those moral norms never apply in their totality. *Id.* at 26-28. Instead, the rule of recognition will always be what the final authority says that it is. *Id.* Thus, following Himma’s argument, moral principles are neither necessary nor sufficient to determine the correctness of a norm’s legal validity in any circumstance. This is because “the necessary or sufficient condition will instead reside in the judgments of the Supreme Court.” MATTHEW H. KRAMER, WHERE LAW AND MORALITY MEET 117 (2004).

Kramer demonstrates the operation of Himma’s thesis as follows: If the Court thinks that a legal enactment is consistent with some moral principal (*P*) the enactment is legally valid regardless of whether or not it is objectively consistent with *P*. Similarly, even if it is posited that the correctness of a norm (*N*) as a moral principle is a sufficient condition for the status of that norm as law in hard cases, the court with final authority has the power to reject *N* as law in hard cases and to invoke or apply some contrary norm. Inappropriate invalidation of *N* as a legal norm would be determinative of *N*’s legal status. *Id.*

<sup>87</sup> Greenawalt, *supra* note 53, at 653.

the power to reject the Court's interpretation through constitutional amendment.<sup>88</sup> While practically this is difficult to achieve due to the cumbersome nature of the amendment process, this does not change the fact that the power exists. Thus, to test Himma's thesis, we must determine who, if anyone, actually has final authority in the United States. If it is not the Supreme Court, Himma's formulation of the rule is empirically incorrect. Additionally, Matthew Kramer offers the second objection by defending inclusive positivism from Himma's attack and thus providing a critique of Himma on a philosophical level. By taking what survives this dual critique of Himma's rule and combining it with the strengths of Greenawalt's formulation, one can construct a superior rule of recognition for the United States.

### 1. Empirical Objections

What Himma takes to be the uncontroversial centerpiece of his theory—a sort of judicial sovereignty in the United States—is, in fact, one of the most controversial topics in constitutional theory. While there is some evidence that the Court may view itself as having final authority in constitutional interpretation, as indicated by Justice Frankfurter's opinion in *Cooper v. Aaron*,<sup>89</sup> *Cooper* itself is controversial amongst constitutional scholars.<sup>90</sup> A central problem in applying Hart's theory of law to the United States, then, lies in the difficulty of identifying that group that acts as the "official" body (in Hart's terminology) or "recognitional community" within the system.<sup>91</sup> It may be—as Himma suggests—the Supreme Court, but it could also be a number of other options: for example, all governmental officials (as Hart believes<sup>92</sup>), a division between officials in different political

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<sup>88</sup> The fact that the Court defers to Congress as to whether an amendment has been validly passed further reinforces the notion of constitutional amendment as a limitation on the Court's final authority. See Greenawalt, *supra* note 53, at 634-36 ("Exactly what authority the political branches have in settling the validity of amendments is now far from clear, but the leading case on the amendment process indicates that, at least in respect to many issues, Congress makes the final decision whether an amendment has been properly adopted." (citing *Coleman v. Miller*, 307 U.S. 433 (1939))).

<sup>89</sup> 358 U.S. 1, 23-24 (1958) (Frankfurter, J., concurring) (asserting that the Supreme Court is "the tribunal specially charged with the duty of ascertaining and declaring what is 'the supreme Law of the Land'").

<sup>90</sup> See Adler, *supra* note 24, at 724 ("Many scholars reject *Cooper* . . .").

<sup>91</sup> See *id.* at 726 (noting the varied options for defining the recognitional community, including personhood, citizenship, territorial presence, or title).

<sup>92</sup> See HART, *supra* note 2, at 117.



branches (as Greenawalt seems to suggest<sup>93</sup>), or perhaps even the people themselves (as posited by popular constitutionalists like Ackerman<sup>94</sup>). The questions then become which of these is the most accurate empirical description of the current American legal system, and, if it is different from what Himma presents, what does that do to Himma's theory?

As explained in Part I, Hart (and positivism generally) holds that only the officials in a legal system are required to take the internal point of view toward a system's rule of recognition, and thus it is official practice alone that provides the foundations of a given legal system. Some positivists, like Joseph Raz and (as we have seen) Himma, go even farther and argue that it is not official practice generally, but judicial practice specifically, that provides this foundation.<sup>95</sup> Such a view points to what constitutional theorists call judicial supremacy.<sup>96</sup> But many other constitutional theorists take different views of how the American legal system actually works.<sup>97</sup> Alternatives to judicial supremacy include popular constitutionalism (official responsiveness to popular elections in the form of "constitutional moments"),<sup>98</sup> judicial deference on certain classes of constitutional issues,<sup>99</sup> the sharing of

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<sup>93</sup> See Greenawalt, *supra* note 53, at 634-36.

<sup>94</sup> See Ackerman, *supra* note 59, at 1017-18.

<sup>95</sup> See Adler, *supra* note 24, at 723. Joseph Raz floats the possibility that there may be multiple rules of recognition in a given legal system. See JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 200 (2d ed. 1980) ("[There may be] various rules of recognition, each addressed to a different kind of official[.]."). Adler goes even farther, arguing that there may be multiple legitimate recognitional communities in a given legal system. Adler, *supra* note 24, at 746.

<sup>96</sup> See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (defending the concept of judicial supremacy in the United States).

<sup>97</sup> See, e.g., Adler, *supra* note 24, at 721-26 (highlighting the views of Kramer's popular constitutionalism and Dworkin's focus on social practices).

<sup>98</sup> See, e.g., Ackerman, *supra* note 59, at 1021-22 (describing constitutional politics, as opposed to normal politics, as a "form of political action . . . characterized by Publian appeals to the common good, ratified by a mobilized mass of American citizens expressing their assent through extraordinary institutional forms . . . during rare periods of heightened political consciousness [deemed 'constitutional moments']" (footnotes omitted)); see also Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5, 60-74 (2001) (arguing that popular constitutionalism was ingrained into the Constitution by the Framers).

<sup>99</sup> Examples of judicial deference include rational basis review of certain types of legislation and the political-question doctrine. See, e.g., James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 143-52 (1893) (suggesting a clear-error approach to constitutional interpretation by the judiciary); see also Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional*

authority between branches (so-called departmentalism),<sup>100</sup> complete deference to another branch (such as executive supremacy or, at least, executive review),<sup>101</sup> or a wholesale rejection of judicial review<sup>102</sup> (or abandonment of judicial review in certain specific constitutional areas, like the Bill of Rights<sup>103</sup>). All of these views pose some sort of threat to Himma's empirical assumption of judicial supremacy and deserve consideration.

First, however, one must look at the above-suggested practices and determine which practices are descriptive—offering an empirical account of the *actual* practice in the United States—and which practices are prescriptive—offering accounts of how the American legal system *should* or *ought* to be. For example, wholesale or even partial rejections of judicial review—such as those presented by Tushnet and Waldron—are not meant to be empirical accounts of how the American legal system currently operates, but rather suggestions for how it could work better. Nor does a theory of executive supremacy accurately describe current official practice in the United States.<sup>104</sup> Ultimately, therefore, these theories do not challenge Himma's strictly empirical observations. Other theories, such as accounts of judicial deference or underenforcement, logically assume that the Court has the power to rule on restricted classes of issues but, for a variety of reasons, *chooses* not to. In these cases, deference to other political actors is determined by judges themselves, and, therefore, such theories still assume some level of judicial supremacy. A judge may view her role as being constrained by some theory of deference or underenforcement,

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*Norms*, 91 HARV. L. REV. 1212, 1213-20 (1978) (arguing that institutional constraints prevent the judiciary from fully enforcing certain constitutional norms).

<sup>100</sup> See, e.g., Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401, 417 (1986) (describing a "modified version of departmentalism" that "ascribe[s] different areas of competence" to the various branches).

<sup>101</sup> See, e.g., Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 905-11 (1989-90) (discussing the President's power to review constitutional issues in a manner akin to judicial review); Michael Stokes Paulson, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 217 (1994) (arguing that "the President has coequal interpretive authority with the courts").

<sup>102</sup> See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (denying all notions of singular supremacy within the three branches of government).

<sup>103</sup> See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1348, 1380-82 (2006) (arguing that judicial review is countermajoritarian and should not extend to the Bill of Rights).

<sup>104</sup> See Murphy, *supra* note 100, at 420 n.28 ("No president has seriously pushed presidential supremacy.").

but she is only restricted because *she* views her role as such—the ultimate rule of recognition is still defined by judicial practice.<sup>105</sup>

Thus, only popular constitutionalism and true departmentalism (granting all United States officials some kind of final authority on constitutional interpretation) potentially pose a problem for Himma's argument, as these accounts move the locus of final authority—either to different branches of the government or to the people themselves. As a preliminary matter, however, it is not clear that moving the locus of final authority changes Himma's argument. The nature of final authority itself poses the problems explored by Himma. If it is an empirical truth that for a legal system to be effective and sustainable, some person or body of persons must have final authority over constitutional interpretation, exactly who that body is will simply be a matter of observable official practice.<sup>106</sup> As long as some person or body has final authority, Himma's argument remains largely intact, even if the wording of his rule would need to be revised.<sup>107</sup> Thus, theories like departmentalism, if true, would change the content of Himma's rule, but would not affect the overall argument supporting that rule.

Putting this preliminary matter aside, Himma's empirical observation that in almost every case other officials (and the citizenry in general) treat controversial Supreme Court determinations as binding law seems to be correct. The common examples brought out to contradict this observation (Lincoln's refusal of the Supreme Court's order to release a prisoner in the *Merryman* case<sup>108</sup> and Roosevelt and the

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<sup>105</sup> See Adler, *supra* note 24, at 725 (asserting that constitutional interpretation techniques are themselves determined by judicial practice).

<sup>106</sup> Adler provides the original argument that there is no single recognitional body in the United States, and that there are, in fact, any number of separate recognitional groups, each with its own rule of recognition. Adler, *supra* note 24, at 746. If true, this argument would pose a significant difficulty for Himma's argument, as there would be no locus of final authority. Empirically, however, it seems more accurate to say that the United States system is made up not of multiple, coequal groups, but, rather, of a series of hierarchical recognitional groups, as described by Greenawalt. While groups lower down the hierarchy may have a limited authority in their sphere, their decisions remain subject to modification or even rejection by higher authorities. Himma therefore seems to be more accurate in saying that most recognitional groups in the United States are under a liability, in a Hohfeldian sense, to have their legal situation changed by a group with higher authority, up until we reach the group with final authority.

<sup>107</sup> See KRAMER, *supra* note 86, at 115 (“[T]he key point arising from [Himma's argument] is not the identity of the institution with the final say over the existence and contents of legal norms; rather, the key point is that *some* person or body of persons must have such a final say if a legal system is to be sustainable.”).

<sup>108</sup> See *Ex parte Merryman*, 17 F. Cas. 144, 152 (C.C.D. Md. 1861) (No. 9487) (holding that President Lincoln could not suspend the privilege of the writ of habeas corpus).

New Deal legislature's rebellion against the Supreme Court's doctrine concerning the limits on federal power) are distinguishable from the general, proper operation of the United States legal system. Lincoln's actions took place during a severe governmental crisis and can be plausibly dismissed as an aberration attributable to the extremity of the circumstances. And during the New Deal, the Supreme Court eventually acquiesced to congressional and presidential pressure, and those rulings ultimately established the post-New Deal limits on federal power. One can plausibly argue that it was not until the Supreme Court itself changed its interpretation of the Constitution that the New Deal became valid law. Pressure from the coequal branches of government certainly influenced the Court, but the Court itself determined the validity of the law. Some form of final authority residing in the Court, then, seems to be a necessary condition for the stability and effectiveness of American government. The times when that authority is difficult to locate or rejected by subordinate officials or citizens do not define a legal system, but test it. Challenges to the Court's final authority, therefore, should be viewed as possible starting points of systemic breakdown, not cornerstones. Thus, some form of judicial supremacy appears to be an empirical fact in the United States system of law when the system is working properly, as constitutional controversies are settled by the Court in almost all cases, absent extraordinary circumstances.

However, going back to Greenawalt's theory, judicial supremacy in the United States is not complete, as constitutional amendment—either by proper Article V procedure or perhaps by longstanding official acceptance—can override Supreme Court precedent. Thus, the American rule of recognition should describe a “weak” form of judicial supremacy that includes the possibility of amendment as a check on judicial authority.

## 2. Philosophical Objections

Even if Himma is empirically correct (to a degree) about judicial sovereignty, it is not clear that his argument is *philosophically* correct. Matthew Kramer responds directly to Himma's assault on inclusive positivism, arguing that Himma mischaracterizes the nature of the rule of recognition and its relation to courts in a legal system like that of the United States.<sup>109</sup> Because his argument is a response to

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<sup>109</sup> See generally KRAMER, *supra* note 86, at 103-40.

Himma's broad attack on inclusive positivism itself, many of Kramer's objections deal generally with inclusive positivism and are not germane to our narrower purposes.<sup>110</sup> Kramer does, however, highlight two flaws in Himma's argument that are useful for formulating a rule of recognition for the United States. The first concerns the notions of duty and justification. Kramer argues that the other officials use the same moral norms to justify their criticism of Supreme Court decisions as the Court itself uses to determine the morally best interpretation of the Constitution.<sup>111</sup> Because the two groups look to the same lodestar to justify their positions, it is that lodestar that provides the content of the rule of recognition, independently of what the Court says that content is. Second, in line with Greenawalt's formulation,<sup>112</sup> Kramer argues that Himma overlooks the multiplicity and rankings of the criteria within any rule of recognition in a legal system as complex as the United States's.<sup>113</sup> While Supreme Court precedent can alter the meaning of substantive moral norms incorporated into the Constitution, these norms still confer legal validity in all cases not affected directly by that precedent. Thus, the interplay between Supreme Court decisions and the substantive moral norms in the Constitution is more complex than Himma presents, and the Supreme Court's duty to adhere to those moral norms in hard cases is stronger than Himma suggests.

Kramer argues that Himma first errs by mischaracterizing the duty and power of the Supreme Court. When discussing the Supreme Court's "authority" or "discretion" to bind other officials, Himma really means "the Court's legal *power* to bind other officials with its erroneous law-ascertaining determinations."<sup>114</sup> The terms "'authority' and 'discretion' are at best misleading" because they imply that the Court's power is combined with a legal liberty that the Court does not have.<sup>115</sup> Kramer explains,

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<sup>110</sup> For an example, see Kramer's rejoinders concerning Himma's implicit rule-skepticism and the intension and extension of moral norms. *See id.* at 119-26.

<sup>111</sup> *Id.* at 126-34.

<sup>112</sup> Note, however, that Kramer does not subscribe to Greenawalt's proposed rule, and he in fact comes to the view of a hierarchical rule of recognition through his own line of argument. *See id.* at 108-09 (critiquing Greenawalt's position as "too fragmented a portrayal of the process of law-ascertainment").

<sup>113</sup> *Id.* at 134-37.

<sup>114</sup> *Id.* at 126. Kramer uses the term "power" in the Hohfeldian sense—i.e., the ability to effect changes in other people's, and one's own, legal liability. *Id.* at 126-27.

<sup>115</sup> *Id.* at 127.

If someone is legally empowered to accomplish a certain alteration in legal relations but is not legally at liberty to do so, then she does not have the discretion or authority to do so. She *can* accomplish the alteration, but she *may* not; that is, she cannot *permissibly* accomplish it.<sup>116</sup>

Himma, then, is incorrect in granting the Court *liberty* to bind other officials with its erroneous law-ascertaining determinations, as it is under a *duty* to make its decisions according to the morally best interpretation of the Constitution. The Court breaches that duty when it is mistaken. Thus, while the Court has the legal power to bind other officials with a mistaken ruling, it does not have the legal authority to obligate those officials to treat those mistaken rulings as legally determinative. Kramer sees the Court and the other officials as being engaged in a sort of SCA,<sup>117</sup> where the Court has the power to alter the other official's legal positions with incorrect judgments but is legally obligated not to do so.<sup>118</sup>

Additionally, Kramer argues that because Himma bases the legal duty of courts on the proposition that they will receive official censure when their interpretations of the Constitution are incorrect, he ignores the empirical truth that the Supreme Court meets with criticism in hard cases no matter what conclusion it reaches. Thus, some group of officials will criticize the Court regardless of whether its decision is objectively correct or incorrect. Consequently, Kramer finds an alternate condition for the existence of the Court's duty in the justificatory orientation of all official criticism: "If officials converge in taking the abstract moral categories of the Constitution as their points of reference for applauding or deploring the law-ascertaining determinations of the Supreme Court, the Court is under a duty to apply those categories correctly when it passes judgment on the legal validity of norms."<sup>119</sup> The shared justificatory orientation of both officials and the Court on the same moral concepts settles the content of the Court's duty, whether or not the Court correctly applies those moral concepts in hard cases. These mistakes, then, are problems of law application, rather than law ascertainment. As Kramer states, the

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<sup>116</sup> *Id.*

<sup>117</sup> See *supra* notes 49-51 and accompanying text. Kramer does not employ the term SCA, but the duty he describes may be fairly characterized as such, as it meets all three requirements of that standard.

<sup>118</sup> See KRAMER, *supra* note 86, at 127 (distinguishing between legal power and legal authority in characterizing instances where incorrect Supreme Court decisions force other officials to treat mistakes as determinative).

<sup>119</sup> *Id.* at 129.

Court's "missteps are errors of application rather than errors of selection concerning the precepts which they are inclined to invoke as binding upon [the Court]." <sup>120</sup>

Even though a judge can adhere to a shared rule of recognition while continually misidentifying the principles to be applied or applying incorrect principles in hard cases, Kramer does not deny that incorrect decisions do create precedents that obligate all other officials in the United States. According to Kramer, however, Himma overlooks the "multiplicity and rankings of the criteria within any complex Rule of Recognition such as that in the American legal system." <sup>121</sup> While Himma is correct that whenever the Court rules on the validity of a given norm as law, its ruling settles the status of that norm, he "errs in thinking that the Supreme Court's legal power to settle the status of norms as valid laws is incompatible with the emergence of norms as laws through other means," such as an incorporationist criterion. <sup>122</sup> A Supreme Court decision binds only within the "precedential purview" of that decision, displacing a larger moral norm in the rule of recognition in only a piecemeal fashion. <sup>123</sup> Misapplication, then, "displaces some moral precept that is optimal for addressing hard cases of some type, and substitutes for it an inferior precept which has thereby gained the status of a law for addressing the cases of that type." <sup>124</sup>

But the incorporated moral criteria give way only in cases of conflict. In all other respects, the unadulterated moral criteria continue as valid criteria for identifying law. Furthermore, the shared justificatory orientation of all United States officials preserves the criteria as valid even in the face of frequent misapplication. <sup>125</sup> In summary, then, even in the case of mistaken applications, substantive moral cri-

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<sup>120</sup> *Id.* at 130. Kramer discusses three notably anomalous or "odd" properties of the Court's law-ascertaining duty. First, the Court is undeniably empowered to produce results that it is duty-bound to avoid. Second, the Supreme Court's duty does not seem to be backed by any real force or threat of force, and it is thus a nominal obligation. And, lastly, the sole means of backing up this nominal obligation is brought to bear on all decisions in hard cases, correctly or incorrectly decided. *Id.* at 131-33.

<sup>121</sup> *Id.* at 134.

<sup>122</sup> *Id.*

<sup>123</sup> *See id.* at 135 (noting that "[i]n a situation of multiple law-validating criteria that are ranked, the priority of one criterion over another does not result in the wholesale elimination of the latter").

<sup>124</sup> *Id.* at 136.

<sup>125</sup> *See id.* at 136 ("Insofar (albeit only insofar) as that effect does not clash with anything ordained by superior criteria in the American Rule of Recognition, it abides.").

teria incorporated into the United States Constitution will remain operative and bestow legal validity on every moral principle that has not been set aside by specific Supreme Court precedent.

Therefore, while Himma is correct that Supreme Court Justices are always under a duty to ground their decisions in the morally best interpretation of the Constitution, how they are required to make those decisions is determined not by their beliefs about the extensions of the moral criteria, but by the objective extensions themselves.<sup>126</sup> And misapplication of those moral norms contained in the rule of recognition creates a limited precedent that only affects directly related cases. Thus, the moral norm itself remains incorporated into the system's ultimate rule.

### III. THE RULE OF RECOGNITION FOR THE UNITED STATES: A PROPOSAL AND DEFENSE

Building on the strengths of the accounts provided by Greenawalt and Himma, and keeping in mind Kramer's helpful critique of Himma's proposal, I can formulate my own rule of recognition for the United States. Borrowing Greenawalt's structure, the inclusive-positivist rule of recognition for the United States today, in hierarchical order, is approximately the following:

- (1) All duly enacted norms that do not conflict with the objectively best interpretation of the appropriate part(s) of the Federal Constitution, which interpretation has not lost its legal force and does not derive its present legal force from enactment by a proscribed constitutional procedure, are law;
  - (a) the objectively best interpretation of the Federal Constitution shall be determined by:
    - (i) existing Supreme Court precedent, unless such precedent is rejected through proscribed constitutional amendment procedures; or
    - (ii) the interpretation of any and all appropriate United States officials, administrative bodies, or lower-court judges if Supreme Court precedent does not apply or ex-

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<sup>126</sup> See *id.* at 140 (“[T]he officials engage in an Incorporationist practice that absorbs all genuine precepts of morality into the law regardless of whether those precepts have been discretely identified and designated as such.”).



isting Supreme Court precedent has lost legal force due to longstanding official practice.

(2) All norms that conform to the objectively best interpretation (as defined above) of the appropriate part(s) of the Federal Constitution, which interpretation has not lost its legal force and does not derive its present legal force from enactment by a proscribed constitutional procedure, are law; unless:

(a) such norms conflict with existing Supreme Court precedent that has not lost its legal force due to longstanding official acceptance; or

(b) such norms conflict with duly enacted norms as described in (1).

(3) All duly enacted norms that do not conflict with the objectively best moral interpretation of those parts of the state constitution (or whatever was adopted in accordance with an accepted constitution-making procedure), which interpretation has not lost its legal force and does not derive its present legal force from enactment by a proscribed constitutional procedure, are law;

(a) the objectively best moral interpretation of the state constitution (or whatever was adopted in accordance with an accepted constitution-making procedure) shall be determined by:

(i) existing precedent of the highest state court, notwithstanding rejection of said precedent as enacted through proper constitutional-amendment procedures by the state legislature (or appropriate body); or

(ii) the interpretation of any and all appropriate state officials or lower-court judges if precedent of the highest state court does not apply, or existing precedent of the highest state court has lost legal force due to longstanding official practice.

(4) All norms that conform to the objectively best moral interpretation (as defined above) of the appropriate part(s) of the state constitution, which interpretation has not lost its legal force and does not derive its present legal force from en-

actment by a proscribed constitutional procedure, are law; unless:

- (a) such norms conflict with existing precedent of the highest state court that has not lost its legal force due to longstanding official acceptance; or
- (b) such norms conflict with duly enacted norms as described in (1).

This rule grants the Court a strong power of judicial review, but not complete judicial supremacy, as it recognizes Congress's power to reject a court's ruling through constitutional amendment. And while it is true that this rule seemingly places a great deal of power in the hands of the Court, it hews closest to the empirical truth that even controversial decisions by the Supreme Court are treated as law by United States officials and will be so treated unless explicitly overruled by the Court or nullified by constitutional amendment.<sup>127</sup> The Court's power is also curtailed by retaining Himma's "original best moral interpretation" language. This language should be read as implying a strong form of the Conventionality Thesis, wherein all legal officials are presumed to participate in an SCA. The Conventionality Thesis, and thus the original best moral interpretation language, carry a strong limitation on the Court's power as described by Kramer.

Furthermore, this rule goes a long way toward accounting for the inclusive positivists' observations about the ways that a moral norm can be both necessary and sufficient to count as law in the United States. Under this rule, a duly enacted norm will only be law if it does not conflict with the objectively best moral interpretation of the Constitution and if consistency with the moral norms contained in the Constitution is a necessary condition of a norm's legal validity. Additionally, a norm has the status of law if it closely conforms to a norm contained in the Constitution, and thus conformity with a constitu-

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<sup>127</sup> Take, for example, the debate surrounding a controversial decision like *Roe v. Wade*, 410 U.S. 113 (1973). While many officials believe that the decision is mistaken, it is still held to be law. See Himma, *supra* note 17, at 161 (adding that "[i]t is true, of course, that officials sometimes attempt to enact rules that restrict abortion in some way, but it is also true that they unflinchingly obey the Supreme Court if it strikes down those rules as unconstitutional"). Proponents of change either argue for the Court to overrule the decision or implore Congress to make a constitutional amendment in their favor. Both options are taken into account within this formulation of the rule.

tional norm is a sufficient condition for legal validity.<sup>128</sup> However, both tests for validity are subject to the interpretation of the Supreme Court, and should the Court err in identifying the correct norm in a given decision, that erroneous decision is binding down through the hierarchy.

Lastly, the rule recognizes Greenawalt's important observations regarding state sovereignty and retains the echoing structure that

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<sup>128</sup> It may be asked what norms, exactly, will fit in the sufficiency category of my rule. One possibility is Cass Sunstein's account of the "canons of construction," or those background principles that courts use when reviewing and interpreting statutes. See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 147-59 (1990). Sunstein defines canons as "reflecting background norms that help[] give meaning to statutory words or to resolve hard cases." *Id.* at 149. These "interpretive principles" (borrowing Dworkin's terminology), while never officially codified by the legislature or explicitly passed down through legal precedent, may be said to be "law" because they are applied by courts in the interpretation of statutes. Sunstein explains that these canons include, but are not limited to, principles that derive "from policies that have a firm constitutional pedigree" that may thus be treated as a form of "constitutional common law" that has "a kind of constitutional status." *Id.* at 155 (citing Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975)). Sunstein gives as examples the principle that "statutes enacted by Congress should not lightly be taken to preempt state law" and the rule of lenity in criminal law, which "counsels courts narrowly to construe criminal statutes in the event of vagueness or ambiguity," a principle "rooted in [constitutional] notions of due process." *Id.* at 156. Thus, these canons may be said to conform to a constitutional norm (such as due process) such that they have legal validity without having been positively enacted as law.

Another example may be found in the Supreme Court's state-sovereign-immunity jurisprudence, a constitutional principle (in the Dworkian sense) of which the Eleventh Amendment is simply one manifestation. In cases establishing this principle, the Court has stated that

the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution.

*Alden v. Maine*, 527 U.S. 706, 713 (1999). As the Court wrote, "The Eleventh Amendment confirmed, rather than established, sovereign immunity as a *constitutional principle*." *Id.* at 728-29 (emphasis added). Thus, the Supreme Court has held that the principle that an unconsenting state may not be sued in its own court is law *because* it is consistent with a moral norm that underlies the Constitution's structure and history, even though the moral norm is not articulated in the Constitution itself. See *id.* at 728 (discussing *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), and *Hans v. Louisiana*, 134 U.S. 1 (1890), and stating that "[t]hese holdings reflect a settled doctrinal understanding . . . that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself"). The principle of state sovereign immunity, then, may be said to derive sufficient legal validity from its conformity with the structure of the Constitution itself.

Greenawalt included in his rule. Retaining Greenawalt's structure also meshes with Kramer's notion of a hierarchical rule that allows for moral norms to retain their extension both before and after judicial interpretation. Thus, this rule combines the strengths of previous attempts at the American rule while, hopefully, eliminating their weaknesses.

As explained in Section II.C.1 above, many constitutional theorists reject the notion of judicial supremacy that my rule assumes. This rule will especially bother popular constitutionalists, as it holds almost no room for popular sovereignty (with just the limited role afforded to the citizenry through the Amending Clause). This conflict may be unavoidable, as the idea of a rule of recognition and the theory of popular constitutionalism may necessarily be at odds. Hart's rule requires the existence of officials who are distinct from the general citizenry.<sup>129</sup> In a few places, Hart indicates that, in a democracy, the official body may, indeed, be the populace at large, but, as this Comment demonstrates, Hart's notion of an ultimate rule seems to require some sort of final authority to settle controversy and provide finality to debates over what the law is. It is difficult (perhaps even impossible) to place such final authority in the hands of the entire citizenry. Hart's theory, then, may simply be incompatible with the central tenet of popular constitutionalism, perhaps making it impossible to simultaneously hold an inclusive-positivist view of law and a popular-constitutionalist view of the American legal system.

Those concerned with a Court run amok, however, should not be alarmed by these conclusions. First, under my formulation, the Court is checked by the process of constitutional amendment. This process, albeit cumbersome and complex, allows the public, through Congress and the states, to reject any decision that they find truly outrageous. Furthermore, the Court is under a very real obligation to ground its decisions in the best objective interpretation of the Constitution. Should the Court fail in this obligation consistently, its authority will almost certainly come into question. But this would be a moment of governmental breakdown, not the sign of a healthy legal system. If such a moment of constitutional crisis occurs, the government of the United States itself would be under threat. No formulation of a rule of recognition can, or should be expected to, account for such a crisis.

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<sup>129</sup> See *supra* note 24 and accompanying text.

## CONCLUSION

Applying Hart's theoretical construct of the rule of recognition proves fruitful both to legal philosophy and constitutional theory. Building upon the empirical and philosophical observations of Greenawalt, Himma, and Kramer, supplemented by the theory of inclusive positivism generally, it is possible to provide at least a plausible description of the form that an inclusive-positivist rule of recognition must take in the United States today. This rule shows how a real legal system can incorporate moral norms in the way described by inclusive positivists. And the positivist account uncovers the inner workings of the American legal system, especially the role that final authority must play in any ordered legal system. However, in applying theory to fact, serious issues are raised about the compatibility of a positivist legal philosophy with certain theories of American constitutional law, most importantly those theories involving any notion of popular constitutionalism. If the inclusive positivists are correct in their account of the nature of law itself and the rule proposed above (or something similar) is indeed the rule of recognition in the United States, the plausibility of some of the oldest accounts of the nature of U.S. law may be on uncertain ground.