

Book Review Note

Don't Go Breaking My Hart*

THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION. Edited by
Matthew D. Adler & Kenneth Einar Himma. New York, New York:
Oxford University Press, 2009. 389 pages. \$99.00.

I. Introduction

It is difficult to overestimate the influence of Herbert Lionel Adolphus Hart in the field of jurisprudence. He was involved in two seminal debates of analytical jurisprudence—with Fuller¹ and then with Dworkin.² He is considered the clear victor in both—by knockout.³ His theory, Hartian legal positivism, dominates the landscape of analytical jurisprudence.⁴ Indeed, positivists and nonpositivists alike use his seminal piece, *The Concept of Law*,⁵ as the starting point of their theoretical endeavors.⁶

Yet, despite this towering influence in jurisprudence, Hart's work has hardly made a dent in U.S. constitutional theory.⁷ Though most constitutional theorists are familiar with Hart's work, they have not done

* I would like to thank Prof. Mitchell N. Berman, Abraham M. Howland, and Dr. Jacob A. Howland for their helpful comments. I would also like to thank my parents for their support of my endeavors. As a point of disclosure, I served as a research assistant on Mitchell N. Berman's chapter discussed in this Book Review Note. Finally, this Book Review Note is named after the famous duet by Elton John and Kiki Dee. ELTON JOHN & KIKI DEE, *Don't Go Breaking My Heart*, on ELTON JOHN'S GREATEST HITS VOLUME II (Polygram Records 1977).

1. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

2. This debate begins with Dworkin's critique of Hart's theory of legal positivism in an essay. Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967). This essay was incorporated as a chapter in a later book. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 14–45 (1978). Hart responded to Dworkin's critiques in the posthumously published *Postscript*, found in H.L.A. HART, *THE CONCEPT OF LAW* 238–76 (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994).

3. See Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 N.Y.U. L. REV. 1035, 1037 (2008) (“The victory of Hart's Lecture in promoting [his] slogan was virtually total.”); Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17, 18 (2003) (indicating that “on the particulars of the Hart/Dworkin debate, [Hart] has been a clear victor”).

4. Matthew D. Adler & Kenneth Einar Himma, *Introduction* to THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION, at xiii, xiii (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

5. HART, *supra* note 2.

6. Adler & Himma, *supra* note 4, at xiii.

7. *Id.*

much to integrate it into their work—until now.⁸ *The Rule of Recognition and the U.S. Constitution*⁹ fills this lacuna in legal scholarship—and in great form. This extraordinary book collects together the works of thirteen giants of legal scholarship.¹⁰ It brings together jurisprudents and constitutional scholars to inform the relationship between Hartian positivism and U.S. constitutional theory. As such, it is a piece that belongs on the bookshelf of anyone interested in constitutional theory or analytical jurisprudence.

In this Review, I will discuss two of this book's chapters: Mitchell N. Berman's "Constitutional Theory and the Rule of Recognition: Toward a Fourth Theory of Law" and Matthew D. Adler's "Social Facts, Constitutional Interpretation, and the Rule of Recognition." Both of these pieces find flaw in Hart's legal positivism—they claim that the rule of recognition framework cannot account for features of U.S. constitutional theory.

Berman argues that the rule of recognition is unable to recognize novel legal arguments as legally valid (or invalid).¹¹ Berman then argues that, because cases are always novel in some way, the rule of recognition cannot perform its task of validating putative laws as law.¹² Because of the centrality of the rule of recognition in the Hartian framework, Berman concludes that Hartian positivism is lacking as a theory of law. Then, drawing from Gerald Postema's work on "common law conventionalism," Berman gestures toward a "fourth theory of law"—law as practice.¹³ Essentially, the Postema–Berman model claims:

“[Law’s] theoretical point of departure is not a set of norms, prescriptions, or propositions of law, but rather a practice of common practical reasoning. Rather than a metaphysical thesis, it urges a methodological thesis, a point about order of explanation and understanding, not an ontological point about the ultimate order of being.”¹⁴

8. Please play Led Zeppelin's *Black Dog* in the background. LED ZEPPELIN, *Black Dog*, on LED ZEPPELIN IV (Atlantic Records 1971).

9. THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION, *supra* note 4.

10. *Id.* at xi. The contributors are Matthew D. Adler, Larry Alexander, Mitchell N. Berman, Michael C. Dorf, Richard H. Fallon Jr., Michael Steven Green, Kent Greenawalt, Kenneth Einar Himma, Stephen Perry, Frederick Schauer, Scott J. Shapiro, Jeremy Waldron, and Wil Waluchow. *Id.*

11. Mitchell N. Berman, *Constitutional Theory and the Rule of Recognition: Toward a Fourth Theory of Law*, in THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION, *supra* note 4, at 269, 277–80.

12. *Id.*

13. *Id.* at 282, 284.

14. *Id.* at 284 (quoting Gerald J. Postema, *Philosophy of the Common Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 589, 602 (Jules Coleman & Scott Shapiro eds., 2002)).

Adler argues that the semantics of the rule of recognition does not fit the discourse of constitutional interpretation.¹⁵ First, he claims that the semantics of the rule of recognition does not represent what constitutional scholars are saying in their discourse.¹⁶ Furthermore, rule of recognition semantics, he argues, cannot hope to make true any of the statements made by constitutional scholars.¹⁷ This leads Adler to ask if we can do a better job in constructing a semantics for constitutional-interpretation discourse.¹⁸ After analyzing the benefits and detractions of some alternative theories, Adler concludes that accounting for the discourse of constitutional interpretation with a plausible theory of law is a genuinely open problem.¹⁹

In response, I will argue that the Hartian positivist can respond to both Berman's and Adler's complaints about the Hartian rule of recognition framework. With regard to Berman's challenge, I argue that Berman improperly restricts the set of inferences to be made from official practices and that, under the broader set of inferences, the rule of recognition can recognize novel legal arguments as legally valid or invalid. That being said, I think that "law as practice" has great promise, but the impetus for such a project does not lie in Berman's objection to the rule of recognition framework. With regard to Adler's challenge, I argue that, using the idea of derivative legal propositions, rule of recognition semantics can plausibly describe and vindicate constitutional-interpretation discourse. However, given that the participants of constitutional discourse have differing views on the correct theory of law, I will question the worth of trying to find a semantics to fit constitutional discourse.

Finally, I will note that there is a common lesson to be learned in Berman's and Adler's challenges. Essentially, the rule of recognition framework accommodates more analogical and inductive reasoning than Berman and Adler recognize, and understanding this may show that Hartian positivism is more broadly applicable as a theory of general jurisprudence than it is credited for.

The body of this Review comes in four parts. Part II provides a brief overview of Hartian positivism. Part III details Berman's challenge, with my response. Part IV details Adler's challenge, with my response. Part V concludes the Review with a discussion of the common lessons to be learned from Berman's and Adler's challenges.

15. Matthew D. Adler, *Social Facts, Constitutional Interpretation, and the Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, *supra* note 4, at 193, 197.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* In particular, Adler discusses alternative semantic frameworks, such as Dworkin's "law as integrity" model, the post-Hartian positivist "shared cooperative activity" model of law, and the "group-relative" account of law. *Id.* at 230–31.

II. Hartian Positivism

We begin by briefly summarizing the Hartian positivist framework. According to Hart, law is the union of primary and secondary rules.²⁰ Primary rules are those rules that regulate behavior; they are “concerned with the actions that individuals must or must not do.”²¹ Secondary rules are social rules, meaning that they are constituted by a convergent practice of behavior among the officials of the legal system.²² These secondary rules are concerned with the primary rules.²³ Hart categorizes these into three types: the rule of recognition, the rules of change, and the rules of adjudication.²⁴ For there to be a legal system, regular citizens must generally obey the primary rules, and the officials of the system must, from an internal point of view, accept the secondary rules.²⁵ Among the secondary rules, the rule of recognition is first and foremost; it is the rule by which an individual in the legal system *recognizes* putative laws as actual laws.²⁶ The rule of recognition does this through “criteria of validity”; these are conditions that are inferred from social practice and provide “conclusive affirmative indication that it is a rule of the group.”²⁷

Another crucial aspect to the Hartian positivist framework is the difference between the core and the penumbra of legal rules.²⁸ In the core, the application of the rule is straightforward.²⁹ Contrast this with the penumbra, where the application of the rule is not straightforward and requires something extra.³⁰ To illustrate this, Hart gives us the example of the rule prohibiting vehicles in a park.³¹ A core case of a vehicle is an automobile, and in such cases the adjudicator simply applies the rule.³² But in penumbral cases, such as with bicycles and roller skates, application of the rule is not straightforward, and the adjudicator must use his discretion to decide the case.³³ According to Hart, such penumbral cases are more or less inevitable due to certain sources of indeterminacy, like the open texture of language and the indeterminacy of legislative aim.³⁴ For Hart, law is limited

20. HART, *supra* note 2, at 94.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 94–97.

25. *Id.* at 116; Kenneth Einar Himma, *Understanding the Relationship Between the U.S. Constitution and the Conventional Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, *supra* note 4, at 95, 97.

26. HART, *supra* note 2, at 100.

27. Berman, *supra* note 11, at 277–78 (quoting HART, *supra* note 2, at 94).

28. Hart, *supra* note 1, at 607.

29. *Id.* at 607–08.

30. *Id.*

31. HART, *supra* note 2, at 125–27; Hart, *supra* note 1, at 606–15.

32. Hart, *supra* note 1, at 607.

33. *Id.* at 607–08.

34. HART, *supra* note 2, at 100.

to the core, and legal reasoning is core reasoning.³⁵ We recognize core cases and, thus, the law through the criteria of validity of the rule of recognition.³⁶

In light of all this, Hartian positivism has three key commitments: the Separability Thesis, the Social Fact Thesis, and the Conventionality Thesis.³⁷ The Separability Thesis states that there is no necessary connection between morality and law.³⁸ The Social Fact Thesis states that the question of what is law is answered purely by social facts.³⁹ The Conventionality Thesis states that the criteria that validate putative laws as law are a product of the convergent practices of officials.⁴⁰

With that backdrop in mind, we proceed to considering Berman's and Adler's challenges to the Hartian positivist framework.

III. Berman's Challenge

A. *The Impotence of Criteria of Validity*

The thrust of Berman's principle objection to Hartian positivism is that the rule of recognition cannot validate or invalidate novel legal arguments because the rule of recognition is confined to inferences from current conventional practices of officials.⁴¹ Therefore, the Hartian model's notion of legal validity is lacking—most cases present new details and novel legal arguments, and the Hartian model cannot correctly identify the law in these situations.⁴² As such, the Hartian commitment to the distinction between law and nonlaw, which rests crucially on this concept of legal validity, is also flawed.⁴³

Berman begins his argument by noting that a principle function of the rule of recognition is to establish criteria of validity—"features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group."⁴⁴ He then posits a rough estimation of one sufficient condition of the criteria of validity in the United States, "*C1*: a norm is law if it conforms to the plain language of the holding of a non-

35. Hart, *supra* note 1, at 614.

36. Berman, *supra* note 11, at 273–74.

37. Himma, *supra* note 25, at 96–98.

38. *Id.* at 96–97.

39. *Id.* at 97.

40. *Id.* at 97–98.

41. Berman, *supra* note 11, at 280.

42. *Id.* at 279–80.

43. *Id.* at 282.

44. *Id.* at 277–78 (quoting HART, *supra* note 2, at 94). "In a complex legal system, the [criteria of validity] likely take the form of a disjunctive set of complex sufficient conditions, such that *X* is law if *C1*, or *C2*, or . . . *Cn*." *Id.* at 278.

overruled Supreme Court decision.”⁴⁵ If the Supreme Court says in some case *Jones*, “P is law,” then P is law because *CI* validates P.⁴⁶

But Berman notes that, if the decision in *Jones* was made through bribery, astrology, or “divination through the peckings of grain by birds,” it is reasonable to doubt whether P is the law.⁴⁷ Yet *CI* is blind to these problems, and *CI* will validate P as the law.⁴⁸ Now, Berman recognizes the repair to this problem. It should be replaced with “*CI**: a norm is law if it conforms to the plain language of the holding of a Supreme Court decision that (1) has not been overruled and (2) was not reached in palpably inappropriate or unfair ways.”⁴⁹ But Berman does not think that Hartians are entitled to make this repair. Though a *CI** could be introduced to repair these problems, he says that it cannot be inferred from social practice.⁵⁰ This is because these situations have never come up, so there is no convergent practice with respect to these situations, and thus there is nothing that allows us to infer the criterion of validity *CI**.⁵¹

This can be better illustrated by Berman’s “fanciful hypothetical.”⁵² “[S]uppose that the defendant in *Jones* was [named after a Dr. Seuss character], and that a post-*Jones* litigant were to challenge [that P is the law] by proposing that a Supreme Court decision cannot validate a norm if it involved a party named after a [Dr. Seuss character].”⁵³ The post-*Jones* litigant is proposing, as a condition of the criteria of validity, “*CI***: a norm is law if it conforms to the plain language of the holding of a Supreme Court decision that (1) has not been overruled, (2) was not reached in palpably inappropriate or unfair ways, and (3) did not involve any party named after a Dr. Seuss character.”⁵⁴ Can the Hartian assert “that *CI*** is not a criterion in the system” and “that a norm is law so long as it satisfies *CI**?”⁵⁵

Berman says the Hartian cannot.⁵⁶ The criteria of validity are established through convergent practices. But because there is no convergent practice on this point, the question of whether *CI*** or *CI** is the proper condition of the criteria of validity is unsettled.⁵⁷ Generalizing from this, Hartians are led to the unfortunate claim that a Supreme Court decision in a novel case is not law because the novel issue cannot be decided by existing

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 279.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

convergent practice and therefore cannot be validated by the criteria of validity.⁵⁸ Since every case is novel in some way, this problem crops up wherever one thinks to point it out.⁵⁹

Because the rule of recognition plays such a central role in Hartian positivism, the fact that the rule of recognition is unable to fulfill its role exposes a fatal flaw in the Hartian framework.⁶⁰ Most importantly, the impotence of the rule of recognition and its criteria of validity makes the Hartian distinction between law and nonlaw no longer sustainable.⁶¹ If the criteria of validity cannot properly recognize what is law from what is not, then the distinction between what is law and what is not is equally dubious. This leads Berman to postulate a fourth theory of law—"law as practice."⁶² The basic idea of law as practice is to understand law as a methodology.⁶³ It is the practice of public, disciplined argumentation.⁶⁴ In Berman's words, law as practice is committed to the following conception of law:

[L]egal norms are the product of the identification, evaluation, and acceptance or endorsement of arguments by participants within a structured practice. Legal norms and propositions are ultimately traceable to social practices, just as in Hart's account. But the social practices converge, not on criteria that have the capacity to furnish conclusive legal validation, but on norms of reasonable and persuasive argumentation.⁶⁵

B. *Response to Berman's Challenge*

Berman's challenge presents quite an enigma, but I think that Hartian positivists have a response. To begin, we can ask how it is that we know that the argument regarding a Seussian name is a loser. There is nothing a priori that would tell us the argument is a bad one. Indeed, there are societies in which having a certain name makes you a loser in most any legal dispute.

It seems that we know that this argument is a loser in light of certain social facts that obtain in the United States. We come to this conclusion by way of an inductive inference that rests on many social facts, including the norms of reasoning and argumentation, the practices of judges to decide in accordance with these norms, and so forth. Indeed, Berman recognizes that

58. *Id.* at 280.

59. *Id.* at 279–80.

60. *Id.* at 281.

61. *Id.* at 282.

62. *Id.*

63. *See id.* at 284 ("Rather than a metaphysical thesis, [law as practice] urges a methodological thesis, a point about order of explanation and understanding, not an ontological point about the ultimate order of being.")

64. Gerald J. Postema, *Positivism and the Separation of Realists from Their Skepticism 2* (Univ. of Tex. Sch. of Law Constitutional Law Colloquium, Paper No. 5, 2009).

65. Berman, *supra* note 11, at 285.

we may make this inference in light of social facts.⁶⁶ Note further that this inference crucially relies on facts about the practices of officials. Indeed, if the officials took Seussian-name arguments to be legally valid, then Seussian-name arguments would be legally valid. Even the facts that do not ostensibly relate to the practices of officials are only relevant in light of their bearing on the convergent practices of officials. For example, if the inference utilizes facts about norms of argumentation that tells us the Seussian-name argument is legally invalid, this only tells us that the Seussian-name argument is legally invalid in light of the fact that officials accept such norms of argumentation.⁶⁷

Thus, the Hartian positivist can use social facts about the convergent practices of officials—such as the norms of argumentation used by judges—to generate the relevant criteria of validity. The Seussian-name argument will undoubtedly fail to be validated by these criteria. So it seems that the Hartian positivist will be able to conclude that the Seussian-name argument is legally invalid. Generalizing from this, the Hartian is not led to the unfortunate claim that a Supreme Court decision in a novel case is not law because there may be convergent practices that will allow the Hartian to infer the proper condition of the criteria of validity.

Berman will likely say that I have pulled the wool over my eyes. Berman will say that there is not a convergent practice of the officials with regard to the Seussian-name argument because it has never been brought up before. But, in response, that does not mean that there are no convergent practices by which we can infer that officials will not respond to Seussian-name arguments. To be clear, the Hartian positivist can make the inference by looking at certain convergent practices among officials that may indicate how they will behave in this novel scenario.

Now Berman might object that if the Hartians are allowed to utilize these inferences, then the criteria of validity will be unstable. There are many different, and perhaps contradictory, inferences about the criteria of validity that we could construct from the practices of judges. It might be that we can make an inference that leads us to a criterion of validity under which the putative law is validated as law, but, at the same time, we might also be able to make an inference that leads us to a criterion of validity that rebukes the putative law. If the criteria of validity are so insecure, then the rule of recognition cannot do its job—it cannot provide a “conclusive affirmative indication that it is a rule of the group.”⁶⁸ Then the rule of recognition will not be able to validate this putative law as law or not law.

66. *Id.* at 270, 279. Given that Berman agrees with the Conventionality Thesis, he must think that the argument is legally invalid in light of social facts. *Id.* at 270.

67. I believe that Berman is committed to this proposition as well, but he only says that he agrees with the conception of law as the product of a social practice and does not explicitly say that the officials' practices are of elevated importance. *Id.* at 270.

68. *Id.* at 277–78 (quoting HART, *supra* note 2, at 94). In his discussion, Berman asserted that his challenge went beyond the problem of inductive generalization, yet at this point we have

Though the problem of competing inferences and analogies is troublesome, presumably there are ways to separate out good inferences and analogies from others. Among other things, the Hartian can utilize, in Berman's words, the "norms of reasoned argumentation."⁶⁹ The Hartian framework can just accommodate such strategies of deciphering between good and bad inferences and analogies. The good, strong inferences and analogies will give rise to criteria of validity. The weak ones will not.

This all may still sound rather fishy. The strength of inferences is perhaps on a continuum, and so Berman may object that trying to incorporate the notion of strength of inferences into criteria of validity will *essentially* undercut the distinction between law and nonlaw of Hartian positivism. But, in response, the Hartian can assert that there is a threshold strength— inferences greater than this threshold will establish criteria of validity and inferences weaker will not. Of course, the threshold may be vague—we may not be able to say where exactly the dividing line between strong and weak inferences is.⁷⁰ But there will be clear cases—like the inference giving rise to the criterion that invalidates the Seussian-name argument.

Now, one may persistently object that large gray areas will undoubtedly remain, for there will be commensurately strong contradictory inferences. At first glance, this may seem problematic for the Hartian positivist, but he might be able to respond by considering Hart's exchange with Dworkin on soft positivism.⁷¹

Dworkin's complaint is that Hart's positivism permits the identification of law to depend on controversial matters, such as conformity with moral judgments and the like.⁷² Dworkin says that this is problematic because the main thrust behind Hartian positivism, and the rule of recognition, is to provide a basis on which law can be identified.⁷³ Hart's response is that Dworkin has grossly overestimated the amount of certainty that should be

seemingly reduced Berman's challenge to just that—a problem of inductive generalization. *Id.* at 279.

69. *Id.* at 270. I must confess to being coy with regard to explicit details as to how to decipher between strong and weak inferences. That is because it is difficult business. But the Hartian need not explicitly describe the contours of good legal argumentation as long as we recognize that it is a practice that can be inferred from current practices of officials. Note that Berman himself recognizes that the Seussian-name argument is ridiculous, and he is not explicit as to why; he just appeals to the "norms of reasoned argumentation." *Id.* at 270, 279. This is not a criticism of Berman; rather it is just to point out that the Hartian can adopt the same strategy.

70. For a discussion of vague predicates, see Roy Sorensen, *Vagueness*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2006), <http://plato.stanford.edu/entries/vagueness/>. As Ian P. Farrell pointed out to me, my formulation seemingly leads to there being a penumbra of uncertainty about where the dividing line between core and penumbral cases is—another penumbra on top of the other penumbra. This does not reveal any problem for the Hartian model, but it does demonstrate a complexity to the Hartian model perhaps not earlier recognized.

71. HART, *supra* note 2, at 251–52.

72. *Id.* at 251.

73. *Id.*

proffered by the rule of recognition.⁷⁴ Hart's theory is not committed to a rule of recognition that eliminates all uncertainty.⁷⁵

The Hartian can respond to the present situation in a similar way. Indeed, it is true that the rule of recognition may not validate or invalidate a putative law because of competing inductive inferences. But this is not all that worrisome because the rule of recognition is not expected to eliminate all uncertainty. Hart says that the rule of recognition has a periphery of vagueness, and these situations of competing, contradictory inferences will be peripheral cases.

But there may be an even more basic worry for the Hartian; Berman might complain that even if we can make strong inferences, the rule of recognition cannot utilize all such inferences. There are just too many of them to include in the rule of recognition. This shows that the rule of recognition will not provide conclusive affirmation that a rule is valid as law because we will always be able to come up with material uncovered by the rule of recognition. However, the reply from the Hartian on this point is clear: even if it were true that the rule of recognition is often so complex as to be intractable to explicit description, the rule of recognition can manifest itself through "tacit knowledge and convergent behavior."⁷⁶ So even though there are lots of strong inferences at play, the rule of recognition need not be able to write them down in propositional form in order to provide us with the ability to recognize law.⁷⁷

With all this in mind, we see that the Hartian concept of legal validity can be rescued. By recognizing that we can make a variety of inferences from existing social practices and that from this set of inferences we can cull out the (threshold) strong inferences, we are able to produce criteria of validity that conclusively validate law. It may be difficult to decide what inferences meet the threshold strength to be considered criteria of legal validity, and the actual set of criteria may be so voluminous as to be intractable to explication. But this just goes to show that the law is complex and that the job of the lawyer is difficult—two claims consistent with Hartian positivism.

Now, how does this bear on Berman's theory of law, law as practice? I do not think it upsets the pith of the project; it is just that the impetus for the project must rest elsewhere. To see this, consider Berman's statement that "legal norms and propositions are ultimately traceable to social practices . . . [that] converge, not on criteria that have the capacity to furnish conclusive legal validation, but on norms of reasonable and persuasive

74. *Id.*

75. *Id.* at 251–52.

76. Richard H. Fallon, Jr., *Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, *supra* note 4, at 47, 58.

77. *Id.* at 58.

argumentation.”⁷⁸ This distinction is supposed to differentiate Berman’s law as practice from Hartian positivism. But, as I have argued above, this presents a false dichotomy. The criteria that have the capacity to furnish conclusive legal validation may include the norms of reasonable and persuasive argumentation if these norms are generally accepted by officials. So these norms of reasonable and persuasive argumentation can be a part of the rule of recognition as conditions that validate or invalidate putative laws—they can be building blocks of the criteria of validity.

That being said, there may be other reasons in support of law as practice. In recent work, Postema has argued that Hartian positivism has some explanatory hurdles; Hartian positivism cannot account for the difference between core and penumbral reasoning that it claims exists.⁷⁹ Thus, the distinction between the legal reasoning of the core and the nonlegal reasoning of the penumbra breaks down.⁸⁰ This lacuna in Hartian positivism may bolster the theory of law as practice. So, indeed, there is great promise in this fourth theory of law, but it is not grounded in the objection that Berman has proffered.

IV. Adler’s Challenge

A. *The Inability to Account for Constitutional-Interpretation Discourse*

Adler objects to the Hartian framework on the basis that the rule of recognition semantics does not accurately describe or vindicate the discourse of constitutional interpretation. Adler begins by constructing a semantics for the Hartian positivist model, namely “rule of recognition semantics”:

A legal statement:

1. Asserts the existence of some legal position (a duty, right, liberty, etc.) (*legal character*);
2. asserts or presupposes that the legal position has normative force, providing genuine reasons for action for the holder of the position and/or those who hold connected positions (*normative character*);
3. asserts or presupposes that this legal position can be derived from an ultimate criterion of legal validity, the rule of recognition (*foundationalism*);
4. asserts or presupposes that the rule of recognition is generally accepted by present officials (*social fact: present official acceptance*);

78. Berman, *supra* note 11, at 285.

79. Postema, *supra* note 64, at 1–2.

80. *Id.*

5. asserts or presupposes that the duties derivable from the rule of recognition are generally complied with by citizens as well as officials (*social fact: general efficacy*); and

6. asserts or presupposes that the combination of (3), (4), and (5) is part of the grounds for (1) and (2) (*nexus between social facts and legal and normative character*).⁸¹

Appealing to many seminal pieces in the literature as demonstrative of the discourse of constitutional interpretation, Adler claims that constitutional discourse is neither described nor vindicated by this rule of recognition semantics.⁸²

1. *Description*.—Adler first aims to show that most typical statements by participants in the discourse of constitutional interpretation cannot be described by the rule of recognition semantics. A generic statement might be: “Such-and-such interpretive method is legally favored.”⁸³ Adler states that the basic problem confronting Hartian positivists is that, under rule of recognition semantics, the participant must be “asserting or presupposing” that such-and-such interpretive method is contained in a criterion of validity presently accepted by officials.⁸⁴ But the participants generally are not asserting or presupposing this; therefore, rule of recognition semantics cannot describe the participants’ typical statements.⁸⁵

Adler first notices that, in the literature of constitutional interpretation, no one ever asserts that a present official practice supports some method.⁸⁶ So, given that there is no explicit reliance on present official practice, the Hartian response then must be that present official practices are being presupposed.⁸⁷ From here, Adler notices a dilemma that arises due to Hart’s foundationalism.⁸⁸ According to the Hartian model, when social facts are marshaled in argument:

(1) . . . the social fact [is] of present official acceptance of the ultimate criterion of legal validity; or

81. Adler, *supra* note 15, at 202–03. One feature of this semantics is that it is cognitivist in nature. This is striking because most think that Hart was a noncognitivist. That being said, I will not take issue with Adler’s cognitivist construction of the rule of recognition semantics.

82. *Id.* at 222. Adler’s list of representative sources includes, among other works, BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969); RONALD DWORKIN, *LAW’S EMPIRE* (1986); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); LEARNED HAND, *THE BILL OF RIGHTS* (1958); and CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999). Adler, *supra* note 15, at 204.

83. Adler, *supra* note 15, at 196.

84. *Id.* at 222.

85. *Id.*

86. *Id.*

87. *Id.* at 223.

88. *Id.*; see also *supra* note 81 and accompanying text.

(2) [the] social fact [is] legally relevant, directly or indirectly, by application of the ultimate criterion of legal validity.⁸⁹

Adler says that some typical social facts marshaled in arguments, such as precedent, framers' intent, and culture/tradition, cannot be of the first category because they are not about current official practice.⁹⁰ Therefore, they must be of the second. Now in trying to fit these kinds of social facts into the second category, we must notice that they come up when "choosing an interpretive method, not at the level of deciding [a] particular case[]." ⁹¹ With that in mind, the Hartian positivist will claim that there is an ultimate criterion of legal validity for choosing an interpretive method, and the social facts are being utilized to show that a condition for using a certain interpretive method is being "trigger[ed]." ⁹²

The problem here is that there is no consensus among U.S. officials on what are the "triggering conditions" for using a certain interpretive method.⁹³ As there is no consensus, there cannot be any triggering conditions (or criteria of validity) for the use of an interpretive method.

The Hartian might respond with the error-theoretic claim that the participants incorrectly presuppose that there is a consensus.⁹⁴ But, as Adler notes, the participants are not stupid—they know that there is no consensus, and so they cannot be presupposing any consensus.⁹⁵ The Hartian might also try to assert that the participants are simply stating that the interpretive method is indeterminately legally favored.⁹⁶ According to Adler, this will not help the Hartian describe what the participants are saying because participants in the discourse are making claims that these social facts provide determinate support for the interpretive methods.⁹⁷

2. *Vindication.*—Adler then claims that because the interpretive methods in constitutional-interpretation discourse are controversial, rule of recognition semantics does not even "minimally vindicate" assertions that some interpretive method is legally favored.⁹⁸ This is because, according to the Hartian framework, "if some officials deny that an interpretive method is

89. Adler, *supra* note 15, at 223.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 224–25.

94. *Id.* at 225. Error theories (and error-theoretic claims) "admit[] that [some] belief . . . is built into ordinary moral thought and language, but hold[] that this ingrained belief is false." See J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 48–49 (Penguin Books ed. 1978) (1977) (discussing error theories about morality).

95. Adler, *supra* note 15, at 225.

96. *Id.*

97. *Id.*

98. *Id.* at 227. Assertions that some interpretive method is legally favored are the typical statements of constitutional-interpretation discourse. See *supra* note 83 and accompanying text.

legally favored, the method cannot *be* determinately legally favored as an ultimate legal matter.”⁹⁹

Now, the Hartian positivist might object that the interpretive method could be indeterminately legally favored, and this might vindicate statements of constitutional-interpretation discourse.¹⁰⁰ But Adler claims that this refinement does not work because those advocating for an interpretive method are asserting that it is determinately favored, not merely indeterminately so.¹⁰¹ Thus, construing the participants’ statements as claiming that an interpretive method is indeterminately legally favored would not result in accurate descriptions of what the participants are saying.

Furthermore, Adler argues, rule of recognition semantics fails to vindicate the mere reliance on the social facts of precedent, framers’ intent, and culture/tradition for the legal status of interpretive methods.¹⁰² He says,

U.S. officials do not, in fact, accept an ultimate criterion of legal validity that makes certain social facts the triggering condition for the legal status of interpretive methods. Therefore, . . . an assertion or presupposition by a [participant] that precedent, Framers’ intent, or culture/tradition determinately bolsters the legal status of an interpretive method will be incorrect.¹⁰³

Given the inability of Hartian positivism to account for the discourse of constitutional interpretation, Adler explores whether we can find a better model. He discusses alternative semantic frameworks, such as Dworkin’s “law as integrity” model, the post-Hartian positivist “shared cooperative activity” model of law, and the “group-relative” account of law.¹⁰⁴ Adler finds all of these lacking with respect to describing and vindicating constitutional discourse and claims that we are left with an open question.

B. Response to Adler’s Challenge

Let us initially note that there is a significant obstacle for the Hartian positivist in trying to rebut Adler’s challenge because some participants in constitutional discourse, like Dworkin, operate under nonpositivist conceptions of law.¹⁰⁵ So when these participants make legal statements in accord with their respective nonpositivist theories of law, the Hartian positivist semantics cannot hope to describe or vindicate their statements. And this

99. Adler, *supra* note 15, at 227.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 227–28.

104. *Id.* at 229–31.

105. For evidence of Dworkin’s nonpositivism, see Dworkin, *supra* note 2. This essay was incorporated as a chapter in a later book. DWORKIN, *supra* note 2. For further evidence, see DWORKIN, *supra* note 82. Indeed, Dworkin is one of the scholars included in Adler’s sample of constitutional discourse. See *supra* note 82.

may be of no fault of the Hartian positivist model. To be silly, if I think that laws are butterflies, one could hardly fault the Hartian semantics for failing to describe or vindicate my statement, “The law on the tree is maize, blue, and burnt orange.” Adler obliquely recognizes this problem, for he recognizes that the inability of rule of recognition semantics to describe and vindicate constitutional-interpretation discourse *may* demonstrate that constitutional-interpretation discourse is “intractable” to description and vindication.¹⁰⁶ With this in mind, in attempting to rebut Adler’s challenge, the Hartian positivist goal is rightly a humble one. It would be enough for the Hartian positivist to provide a plausible description of statements of constitutional discourse and vindicate some of those statements.

1. Description.—First, let us see how the Hartian account can describe statements of constitutional discourse. To rebut Adler’s challenge, we must give a description, congruent with Hartian positivism, of what these participants’ statements could mean. Let us begin by producing a plausible description of what these participants are saying, and then we will analyze whether it fits the Hartian positivist picture.

When a participant says, “Such-and-such interpretive method is legally favored,” what might he mean? For one, he might be completely ingenuous and mean that, regardless of what is the law, such-and-such interpretive method is the one we should use for some nonlegal, perhaps political, reasons. This is an unsatisfying solution. It does not rebut Adler’s challenge, for it does not seem to be an accurate description of what the participants are actually saying. In order to recognize this, we need not try and reach into the heads of Ackerman, Sunstein, or Ely. We ourselves can recognize that when we assert that such-and-such interpretive method is legally favored, we may not be lying—we may mean that we actually think the law leads us to a method of interpretation.

Hence, we should try to describe such statements preserving their legal nature. In so doing, it will help to consider the reasoning behind the participant’s statement. As Adler notes, a participant, when making the claim that such-and-such interpretive method is legally favored, may appeal to the social facts of precedent, framers’ intent, and culture/tradition.¹⁰⁷ And such arguments from precedent, framers’ intent, and culture/tradition may be winners. But why? If our society (and, more importantly, its officials) gave not a care for precedent, framers’ intent, and culture/tradition, the arguments would not be winners. If many of our officials took the attitude that precedent had very little weight, then arguments from precedential value

106. See Adler, *supra* note 15, at 229 (“The fact that [rule of recognition] semantics fails to vindicate [constitutional-interpretation discourse] *may* just be one upshot of the fact that [constitutional-interpretation discourse] is relatively intractable to vindication. I emphasize ‘may’ . . .”).

107. *Id.* at 194.

would be bad legal arguments. So appeals to these considerations can only hope to win the day in light of certain social practices of officials, namely their considering and respecting precedent, framers' intent, and culture/tradition.¹⁰⁸ With that in mind, consider the following candidate of the participant's statement: "In light of the fact that officials in our society have certain commitments, like following precedent, framers' intent, and culture/tradition, this interpretive method is legally favored because it is consonant with these commitments."

This seems like a plausible construction of what the participant is saying, but is it in accord with the Hartian positivist picture? I think yes. The participant is saying that, in light of some convergent practices of officials, we can infer that this interpretive method would be validated by the ultimate rule of recognition inferred from those practices.¹⁰⁹ It may be true that the officials do not converge on the practice of employing the interpretive method, but that is not a problem because the officials converge on some practice that grounds the participant's argument. This is similar to what Adler recognizes as a derivative legal proposition.¹¹⁰

The proffered example of a derivative legal proposition is the "city-boundary" question.¹¹¹ Suppose some officials disagree about where the boundary line is between two cities.¹¹² But suppose also that there is a statute on the books that defines where the boundary is by a particular line.¹¹³ And suppose the statute was passed such that it is made valid by the rule of recognition, and the officials accept the rule of recognition.¹¹⁴ Then, even though there are officials that deny that the particular line given by the statute is the city boundary, the legal boundary will be the line as defined by the statute.¹¹⁵

Now consider the analogy with a participant's statement about a method of interpretation. Suppose the officials disagree about what interpretive method is the correct one. But suppose the officials, by and large, agree about some things; they agree that precedent, framers' intent, and culture/tradition matter in adjudication. These points of agreement generate the ultimate rule of recognition. Suppose then that a particular interpretive

108. This is just the Conventionality Thesis of Hartian positivism. See *supra* note 40 and accompanying text.

109. One may object that I am hedging between commitments and practices and that Hartian positivism only allows the rule of recognition to be inferred from officials' practices, not commitments. To respond, I would simply say that the commitments that fuel the inferences will be those expressed through officials' practices.

110. Adler, *supra* note 15, at 219–20.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* There is a caveat: if an official takes his view of the boundary of the city to be part of what he takes to be the rule of recognition, then it will not necessarily be validated by the statute. *Id.*

method best fits the officials' commitments to precedent, framers' intent, and culture/tradition. This would mean that the particular interpretive method is validated by the ultimate rule of recognition. This would lead to the conclusion that this particular interpretive method is legally preferred.¹¹⁶

One may object that there is a disconnect in the analogy: the first situation is at the level of deciding particular cases, whereas the second is at the level of a method of deciding cases.¹¹⁷ It is correct that in the second case we have shifted one level up. But this difference does not seem all that important because we have an equivalent shift in the rule of recognition; the rule of recognition that identified the statute is related by analogy to the ultimate rule of recognition that validates an interpretive method.

Taking stock of where we are, recall that the problem facing the Hartian positivist is to account for how, through a Hartian positivist picture, a participant can both recognize the contentiousness of his statement and yet also think it is determinately true. In response, we notice that the participant can recognize that there is no official consensus on a question, and yet the participant can also think that the commitments of the officials derivatively, but determinately, give us a legally favored answer. To be clear, the participant could be saying something like the following:

Listen, I know you guys can't come to a consensus about what interpretive method to use. But if you opened your eyes, you'd see that we should be using such-and-such interpretive method. See, you guys are committed to X, Y, and Z, and X, Y, and Z lead us to such-and-such interpretive method because of <insert argument here>.

And this statement is completely in accord with the Hartian framework.¹¹⁸ It takes certain social facts about present official practices, namely the officials' commitments to X, Y, and Z, and infers from this a criterion of the ultimate rule of recognition. From this criterion of the ultimate rule of recognition, it makes a derivative claim (which requires an argument) about an interpretive method being legally validated (or legally preferred).

2. *Vindication*.—Now we consider how Hartian positivism can vindicate statements of constitutional-interpretation discourse. Note that we need not vindicate all of the statements of constitutional discourse.¹¹⁹ Indeed, there will be contradictory claims, and so this will be impossible to do. Furthermore, there will be statements made under nonpositivist theories of law, and these may be impossible to vindicate according to rule of

116. There is, again, another caveat: the interpretive method would be legally preferred unless a contrary interpretive method is part of what some officials take to be the rule of recognition.

117. See Adler, *supra* note 15, at 223 (discussing how the rule of recognition model becomes more complicated when it deals with the level of choosing an interpretive method, instead of the level of particular cases).

118. Fallon uses a similar strategy in showing that non-originalist decisions are in conformity with the law. Fallon, *supra* note 76, at 50–55.

119. Adler, *supra* note 15, at 225–26.

recognition semantics. In order to satisfy Adler's challenge, we need to show that our descriptions of statements of constitutional interpretation could plausibly be true. This can be contrasted with an error-theoretic description that says, "This is what people mean, and they are always wrong."¹²⁰ This kind of explanation, though meaningful in some contexts, does leave us in the want. After all, it is odd to say that constitutional theorists are always wrong about whatever they are talking about. Recall that the description of the participant's generic statement is the following:

In light of the fact that officials in our society have certain commitments, like their commitments to precedent, framers' intent, and culture/tradition, this interpretive method is legally favored because it is consonant with these commitments.

But it seems clear that some of these statements can be made true. The officials' commitments might actually inferentially lead to criteria that validate a certain interpretive method. Now, it is rare that they will deductively do so, and so the reasoning will rest on inductive inferences and analogical inferences. As seen, the participant's statement claims that an interpretive method is legally favored because it is validated by a putative criterion of validity that is inferred from some social facts. For the participant's statement to be determinately true, the putative criterion of validity must truly be a criterion of validity, and whether a putative criterion is truly a criterion of validity will depend on the strength of the inference that supports it. Some of these inferences and associated arguments will be strong, and some of them will be not so strong. The strong inferences will give rise to criteria of validity that we can utilize in the ultimate rule of recognition. Participants' statements using such strong inferences in support of the claim that their method of interpretation is legally favored will be made true—they will be vindicated.¹²¹

Sometimes there will be competing inferences that have commensurate strength. In these situations, the ultimate rule of recognition cannot provide the certainty we might crave. And because of that, some of the statements made by the constitutional-interpretation participants will not be determinately true—they will not be vindicated. But this is not a reason for the Hartian to be ashamed, for this seems to fit what we see in the

120. For more on error theories and error-theoretic claims, see *supra* note 94.

121. For an oversimplified example, consider that we have embedded in our culture, and in the culture of our officials, a commitment to economic progress, a commitment to framers' intent, and a commitment to precedent. See, e.g., Kenneth W. Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367, 389 ("[I]t is difficult to escape the conclusion that the Framers intended to prohibit [the] use [of paper money]."). Now, in light of the *Legal Tender Cases*, we may infer from the officials' commitments that when it comes to economic issues, framers' intent gives some way—it is not a strict limitation to governmental action. This allows us to conclude that non-originalism is legally preferred when considering economic issues. And this statement is both described and vindicated by that Hartian semantics. See *infra* note 127 (recognizing that the use of "originalism" here is perhaps too simplistic in assuming that originalism is concerned with framers' intent).

interpretive discourse quite well. There are debates that have been going on for decades, and they have not been settled because there are competing inferential arguments. Each of the participants is convinced that his argument is better—but, as is the case when inductive inferences are at play, it is hard to say for sure which one wins.

Adler may claim that, under this model, the indeterminate cases dominate the discourse of constitutional interpretation, and because participants are usually making claims that an interpretive method is determinately legally favored, this fails to vindicate their statements. In response, such statements by the participants will be contra the Conventionality Thesis, and so here we approach the initial problem recognized.¹²² Rule of recognition semantics will be unable to vindicate statements that are not made in accordance with the Hartian positivist framework. But is this a devastating problem for the Hartian model? I do not think so. Ultimately, the question is how crucial it is to preserve the intuition that these statements determinately identify legally preferred interpretive methods. I am not persuaded that the intuition is important enough to truly blemish Hartian positivism because it seems rather controversial whether we want to identify such statements as determinately identifying a legally preferred interpretive method.

Now, Adler briefly recognizes the possibility of my proffered solution, but he quickly dismisses it:

The RoR framework does allow that an interpretive method, albeit controversial, might be determinately legally favored if the method is derivable by application of the ultimate criterion of legal validity, rather than being part of that criterion. But, as a matter of the actual facts of social practice in the United States, it is very hard to believe that there is a “deep” rule of recognition that is universally agreed upon by present officials, the application of which will yield any of the controversial interpretive methods defended by [participants]. Try to formulate that rule!¹²³

In response, Adler seems to require too much in his demand that the rule of recognition be explicitly described. As Richard Fallon Jr. wisely notes, the rule of recognition need not be relatable in propositional form to be of use; the rule of recognition can show its form through tacit understanding and convergent practice.¹²⁴ The rule of recognition may be incredibly

122. *See supra* notes 105–06 and accompanying text. These statements by participants will contravene the Conventionality Thesis because they assert that some interpretive method is determinately legally preferred even though there is no determinate support, direct or derivative, from the current practices of officials.

123. Adler, *supra* note 15, at 227.

124. Fallon, *supra* note 76, at 56–58.

complex—and in the United States it certainly is.¹²⁵ The rule of recognition is inferred from the practices and commitments of officials, and because there may be lots of such practices and commitments, it may be exceedingly difficult to compile them all and detail their interrelations.¹²⁶ Yet even if the rule of recognition is too complex to detail completely, we can explicitly state parts of it. For example, we can say that in a society where the officials regard the framers as almost divine prophets, the interpretive method of originalism¹²⁷ will be legally favored—and so forth. Where we have strong inferences that lead from the practices and commitments of officials to a particular interpretive method, we can say that the particular interpretive method is legally favored. It is true that such strong inferences may be infrequent in constitutional-interpretation discourse. Where strong inferences are lacking, we have indeterminacy. That being said, the fact that there might be uncertainty that comes out of such a complex rule of recognition is unproblematic for the Hartian framework. Indeed, Hart recognizes that this is a reality in most legal systems.¹²⁸

In light of all this, I claim that Adler's objection to the Hartian framework falls flat. Wise spectators will mutter that my defense of the Hartian framework against Adler is peppered with caveats. Indeed, I have admitted that the Hartian framework cannot describe or vindicate statements that flatly reject Hartian positivism. But the true strength of Hartian positivism can be recognized in examining Adler's assessment of Dworkin's theory of law, law as integrity. Adler writes, "Legal propositions can be both controversial and true, Dworkin emphasizes—and 'law as integrity' explains how. . . . In [this] sense[], law-as-integrity seems to be a promising framework to describe [constitutional-interpretation] discourse."¹²⁹ But as I have shown, rule of recognition semantics can do the same—through the idea of derivative legal propositions. Furthermore, Hartian positivism does not suffer what Adler thinks to be a flaw of Dworkin's theory, namely a reliance on the dubious "moral" principle of integrity.¹³⁰

Finally, I want to take issue with Adler's overall project of constructing a semantics for constitutional-interpretation discourse. I do not think that the question is open; rather I think it has no answer. Given Adler's methodology—taking a bunch of works by venerable scholars on both sides

125. See HART, *supra* note 2, at 94–95 (explaining that the rule of recognition increases in complexity as a society's legal system becomes more developed).

126. See *id.* at 101 ("In a modern legal system where there are a variety of 'sources' of law, the rule of recognition is correspondingly more complex: the criteria for identifying the law are multiple and commonly include a written constitution, enactment by a legislature, and judicial precedents.").

127. For simplicity and convenience, I have taken originalism to be the view that framers' intent fixes law. For a more thorough examination of originalism, see Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009).

128. HART, *supra* note 2, at 251–52.

129. Adler, *supra* note 15, at 231.

130. *Id.*

of every possible aisle¹³¹—I do not see how a theory of law can do this. The main problem is that the participants in constitutional discourse are not isolated from theories of analytical jurisprudence. These venerable scholars have likely thought long and hard about the concept of law. It may be that their theories of law have not been formally integrated into their work in American constitutional law, but their thoughts on theories of law likely color their scholarship in constitutional interpretation. Furthermore, it is very likely that they disagree on substantial jurisprudential issues. Thus, picking any one theory of law for the tasks of description and vindication of the discourse of constitutional interpretation just seems unlikely to work. All we can expect from a theory of law is that it gives us plausible descriptions of statements of the discourse and that these descriptions be possible to vindicate. The Hartian model, perhaps along with other theories, satisfies this challenge, and so to adjudicate among the theories of law, I think we must look beyond modeling the discourse to other considerations.

V. Conclusion

We have seen that the Hartian positivist can respond to both Berman's and Adler's challenges. Berman claims that, because the rule of recognition appeals to current conventions of officials, it cannot validate (or invalidate) novel legal arguments. This is because those novel legal arguments are not embedded in current practices, and so the rule of recognition cannot say anything about these new arguments. The Hartian response is that, even though the novel legal arguments are not embedded in practices, the rule of recognition can do its work. The rule of recognition is inferred from current practices of officials. Even though the official practices cannot address directly the novel legal argument, there may be some practices of officials by which we can infer the validity (or invalidity) of a novel legal argument.

Adler claims that rule of recognition semantics cannot account for the discourse of constitutional interpretation. This is because statements of constitutional-interpretation discourse are often contentious, but rule of recognition semantics, to make those statements true, would require consensus. The Hartian response here is that even though there might not be consensus on the particular method of constitutional interpretation, there might be consensus on something through which we can infer that a method of constitutional interpretation would be legally preferred.

Taking a step back, there seems to be a common thread in these Hartian responses to Berman and Adler. It seems that both Berman and Adler base their challenges on a restrictive view of what can be inferred from the current practices of officials. On behalf of the Hartian positivist, I have proffered a view to the contrary. With the full width and breadth of analogical reasoning and inductive inference, we can put together a plethora of candidate,

131. *See supra* note 82 and accompanying text.

derivative conclusions to be inferred from current practices of officials. Some inferences will be bad, and some of them will be good; the good inferences give rise to criteria of validity that comprise the rule of recognition. Equipped with these good inferences, the rule of recognition model can rebut the challenges of Berman and Adler, and, understood this way, Hartian positivism is better able to model legal argument as American constitutional theorists know it.

—*Guha Krishnamurthi*