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Colloquium in Legal, Political, and Social Philosophy

**Conducted by
Liam Murphy and Samuel Scheffler**

Speaker: **Jeremy Waldron, NYU**

Paper: **Quain Lectures 2025**

BACK TO PRINCIPLES



Colloquium Website: <http://www.law.nyu.edu/node/22315>

Lecture One: Taking *Riggs* Seriously

Apologies: This is the draft of a lecture; footnotes are incomplete and ragged.

I have cut out a considerable amount of material for the purposes of the NYU Colloquium.

1.1: Introduction

Nothing makes a legal argument look as good as the citation of what we might call a *principle* to bolster its reasoning. Principles sparkle like jewels in the midst of a tedious array of texts, precedents, rules and standards. The phraseology of principles adorns our jurisprudence. We talk about our cherished principles, our fundamental principles, our sacred principles; we admire someone who acts on principle, who adopts a principled position, who behaves as a man of principle; we say that some issue is a matter of principle, and we hope it will be assigned for decision to what Ronald Dworkin called a forum of principle.

In the jurisprudence of the mid-20th century, when American legal theorists began to emphasize the role of principles in their arguments, that emphasis was thought to restore to legal reasoning a dose of rationality, a modicum of respect for reason, after the excessive iconoclasm of the Legal Realist movement. To the Realists, everything seemed like an exercise of discretion and the indulgence of preference. But having judges' discretion guided or even superseded by the "consecrated principles" of the *corpus juris* would give legitimacy to decisions that were not fully governed by texts and rules and that otherwise seemed to depend on the personal preferences of judges.

But: how do we know we are dealing with a *genuine* legal principle? I'm not sure. There is not much on this in the literature. One commentator, who has lamented the lack of work on principles, says: "Our understanding of what a principle is has a persistent scent of 'I know it when I see it.'"¹ When we identify

some directive proposition as a principle, we do so in virtue of the impression it leaves us with and the quality of justice that it puts on display. It says something like “*Pacta sunt servanda*,” or “Intentional wrongdoing is worse than reckless wrongdoing,” or “A person in a powerful position must not take unfair advantage of another person’s economic necessity,” or “The demands of corrective justice are not to be offset by requirements of distributive justice.” Legal principles have the solemnity of moral admonition; but as these examples show, they also embody concerns that are distinctly legal in character. Unlike a moral principle, a *legal* principle is tailored to work in the habitat of law. But unlike a legal rule, whose formulation tells us what what’s to be done under specified conditions, a legal *principle* identifies a kind of outcome as just or unjust, rightful or wrongful, in given circumstances. It does this in a non-conclusory way. And not with the settled text of a formulated provision, but in a way that shimmers with alternative formulations, different ways of awakening the concerns that it puts in play.

With all their informality, principles crop up in cases large and small. They crop up in relatively small-scale disputes, like one that I shall spend a lot of time with this evening: the famous dispute in *Riggs v. Palmer* 115 N.Y. 506 (1889), the case of a legacy fought out in upstate New York in the 1880s. But they figure also in large constitutional issues, like the question of presidential immunity that the US Supreme Court decided last year in *Trump v. United States*.² In Lecture Three, I will focus on that decision, ending up with a rather disconcerting account of how grand principles like these are constructed almost to order, purpose-built, to fill out legal arguments.

1.2: What are legal principles?

What is a legal principle? Here’s an unkind answer: a legal principle is a solemn-sounding proposition that a jurist makes up, invoking it in legal argument to justify a desired outcome that might be inaccessible on the basis of accredited sources of law. This initial skepticism needs to be taken seriously, if only in a Cartesian spirit, to see if it is possible in the midst of adversarial argument to secure any honest reckoning of what principles are, where they come from, how quarrels over them

¹ Han-Ru Zhou, *Legal Principles, Constitutional Principles, and Judicial Review* 67 AM. J. COMP. L. 889 (2019).

² *Trump v. United States*, 603 U.S. 593 (2024).

arise, and how those quarrels are settled. We can't really account for the work that principles do unless we confront the many sources of skeptical concern about the role they play in legal argument.

1.3: Look back at Dworkin

It is appropriate in these lectures that I should draw on the seminal work that Ronald Dworkin did on principles early in his career. The jurisprudence set out here is going to follow up some lines of thought that he pioneered in his essay "The Model of Rules," Chapter Two of *Taking Rights Seriously*. They will also highlight some difficulties with the idea of principles—difficulties I know that Dworkin noticed, but never fully came to terms with.

So—again!—what are legal principles? What does Dworkin say about them? Dworkin contrasts them with rules, like those defining a speed limit, in four ways. *First*, in a rule, we find a descriptive or a numerical or certainly a determinate predicate in the norm condition (like "travelling in excess of 55 mph") and again in the norm consequence ("to be fined \$200"), so that it is crystal clear what is to happen in the exactly specified conditions. Principles present themselves in a way that is looser than that, engaging a judgment of reasonableness or fairness, to determine what is to be done. In this respect a principle is like a standard. Except it's not always easy to tell, because—and this is the *second difference* between rules and principles—principles have no canonical formulation. Standards do: think of the Eighth Amendment to the US Constitution with its formulated ban on cruel punishment. The text is clear even if its application is disputed. With principles we don't have that textual clarity. This is partly the result of (*third difference*) the way principles make their appearance in the law. They are not enacted; they are not posited as legal norms by an authoritative lawmaker. They emerge. And when they do, *fourthly*, it seems that principles operate normatively in a way that rules do not. Rules have, so it is said, an all-or-nothing application and standards do too even when their application remains contested. Whereas principles have weight, and, like reasons for action, they compete in a non-conclusory way with other weighty considerations and they bear with greater or lesser practical force in the matter under dispute. I hope all this is familiar, if not from Dworkin's jurisprudence, then from the Hart and Sacks *Legal Process*

materials taught at Harvard Law School in the late 1950s³—a badly neglected volume of legal theory, in my opinion.

1.4: Riggs v. Palmer

The title of this evening’s lecture alludes to a case brought by a Mrs. Lorette Riggs. Actually Mrs. Riggs was one of two plaintiffs—sisters—in what has become a very famous case:⁴ *Riggs v Palmer*, decided in New York in 1889 by that state’s highest court. The sisters’ lawsuit involved a challenge to an apparently valid will made by their father purporting to confer property on their nephew, a young man who had been held criminally responsible for the death of the testator, his grandfather. That a killer should inherit from his victim seemed to shock the conscience; it certainly shocked the conscience of Lorette and her sister, both of whom stood to benefit if the young man could be excluded. But inheritance by the testator’s killer—that was what the will provided.⁵

Palmer was Elmer Palmer, the nephew of Lorette Riggs and grandson of Lorette’s father, Francis. The grandfather owned a farm in the far north of upstate New York. Elmer lived there with his mother (a third sister). It was well known that Francis Palmer had made a will that left the farm to Elmer, though the two did not always get along and Francis would occasionally talk about revoking his grandson’s inheritance if he didn’t mend his ways.⁶ One day in April 1882, the old man, aged 66, died suddenly after drinking rum that had been spiked with strychnine. The poisoning was investigated and a grand jury indicted Elmer for first-degree murder. He pleaded not guilty and in October he went on trial.

He claimed the poisoning was accidental; and witnesses were brought in to testify to his good character. But after twelve hours of deliberation, the jury convicted Elmer of second-degree murder. With that verdict, he was not eligible

³ HENRY HART AND ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 141-3 (Eskridge and Frickey eds., 1994).

⁴ Ronald Dworkin, *The Model of Rules*, 35 *UNIVERSITY OF CHICAGO LAW REVIEW* 1 (1967), reprinted as Chapter Two of RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (Harvard University Press, 1977), discussing *Riggs v. Palmer*, 115 N.Y. 506 (1889).

⁵ Many of these details are taken from William Meyer, “The Background to *Riggs v Palmer*,” *American Journal of Legal History*, 60 (2020), 48.

⁶ Quoted from Meyer, p. 54.

for the death penalty, but he could have been sentenced to life without parole. However, he was lucky in his judge. The young Mr. Palmer was sentenced to indefinite detention at a new penal facility in Elmira, New York, which had been established as a reformatory for adults, with—it has to be said—a very flexible philosophy of penitential servitude. Elmer fell in so well with the reformatory’s program of work and education, that he found himself released on parole in 1886, a discharge that was made absolute a few months after that.

Outraged by the young man’s early release and by his insouciant claiming of his inheritance, Palmer’s aunt, Lorette Riggs, sued to deny that to him. At first and second instance, the New York courts ruled that the clear terms of the grandfather’s will had to be honored. The lower courts said the law relating to wills was perfectly clear and disclosed “no exception that could justify depriving him of his legacy.” But the highest court in the state, ruled differently. By 3 votes to 2, the New York Court of Appeals ruled against Palmer, with Judge Robert Earl and two others holding that a case like this was controlled by “general, fundamental maxims of the common law.” Earl J. didn’t use the word “principles,” but here is what he said:

No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes. These maxims without any statute giving them force or operation, frequently control the effect and nullify the language of wills.⁷

We’ll call what Judge Earl cited a principle. And though it was an unenacted legal proposition, the court said that this principle expressed the spirit of the law. As such it was binding on the judges of any court. They were not to permit any person to profit from his own wrongdoing or acquire property by his own crime in a case like this. ...

I said Judge Earl didn’t describe the proposition in question as a principle. Some of his fellow judges did in the first page or two of their dissent.⁸ Earl J.

⁷ *Riggs*, at 511

talked of “general fundamental maxims of the common law.” But a principle seemed to be what was being invoked here, with the moralistic overtones of the predicates it used, with emphasis placed on the pervasive character of its invocation, on its evidently unenacted character, and with a characteristic looseness of formulation from context to context.

So Francis Palmer’s poisoner was excluded. The Court of Appeals nullified the application of an otherwise valid will, finding in favor of the deceased man’s daughters. Elmer surrendered the farm to Lorette. He then moved to Canada, actually just a few miles away from where he had been living in upstate New York. He raised a family and subsequently seems to have led an exemplary life in London, Ontario until he died at the age of 69. ...

1.5: The work that a principle does

It is important to understand what exactly the wrongdoing principle did in *Riggs v. Palmer*. It wasn’t really a way of resolving what Dworkin might call a “hard case”—a case in which the application of existing law was unclear or indeterminate. Apart from the operation of the principle cited by the majority, *Riggs v. Palmer* was an *easy* case, at least so far as the law was concerned. It posed an issue of conscience, not of law. The grandfather’s will was properly executed by a competent testator. And nothing about the existing criminal law made the grandson’s inheritance problematic: the grandson was serving his sentence for homicide—paying his debt to society, as we say. There was no provision for an additional penalty such as expropriation, attainder, or civil death.⁹ The case became hard only because the wrongdoing principle seemed to have a bearing on it. It was the principle that made the case hard, or perhaps the discomfiture that surfaced in the form of the principle.¹⁰

And then once the case became hard, the hardness was resolved, not just by the recognition and application of the wrongdoing principle but by the majority’s discernment of the comparative weight of *all* the principles involved—in this case

⁸ 517/192

⁹ For the bearing of the civil death concept in a case like *Riggs v. Palmer*, see Kim Scheppelle (get cite from Leiter).

¹⁰ I owe this argument to Michael Moore, [redacted], IOWA LR 872

by a judgment that the wrongdoing principle had greater weight in the circumstances than another principle we might summon up, which demanded that proper effect be given to legislation like the statute of wills, proper effect according to its terms for the sake of predictability, and security. (We might include too the principle that insists punishments must be specified explicitly.) The dissenting judges in *Riggs v. Palmer* thought that even if there were something like the wrongdoing principle in play, it would carry much less weight than a principle asserting the authority of statute law—in general, or certainly on a matter such as testamentary law. Said Judge John Gray:

We are bound by the rigid rules of law, which have been established by the legislature.... The question we are dealing with is, whether a testamentary disposition can be altered after the testator's death, through an appeal to the courts, when the legislature has, by its enactments, prescribed exactly when and how wills may be made, altered and revoked.... The whole of this subject is now regulated by statute.

That Judge Gray's was a dissenter reminds us of the *adversarial* dimension of the invocation of principles. One seldom has principles invoked on only one side to clinch a case. Even when a statute is cited to rebut a principled decision, its rebuttal involves principles of its own supporting the application of positive law.

The invocation of the wrongdoing principle sounds all very high-minded compared to the grubby positivity of statute law. The principle of wrongdoing glows with moral rectitude and claims a "foundation in universal law administered in all civilized countries."¹¹ But the competing principle about the authority of statute law can be made to seem equally aglow and equally fundamental. The position of the dissenting judgment is not just a pedantic, blinkered or arbitrary refusal to concede the normative bearing of the *Riggs* principle. Or, if we're going to talk about arbitrariness, *either* the majority *or* the dissent might be seen as making an arbitrary choice among several principles, equally fundamental, equally important, and all purpose-built to support their respective conclusions.

1.6: The weight of a principle

¹¹ *Riggs*, 511-13. See also JEREMY WALDRON, PARTLY LAWS COMMON TO ALL MANKIND: FOREIGN LAW IN AMERICAN COURTS 62-7 and 72-3 (Yale University Press, 2012).

In a symposium in the *Iowa Law Review* many years ago, Ken Kress and Larry Alexander raised the question of how such weight could be assessed and attributed to a principle, understood as a legal not a moral entity. ...

I was never convinced of the difference—crucial to Kress and Alexander’s concern—between discerning the weight of a *moral* principle and discerning the weight of a *legal* principle, in which endeavor moral intuition could play only a partial and equivocal role. Kress and Alexander thought the former was straightforwardly intuitible. Anyone who understood an objective moral principle, necessarily understood what weight it would have in moral argument. That was part of what intuition was supposed to make available to us. Or at least someone could pretend that this was the case: they could wave the flag of imputed moral objectivity over their own cocksure opinion on the topic and accuse anyone who disagreed with them of being a moral relativist. Kress and Alexander worried that nothing like that was available in the case of *legal* principles, whose operation was not determined morally. Now I have never been much of a believer in intuition. “Intuition” just gives us whatever answer we want or need, on either side of the controversy.

1.7: No canonical formulation

It is commonly said that principles have no canonical formulation—and this is going to be crucial to what I want to argue in these lectures. No canonical formulation: so they are not to be parsed textually as a statutory rule might be.

This means that in a matter of any complexity, different and rival formulations will inevitably be in play, and, to the extent that the formulations point in subtly or grossly different directions, there will be no clear sense of priority or authoritative ordering among them.

We can see this in our example from the language used in *Riggs v. Palmer*. What’s the crux of the wrongdoing principle supposed to be? Is it about crime, iniquity, fraud, moral turpitude, or what? How far does it extend? You may say, “Well, murder at any rate is pretty bad; if the principle doesn’t apply to murder, what sort of wrongdoing *would* it apply to?” But even there, difficulties come to light from the subsequent history of the wrongdoing principle. Where legal systems have found it wise or necessary to pass a statutory enactment to express

the force of the principle in *Riggs v. Palmer*, there has been uncertainty and controversy about how to do it. Should the relevant legal proposition refer to all forms and degrees of homicide? How should it affect the rights, say, of a woman convicted of a lower-degree of homicide in a response to domestic violence (battered woman syndrome)? How indeed should it affect that woman's inheritance of her share of matrimonial property according to law, as opposed to the gratuitous benefit taken under a decedent's will in *Riggs v. Palmer*? And so on.¹² Had the jurisprudence of principles taken its rise from a case like that, rather than from the more straightforward case of wrongdoing in *Riggs v. Palmer*, its bearing would be less clear and the significance of controversy among candidate formulations and their assigned weight would have been more apparent.

1.8: Emergent, not enacted

The idea of non-enacted law, law emerging from practice or from thousands of micro-decisions in (say) a Common Law environment is an intriguing and attractive one. ... [omitted]

1.9: Can *anything* be a legal principle?

Any kind of content might be law, said Hans Kelsen.¹³ If we are lawmakers in a parliament, we can just make something up and use the processes of legislation to give it authority—whatever it is. Can we do the same with principles? *We*, now being litigants, not legislators—litigants, fleshing out an argument we want to offer in court? In terms of the provocation I offered earlier, is a legal principle just an impressive-sounding proposition that a judge or an attorney makes up and invokes in legal argument, like Judge Earl's argument in *Riggs v. Palmer*, to justify a desired outcome that is inaccessible on the basis of other accredited legal sources.

Sometimes the invocation of a principle might be justified by citing an earlier decision in which the principle in question has been invoked. But that just pushes the problem back a bit. For still we ask: where do principles come from originally? The life of a legal principle has to start somewhere. Sometimes a

¹² See the helpful discussion in Nicola Peart, *Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia*, 31 *COMMON LAW WORLD REVIEW* 1 (2002). See also the brief reference to dower in *Riggs*, at 514.

¹³ Hans Kelsen, *Pure Theory of Law*, 198.

principle needs to be formulated that, in its terms, has never been heard of, because it was never needed, before. When this is so, all one can do is point to the intuitive appeal of the proposition in question. “Don’t you see that our jurisprudence can’t really get by in this area, can’t be made to look plausible, unless it is supplemented by a principle like this?” And of course, if that is how things stand, one must acknowledge that opinions among jurists are bound to differ.

What justifies a legal principle when there are competing proposals for “principle” status or when there is concern about their formulation or about their weight, or the way they are drawn from existing materials? Don’t talk to me about a solitary jurist making an argument that seems satisfactory to him. Think about the adversarial invocation of disputed principles, not just a Hercules wrestling with a problem of his own. This in the end is key to my argument this evening. Principles seem to be just made up, and nowhere is the importance of this clearer than in the adversarial context. Listen to Dworkin’s acknowledgement of the problem in his second book, *A Matter of Principle*:

In such a case the plaintiff’s lawyers will present an argument as to why, all things considered, his case is stronger than the defendant’s, and the defendant’s counsel will present a different argument to the opposite effect. At the end of the day the judge ... will decide by preferring one of these two arguments, or perhaps by providing a different one of their own. I believe that even in hard cases like these the arguments that lawyers put forward and that judges accept are arguments of principle.¹⁴

For too long we have been satisfied in jurisprudence with understanding how a particular attorney or a particular judge (say, Hercules) constructs an argument. But there are always two attorneys, each constructing an argument to his own satisfaction. That an individual judge can construct a principled argument—an argument that reeks of principle in the most impressive way imaginable—was never in doubt. And considered on its own, such an argument might look decorous, and cogent (at least to its Herculean author). But how does the objective jurist choose between the respective selection of principles, their formulations, and their weight when one is confronted with adversaries arguing in this way?

¹⁴ RONALD DWORKIN, *A MATTER OF PRINCIPLE*, 74-75.

1.10: Source-based credentials

Henry Hart and Albert Sacks don't help in my estimation when they associate principles with "reasons of *established credit* in jurisprudence."¹⁵ Principles, it seems, convey the force of reasons already recognized by the law. ... Ronald Dworkin relied on something similar in various places as well.

If we were challenged to back up our claim that some principle is a principle of our law, we would mention any prior case in which the principle was cited, or figured in the argument. ... Unless we could find some such institutional support, we would probably fail to make out our case....¹⁶

He said this though he was anxious to avoid giving the impression that a principle was recognized as such just by passing a certain threshold of practice and evidence in its favor. He didn't want to concede too much to the positivists. He resisted—rightly—conceptions that tied principles to recognizable facts about judicial custom.¹⁷ Not only was the room for controversy too wide (controversy about content, detail, nuance, and normative weight); not only would the practice of recognition defy easy organization into a secondary rule;¹⁸ but also the provenance of a particular alleged principle might be too recent to be captured by any customary version of recognition. "[A] great many appeals to principle," said Dworkin, "are appeals to principles that have not been the subject of any established judicial practice at all." In many cases, he said, they comprise principles "that [have] not in fact been formulated before, in anything like the same fashion...."¹⁹ I think we have to take this very seriously when we contemplate the role that principles play in legal argument.

1.11: Intuitive appeal?

¹⁵ HART AND SACKS, *THE LEGAL PROCESS*, 141-3 (my emphasis). I think the phrase originates from *D'Oench, Dume & Co. v. FDIC*, 315 US 447 (1942)

¹⁶ Dworkin, *The Model of Rules*, 40.

¹⁷ Cf. Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, at 852 (1972)

¹⁸ Dworkin, *The Model of Rules*, 40-41.

¹⁹ *Ibid.*, 65.

A further basis for assessing a putative principle may have to do with its moral quality. Dworkin maintains that the power of a principle depends on the sense of moral appropriateness associated with its application. For example, he said of the principle in *Riggs v. Palmer* that “[i]f it no longer seemed unfair to allow people to profit from their own wrongs, th[at] principle[] would no longer play much of a role in new cases....”

He implied too that we would have to recognize outer substantive limits on the principles that we draw out of the law that we share with our ideological opponents. In his discussion in *Law's Empire* about whether we should regard the Nazis as having law, he says that certain principles could have no justifying power “in any acceptable political morality.”²⁰ But of course the Nazi example is too easy: the morality is atrocious and in any case it is not “ours.”

What happens, however, when we try to extrapolate principles from a body of law that is acknowledged as ours but is riven nevertheless with bitter partisan divides. Maybe not a legacy shared with the Nazis but certainly a legacy shared with racists. Think of the principles that in 1856 Chief Justice Taney in the *Dred Scott* case extrapolated from antebellum American law concerning the possible citizenship rights of African-Americans.²¹ The examples Taney cited are to our ears egregious and appalling,²² but it is hard to ignore the fact that there was enough in our law then to license such extrapolations, which might pass any test of intuitive plausibility administered at that time. Is this a fair instance of how principles are produced?

²⁰ LE 102.

²¹ *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

²² Taney on negroes in *Dred Scott*: “They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics which no one thought of disputing or supposed to be open to dispute, and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.” [Citation]

The most important reason why we cannot demand that the principles we recognize must be intuitively appealing is that principles are supposed to emerge from the law as a whole and the law as a whole has not been under the influence of just one person's intuitions or the intuitions solely of a class of persons with whom we identify. In these matters, the beginning of wisdom—I have made it the theme of almost all of my work²³—is that we share a legal world with those with whom we disagree morally, and we can't expect principles that are supposed to have emerged from law laid down first on this side, then on that side, to be morally congenial both to ourselves and our moral opponents. Joseph Raz once wrote that "law is the result of the rough-and-tumble of politics ... and [it] reflects the ... changing fortunes of political forces."²⁴ We share the legal system with people who disagree with us about political morality—about rights, justice, the public good, and so on. They have their principles; we have ours. In a legal system that lasts longer than a few weeks, victories for my side will be matched with victories for my opponents' side. When I win, I can recognize my principles or something like them in certain legal or judicial outcomes. Inasmuch as I endorse them, I will be comfortable calling them either moral principles or legal principles or both. When my opponents win, I won't be comfortable calling the resulting principles moral principles, except in a third-person sense: this is *their* morality. But I recognize them as legal principles on account of their position in the law. In this sense legal principles don't have to be moral principles, any more than legal rules have to be moral rules.

1.12: Midden

... If principles are supposed to emerge from existing law, then we must say they are oriented to the contents of a sort of *midden*—a compost of laws enacted by last year's liberals, last century's conservatives, feminist legislators in the 1970s, religious advocates in the 1870s. And it's not a tidy and well-sorted midden. Shards of law and legal initiatives, bad laws, rotting laws only half-repaired, laws hostage even now to disagreement about the extent of their badness. As we pick through that to find something to flesh out our arguments, the noise we will hear is

²³ JEREMY WALDRON, *LAW AND DISAGREEMENT* (OUP 1999).

²⁴ Joseph Raz, *The Relevance of Coherence*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 277, 298–300 (1994).

our opponent's attorney doing something exactly similar to match the requirements of the case he is trying to make on behalf of his client. Or if (like Hercules) a judge is trying to make a principled case out of this compost, he will be conscious of working alongside clerks trying to do something similar—though in the opposite direction—in behalf of his bitter opponents on the bench.

1.13: Four themes

We have seen four themes meet up in my argument – (1) a theme of moral disagreement, which undermines any easy intuition test for principles; (2) the character of our legal heritage as an untidy midden or compost of opposing legal ideas; (3) the looseness or, if you like, the indeterminacy of any particular principle, given that it is not presented to us canonically as an authoritative enacted text; and (4) the adversarial character of legal argument, which means that it is not enough to show that a given jurist (with whom we identify) can make a principled argument to his own satisfaction.

The life of the law is not just a set of theories concocted by solitary jurists. Dworkin's lawyer is supposed to be able to find sufficient coherence to assert credibly that the law is pervaded by principles which favor his client's case and to exclude any similar but opposing claim made in behalf of his opponent. But why should we assume that this is possible? As Dworkin acknowledges, nothing in the way the law was produced guarantees that the lawyer or the judge will succeed in finding a coherent interpretation of it.²⁵ Or if he can find a coherent interpretation of the patchwork, nothing in the way that the law was produced guarantees that his success precludes similar success for his opponent pointing towards a different conclusion: nothing guarantees that the law has a shape amenable to a *unique* coherent justification of principle.²⁶ Without that guarantee, or at any rate without a reasonable prospect of a unique coherence result, the Dworkinian approach to legal argument is just a recipe for the reproduction of indeterminacy.²⁷ The introduction

²⁵ RONALD DWORKIN, *LAW'S EMPIRE* (1986), 273.

²⁶ *Ibid.*, 272

²⁷ This passage is adapted from Jeremy Waldron, *Did Dworkin Ever Answer the Critics?* in *EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN*, Scott Hershovitz ed. (Oxford University Press, 2006), 155-181.

of principles does little to help us resolve the indeterminacy that we already face.

Lecture 2: NON-NORMATIVE PRINCIPLES

2.1: Schulz's "Principles of Roman Law"

Wasting time in Princeton one afternoon some time ago, I went into Labyrinth Books on Nassau Street. It's a lovely store with a fine selection of new and used volumes. You can browse there for hours and there are comfortable chairs where you can read a few pages of your potential purchases.

One book that caught my attention was a used copy of *Principles of Roman Law* by Fritz Schulz, a translation of the last set of lectures Professor Schulz gave at the University of Berlin before the authorities there put an end to his teaching in 1933 on account of his Jewish ancestry. The book cost me \$90. I don't know why I bought it. To my shame, I have no training or professional interest in Roman law. Mostly I was intrigued by what I read Schulz saying at the very beginning of his lectures in a brief chapter called "Explanatory Observations":

The title 'Principles of Roman Law' calls for explanation. We do not intend to deal with the main elementary rules of Roman law. These might be called "Principles of Roman Law," but are generally known today as "Elements of Roman Law." Rather do we desire to elucidate the basic views of law and justice animating the Romans responsible for the law; it is from them that the rules of the Roman law system were derived—these are the true *principia*, the true "beginnings" of Roman law....

Professor Schulz went on:

It is not possible to arrive at these principles by the simple process of extracting them from available texts. The Romans did not formulate them, self-analysis and research into underlying first principles being foreign to their nature: it may be assumed that in many cases they were not even aware of them. Nevertheless, it is not mere fantasy to presume their existence. The principles animating Roman jurists must necessarily be present in the results of their work and may be disclosed by means of research into individual facts of Roman history.²⁸

The principles Schulz discussed in subsequent chapters were given minimal labels: *statute law*; *simplicity*; *authority*; *security*; *nation*; *liberty*; *humanity*; and *fidelity*. They were cashed out in more extensive formulations, such as these:

[*Liberty*] They considered their strivings after liberty to be a national peculiarity; all other nations could in their opinion endure a state of servitude but not the Roman nation....

[*Tradition*] Seriously and cheerfully they abide by the customs of their fathers, refer to them often and feel themselves safe and sheltered when they adhere to them; to deviate from them is objectionable, and *novarum rerum cupidus* is to Roman ears almost synonymous with “revolutionary.”²⁹

Such observations were presented as the insights of an observer telling us about the character of Roman law, rather than as normative resources to be used by lawyers or magistrates in the workings of the legal system to address the problems that such a system had to deal with. We might say that they purported to capture the *spirit* of Roman law—though, if we said that, we might still be edging towards the view that a good Roman lawyer would need some awareness of them in order to do his job—they would need to animate him at least half-consciously—for sometimes the spirit of the law can be invoked as an element in legal argumentation.

Schulz’s principles tell us about the character of the legal system he is studying. I will label them *characterizing principles*, contrasting them with principles that are understood to serve a normative function in the law—*normative principles*. Now, that makes it sound as though some principles are straightforwardly normative. We shall see in a moment that few modern jurists think there are *any* legal principles that are *straightforwardly* normative. Most think that what I am calling normative principles are normative in a complicated and perhaps attenuated sense. And that is what I want to explore this afternoon.

I am assuming that the principle we discussed yesterday—the wrongdoing principle in *Riggs v. Palmer*—was a normative principle in some relatively straightforward sense. Said the New York Court of Appeals, Mr. Palmer is not to be permitted to gain property by his own wrong-doing; he is to be denied the

²⁸ FRITZ SCHULZ, *PRINCIPLES OF ROMAN LAW* (Marguerite Wolff trans., 1936), at pp. 1-2.

²⁹ *Ibid.*, 135, 7, and 142

inheritance he secured by murdering his grandfather. But I can imagine throwing this apparently straightforward distinction—between characterizing principles like Schulz’s and normative principles like the one I have just mentioned—into doubt by saying about the law of New York that its spirit is opposed to allowing anyone to secure property by their own wrongdoing, that descriptively this is one of its characteristics, leaving it as a further question what norms, processes, or presumptions it deploys to actually block that from happening. And that makes the citation of the principle sound a little bit more like one of Schulz’s characterizing principles.

2.2: Raz on the mnemonic function of principles [omitted]

2.3: Montesquieu [omitted] on the “principles” of various political systems.

2.4: Contradictions

We assume that, in an enterprise like Schulz’s, it is the theorist’s task to find a characterization that fits the legal system he is studying. Should we regard this as a straightforward enterprise? I wonder. It may make sense as such when we are considering relatively non-pluralistic societies like Schulz’s Rome or France and Persia in Montesquieu’s time (each organized in its own way around its own legal monoculture). But what about societies like 20th or 21st century America, which on any plausible account are riven by deep and conflicting partisan values?

In the 1970s and 80s, scholars in the Critical Legal Studies movement—Crits, I shall call them—became convinced that modern legal systems are characterized by warring principles of individualism, on the one hand, or some suitable invigorating version thereof, which seeks to leave each person’s fate in their own hands, and, on the other hand, a craving for the shelter of community and solidarity where we look out for each other and accept that our individual fates are importantly linked together. The Crits used to say that if you examine our doctrines of private law—torts, contracts, and so on—you will find these principles at war with one another—*caveat emptor*, on the one hand, versus doctrines of unconscionability, on the other hand—marshalling support for what seem to be inconsistent outcomes depending on which of these tendencies happens to be ascendant in the mind of any particular adjudicator on any particular day.³⁰ Here’s

what Duncan Kennedy inferred from these inconsistencies:

[T]he acknowledgement of contradiction makes it easier to understand judicial behavior that offends the ideal of the judge as a supremely rational being. The judge cannot, any more than the analyst, avoid the moment of truth in which one simply shifts modes. In place of the apparatus of rule making and rule application, with its attendant premises and attitudes, we come suddenly on a gap, a balancing test, a good faith standard, a fake or incoherent rule, or the enthusiastic adoption of a train of reasoning all know will be ignored in the next case.³¹

If these deep background principles were conceived as normative, then it would have to be said—on the CLS account, and many of the Critics said this—that the body of our law is so riven with contradiction as to be capable of offering spurious support for everything and decisive support for nothing in legal reasoning.

The argument can be generalized, for it is not just about normative contradictions in Duncan Kennedy's extreme sense. A similar conclusion follows even if we acknowledge a plurality of smaller-scale ideas—partly-conflicting, partly-complementary ideas jostling and competing in each system for the same principled space. There may be no difficulty in identifying a given principle embedded in the body of our law. But if we use just that principle in legal argument in favor of a decision for one side or the other, we are not actually being faithful to the reality of the so-called principled character of the law. For our law comprises not just this one principle, but a *mélange* of others jostling with it in ways that leave us quite unclear what the actual bearing of the two of them on future cases should be taken to be. Since—as Roberto Unger put it—law “is the product of real collective conflict, carried on over a long time, among many different wills and imaginations, interests and visions,” any given body of legal doctrine is bound to be messy—i.e., rich in compromises and contradictions:

Warring solutions to similar problems will coexist. Their boundaries of application will remain uncertain. Interests and ideals favored in some domains will be discounted in others for no better reason than the sequence in which certain decisive conflicts took place ... Intellectual fashions will

³⁰ Cite to Duncan Kennedy, *Form and Substance in Private Law Adjudication*. [full cite].

³¹ *Ibid.*, 1776.

join with preponderant interests to produce results that neither interests nor fashions alone would have allowed us to predict.³²

All this—as I say—is a problem on a *normative* understanding of the work that principles are supposed to do in these circumstances of disparity. It may be less of a problem, however, for principles formulated in a way that is supposed to help characterize a given legal system rather than solve cases within it. An unruly characterization is a characterization after all, and the truth-seeking purpose of legal science may actually best be served by putting these contradictions on explicit display. ... Schulz's enterprise in *Principles of Roman Law* would not have been discredited by his acknowledgement of antagonism among the principles he identified. Often the best characterization is just to acknowledge that the system reflects the fractured and uneasy coexistence of a plurality of values.

2.5: Hesitations about normativity

I mooted earlier the idea that, once we acknowledge that some principles operate non-normatively, we might find ourselves revisiting the normativity (such as it is) of principles that present themselves as avowedly normative at first glance. Normativity, we may find, is not a straightforward idea and we may want to put some pressure on the work that it is supposed to be doing even in simple cases.

Let's accept that *some* legal principles are normative even if not all are. This seems obvious from the way we use the term “principles” in other domains of practical life. If I were to tell you what someone's principles were, I would be telling you what he was guided by, what was normative for him. If I myself adopt a principle—e.g., the principle of truth-telling—I commit to always telling the truth, and in that sense the principle is normative for me.

Acting on principle is often thought of as *deontologically* normative: the principle doesn't just guide my action, it dictates it. ... Ronald Dworkin toyed with the idea that principles as such embody a commitment to individual rights, conceived as trumps over utility or other social goals. But this won't quite do. Although Dworkin cites many rights-based principles, his most famous example—the one we explored in Lecture One: the principle invoked in *Riggs v.*

³² ROBERTO MANGABEIRA UNGER, WHAT CAN LEGAL ANALYSIS BECOME? 65 (1996).

Palmer: “no one should be permitted to profit from his own wrong-doing”—is not rights-based at all.³³ It is phrased more in terms of duty, or rightness and wrongness. Although the wrong-doer’s aunts are held to profit from the estate, this is not by virtue of any right they are thought to hold.³⁴ So we need to raise a question over the equation of principles with rights.

We might say something similar about the various constitutional principles like separation of powers that we will consider in my third lecture, tomorrow. Though some constitutional norms embody rights, many of them, such as the separation of powers, are structural and their significance for rights is at most indirect. Still they count as principles.

... We know that Dworkin insisted that the normativity of a principle like the one cited in *Riggs v. Palmer* was not the same as the normativity of a rule. A principle did not dictate a result to be secured in specified conditions in the way that an enacted rule would do. But Dworkin said that a principle was normative nonetheless, rather in the way that a strong reason might be normative in moral argument. “All that is meant, when we say that a particular principle is a principle of our law, is that the principle is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another.”³⁵

2.6: Detracting from normativity

It is tempting to think that detracting from deontic normativity is detracting from normativity as such. But that is not the case. It just means that one has to be more sensitive with other considerations when one deploys principles. It may be difficult though to see for oneself how to apply them and/or how to convince others of their non-conclusory character. Short of the trumping force that rights are supposed to have in Dworkin’s account, principles may have little more than the normativity of reasons—a tendency to favor a course of action; counting in something’s favor in

³³ For contrast between rights-based, duty-based, and goal-based theories, see DWORKIN, *TAKING RIGHTS SERIOUSLY*, 171-77 and John Mackie, *Can There Be a Right-based Moral Theory*, in *THEORIES OF RIGHTS*, Jeremy Waldron ed. (Oxford University Press, 1984)

³⁴ This needs slight modification: it is part of Dworkin’s overall position in jurisprudence—at least in his early work—that in all litigation parties put themselves forward as right-holders, entitled to the benefit of “the right answer” to the legal question they have submitted to the court. But that doesn’t mean the right answer is necessarily rights-based.

³⁵ Ronald Dworkin, *The Model of Rules*, in *TAKING RIGHTS SERIOUSLY* (1977), at p. 26.

the way that a reason might count; something to be reckoned with; but not necessarily decisive in its bearing.

Now here's the problem. If we think about reasons in this way, there is a danger of exaggerating their normativity in law. Once one gets one's hands on a principle, or one's lips around some familiar formulation of it—some principled formulation in tones of gravitas and moral seriousness—once this happens, the principle begins to loom large in one's decision-making as a formulated standard might loom. And one may come to think of oneself as bound by it, rather than as just having an obligation to take the implicit reasons into account.

Hart and Sacks thought that all of this made it difficult for principles to be straightforwardly normative at least so far as ordinary people were concerned.³⁶ In fact they offered the following quite striking advice:

As independent guides to private persons, ... the utility of principles and policies is obviously minimal. When they are addressed to people without special training or responsibility, they commonly tell too little about what to do either to be effective in getting it done or to make a penalty seem fair for not doing it.³⁷

Principles, said Hart and Sacks, are primarily “useful as guides to the exercise of a trained and responsible discretion,” usually official discretion.³⁸

This, I think, is a very interesting blurring of the distinction between normative and non-normative, pivoting around the question, “Normative for whom?” If the category of persons whose action is supposed to be guided by the principle is a restricted one, one has to ask, with some consternation, about the rule-of-law predicament of those whose legal situation is affected, though it cannot really be guided, by the norm. How, for example, would Elmer Palmer know about the “wrongdoing principle”? He would know that murder was wrongdoing, but the rule of law is perhaps also supposed to guide him by ensuring the transparency of the legal consequences attached by statute to that wrongdoing. And that might be a

³⁶ HENRY HART AND ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 141-3 (Eskridge and Frickey eds., 1994).

³⁷ *Idem.*

³⁸ *Ibid.*, 143

problem. Saying that the principle is just supposed to guide judicial discretion is not enough. For the worry about judicial discretion is not that it might be arbitrary in the sense of whimsical, but that it might embody moral ideals or preferences that the judge has but that are not shared necessarily by all of those affected by his decision, who in any case have not been given notice of their availability.

2.7: Technicality?

[Mostly omitted]

... A principle like the one in *Riggs v Palmer* is not esoteric ..., and its difficulty is not just that posed by something technical. The wrongdoing principle embodies a relatively straightforward moral position. The rule-of-law problem is that the principle's operation in the law—particularly its resolving questions of conflict, balance and weight as against other principles—can't be trusted to the ordinary understanding. That's what Henry Hart and Albert Sacks seem to be saying. To that extent we face the unhappy prospect of the opacity and incalculability of the place or role of substantial ideas in the law.

2.8: The rule of law as an example

Finally—and continuing this theme of the blurring of normativity—I want to say something about principles that present a hybrid face—complex principles that are normative in some aspects, non-normative (characterizing) in others

I teach a course at NYU on *the rule of law*, and one source of my interest in this topic involves thinking about the normative work (if any) that the idea of the rule of law does in legal systems like ours. I have already mentioned the rule of law several times today—most importantly in considering the implications of the warning about principles sounded by Hart and Sacks. And also, connected with that, the specific kind of normativity and constraints on normativity sponsored by the rule of law: guiding action, being known in advance, establishing reliable expectations, and so on. Right now, however, I want to approach it from a different angle. Let's focus on the rule of law as a principle in its own right, and not just as a constraint on the way that other principles operate.

The rule of law is commonly mentioned as a distinguishing characteristic of our law. It is—we are told—one of its most important characteristics. But there is a

further question whether it has any specific normative work to do within the legal system, guiding people's conduct, or whether it is really better conceived as one of these non-normative characterizing principles that we found in Schulz's book. ...

So: is *the rule of law* supposed to operate as a Dworkinian principle? I think it is an interesting question whether our judges should use the rule of law as a normative proposition to help in the decision of cases in constitutional and administrative law or whether it's just a characterizing principle that tells us what our legal system is like. Is it just decorative as part of the system's PR? I don't mean that as cynically as it sounds.³⁹ Something might be a principle that characterizes our constitution—something that captures its spirit and deserves to be highlighted in a comparative analysis—but is really not of much normative use within the legal system, for example in settling cases. Maybe it's both.

In his famous discussion of constitutional law in Britain, Albert Venn Dicey described the rule of law as an “attribute of English institutions,” “a distinctive characteristic of the English constitution,” and one of two features (the other is Parliamentary sovereignty) which “have at all times since the Norman Conquest characterized the political institutions of England.”⁴⁰ The two principles he mentioned—*rule of law* and *sovereignty of parliament*—are not exactly in contradiction, but they jostle up against each other and opinions differ as to whether Dicey ever succeeded in his effort to reconcile the two. Certainly this language made them sound like a pair of Fritz Schulz's characterizing principles.

On the other hand, Dicey's rule of law has certainly been used in a quasi-evaluative fashion as a matter of political theory. Dicey used it to fuel his laments about the collapse of legality in English politics and institutions. He worried about how long the rule of law would continue to characterize the constitution and the state practice of the United Kingdom.

³⁹ But see Judith Shklar, *Political Theory and the Rule of Law*, in *POLITICAL THOUGHT AND POLITICAL THINKERS* 21 (Hoffman ed., 1998): “It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter.”

⁴⁰ ALBERT VENN DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION*, 8th edition of 1915 (Liberty Classics edition, 1982) 110.

In his detailed discussion, Dicey parsed the rule of law into three sub-principles. At least one of them—the third—was clearly understood as a characterizing principle. He said:

[3] The ‘rule of law,’ ... may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts.

Our understanding of constitutional protections is arrived at inductively rather than deductively. This does not comprise the assertion of any right and can’t really be regarded as normative in that (or any other) way. It’s a contrast between the way we do things in England and the way they’re done on the Continent.

But the other two Diceyan principles of the Rule of Law did appear more normative:

[1] no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land.

[2] no man is above the law [and] every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

True, the first is vague, in the various senses that may be attributed to the phrase “made to suffer in body or goods” (does it refer only to punishments or to the imposition of any cost or loss?). And the second jostles up against reasons for conferring special powers, responsibilities, and procedures on servants of the state. (But neither of these points means that the principle cited is not normative.)

In 20th century and (so far) 21st century jurisprudence, the rule of law has been commonly understood in terms of Lon Fuller’s list of eight principles of the inner morality of law: power must be exercised pursuant to norms that are general, public, prospective, clear, stable, etc.⁴¹ These look as though they might be read normatively as instructions to law-makers. But Fuller’s principles do direct normative work *in the law* only insofar as they have been embodied in

⁴¹ LON FULLER, THE MORALITY OF LAW ____ (1964).

constitutional rules: for example, the rule-of-law insistence on prospectivity finds only limited expression in the jurisprudence of Article I of the US Constitution; it applies to criminal statutes only, not to civil liability.⁴²

Fuller observed that compliance with each of his eight principles was a matter of degree and that it would be affected by other values operating in the vicinity. The point can be illustrated in more general terms in a consideration of how far the rule of law commits us to predictability in a legal system. Certainly the predictability of law for ordinary subjects is one principle that needs to be taken into consideration. But it faces off against other principles that the rule of law also sponsors, like the principle of procedural due process and the room that legal process makes available for legal change and high-level argumentation. Such procedures are potentially unsettling, but few of us would want to sacrifice it on the altar of implacable legal certainty.⁴³ So: in order to make normative use of the principle of legal certainty, we have to be aware of the balance that is being struck with these other considerations.

None of this is supposed to discredit the rule of law—though any work we do with it (normative or non-normative) should acknowledge ongoing debate—sometimes quite cynical debate—about what aspects of our legal system the rule-of-law heritage validates. I have spent a few years recently tracing ways in which the rule of law takes us beyond an implacable insistence on certainty, predictability, reliance and the integrity of expectations. The same principle that tells us how important predictable rules are also tells us about the importance of reason and thoughtfulness in the law. The rule of law calls for certainty, but it also sponsors creative argumentation in the law and respect for parties' elaboration of new ways of looking at things. So there's another instance of looseness in our understanding of an already multi-faceted principle.

In tomorrow's lecture, I will focus on a third kind of principle that, as it happens, the rule of law exemplifies. I'll be looking at grand principles of constitutional politics, principles like separation of powers, democratic representation, bicameralism, federalism, checks and balances, and—yes—the rule

⁴² *Calder v. Bull* 3 U.S. (3 Dall.) 386 (1798).

⁴³ I addressed this tension in Jeremy Waldron, *Thoughtfulness and the Rule of Law*, 18 BRITISH ACADEMY REVIEW (2011); also in a collection of my essays of the same name.

of law. We will see that these principles too have a chameleon-like ability to adapt to the exigencies of legal and constitutional adversarialism, indeed sometimes turning themselves inside out to make our rather shabby political arguments look more solemn and serious, more deontic and decorous, on both sides.

Lecture Three: GRAND PRINCIPLES OF POLITICS

3.1: Introduction

Last lecture, we ended up talking about the rule of law, a complex, hybrid principle that is normative in some respects, non-normative and descriptive in others. Today, I want to show that the rule of law helps with yet *another* distinction. I want to consider principles that present themselves as large-scale political positions to be invoked when we construct and interpret our constitutional arrangements. These principles operate on a larger scale than (say) the wrongdoing principle in *Riggs v. Palmer*, and they come surrounded by clouds of political theory and squalls of theoretical disputation whenever they are invoked. The rule of law is one of those; so is the separation of powers; so is the principle of democratic accountability.

3.2: Focusing on grand principles

I believe these grand political principles can be subject to critical scrutiny similar to the scrutiny we applied to ordinary principles like the wrongdoing principle in *Riggs v. Palmer*. But they are also like some of the non-normative principles we considered in Lecture 2. They represent staging posts in political as well as legal argumentation, directing attention towards aspects of the choices we face that promote the large-scale and systemic effects whose importance these principles emphasize for us.

So how exactly do they fit into our analysis? What can we say about the *jurisprudential* status of grand principles of political philosophy like the separation of powers—that’s going to be my paradigm—grand political principles that we hear of so often in legal and political argument. One possibility is that they have little except the nomenclature of the word “principle” in common with the sort of

provisions that Ronald Dworkin identified. Certainly, they seem to serve a different function: they are markers for grand theoretical positions that fill out our constitutional doctrines. But from time to time they are also presented as a basis for resolving legal problems—I have in mind the recent use of the separation of powers to settle issues in constitutional jurisprudence. Not just in political theory seminars, but in American courtrooms.

Some of these grand principles are too unwieldy to do focused argumentative work on their own. The rule of law, for example, comprises such a variety of propositions and provisions and is controversial in so many ways that it cannot really be expected to drive a contested argument forward. The deployment of such principles in particular disputes usually involves a tendentious move in theoretical argument that maybe enriches our understanding but doesn't really settle anything. One possibility would be to just put them to one side as mainly decorative and hortatory artifacts of political philosophy.

But sometimes they do play a role in legal analysis, particularly in constitutional law, particularly in American constitutional law with its juridification of politics. (Think of the role accorded to the separation of powers in the recent US Supreme Court decision about presidential immunity in the 2024 case of *Trump v. United States*, which I will say a lot more about in a moment.) The question is whether this is an entirely different sort of role than that envisaged for legal principles in *Riggs v. Palmer*. ... Can the grand principles of politics really settle anything? Perhaps the reputation of these principles depends on their chameleon-like capacity to adapt to the needs of almost any argument.

3.3: Looseness of grand principles

The grand principles I have mentioned certainly have some of the features that make their more ordinary brethren problematic. There is their emergent character: they are not enacted in any authoritative institutional process. They emerge not just from case law but from centuries of reflection in our political morality. And there is their consequent character as non-textual law, which, given the absence of any canonical formulation, generates a sort of looseness and flexibility. This may be helpful to advocates deploying a legal argument supposedly resting on them, but, for that very reason, it makes them unhelpful to those whose institutional task it is

to resolve *decisively* some adversarial issue. I don't just mean that these principles are loose in the sense of being verbally indeterminate. They are. But they are also loose in the more substantial sense of its not being fully clear on all sides what we are trying to do with them.

We set up these grand principles to denote, respect, and proclaim what we think is important in political theory. But there is disagreement both about which of these principles is important in a particular setting and about which versions of these principles we should be trying to give effect to. Sometimes this is evident from the use of competing formulations. Think of the array of variations on the theme of the rule of law that I mentioned in Lecture 2: the rule of law; law and order; legality; the rule of laws not men; no-one is above the law; one law for all; the rule of law as opposed to rule *by* law; the inner morality of law; and so on.

3.4: Separation of powers

Or if we're talking about the separation of powers, there is a bunch of adjacent formulations, not really cognate in vocabulary or syntax or logic, but which seem nevertheless to be irretrievably entangled with one another in the use that is made of the phrase: separation of powers, checks and balances, enumerated powers, co-equal powers; the dispersal of power, and so on. When separation of powers is in the offing, any of these formulae may be used on both sides or even on one and the same side, from page to page, despite the considerable differences conveyed by each of them if it is understood literally.

My point as before is that the application of these principles does not enjoy the benefit of authoritative enactment. They have not been enacted and so they have no canonical text. But there is this slight difference from common or garden principles. Though grand political principles may not have been enacted by any authority whose historical intentions might settle the terms of their application, some of them come nevertheless trailing vague and drifting clouds of at least theoretical authority.

In America, everyone knows that if you want to talk about separation of powers, you need to resort to the arguments of James Madison in *Federalist* 47. Madison spoke of "the political maxim, that the legislative, executive and judiciary departments ought to be separate and distinct." And he said (responding to an Anti-

Federalist complaint that he and his fellow Federalists didn't take separation of powers seriously enough):

No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded. The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.⁴⁴

And he indicated that he himself (Madison) was subject in turn to some theoretical authority in these matters.

The oracle who is always consulted and cited on this subject, is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind.⁴⁵

We also have, said Madison, an institutional exemplar:

The British constitution was to Montesquieu, what Homer has been to the didactic writers on epic poetry. As the latter have considered the work of the immortal bard, as the perfect model from which the principles and rules of the epic art were to be drawn, and by which all similar works were to be judged; so this great political critic appears to have viewed the constitution of England as the standard, or to use his own expression, as the mirror of political liberty....

Actually, Madison and others made it clear that this was an equivocal paradigm, for in England the powers of government have always been entangled: the effective executive being a committee of Parliament; the highest court being a committee of the House of Lords; and so on. So we have this equivocal archetype—actually grist to the mill of someone who does not want to invest too heavily in the

⁴⁴ FEDERALIST PAPERS #47.

⁴⁵ Though it has to be noticed that Madison was certainly capable of excoriating Montesquieu on separation of powers issues when necessary—e.g., in his debate with George Washington and Alexander Hamilton on the treaty power. *Helvetius v Pacificus*.

separation, because he wants an effective not a paralyzed government, and who, like Madison, is actually quite defensive about his attitude towards it.

But isn't the separation of powers authoritative in a more direct way? Isn't it explicit in the distinction drawn in the constitutional text between Article I powers (legislative), Article II powers (executive), and Article III Powers (judicial). I am afraid that that delineation is inconclusive. The constitutional text simply sets out separate articles: but separate reference to three things doesn't necessarily connote a normatively insistent separation of them.

The fact is: nothing is said in the constitutional text about a normative separation, nor even anything about the evaluative importance of separating the powers. ... For the constitutional text ordains in some cases that one power may play a role in the decision-making of another power: e.g. the Senate and Presidency on judicial appointments and the ratification of treaties. Or it ordains that one of the enumerated powers can operate as a check on the activity of another one and that, despite being co-equal (in another of the formulations), that branch is entitled to prevail in the other's realm when there is disagreement (ever hear of judicial review of legislation?). Indeed, the separation of powers is sometimes turned inside out to just *mean* checks and balances, which, although diametrically opposed in a literal sense to any norm of separation, is nevertheless identified with it by many theorists and politicians. Checks and balances are based on the very interaction between powers that separation, understood literally, is supposed to preclude. In this theoretical back and forth, the alleged co-equality of the branches is violated by judicial supremacy; sometimes by a functional argument for the primacy of the legislature in law-making; and sometimes—as right now, under the Trump administration—by a sense of the necessary ascendancy of the executive.

As I said, there is no canonical account of why separation of powers is important, to the extent that it is. Political philosophers have offered various theories, and such theories may (or may not) have a bearing on issues under consideration in court. It's not just me: one of the most distinguished students of the separation of powers, M.J.C. Vile, talks of the "extraordinary confusion" surrounding the use of the idea.⁴⁶ Madison proclaimed that the justification for

separation of powers was stated by Montesquieu; but Montesquieu's "justifications" (what we know of them) were mostly tautologies;⁴⁷ and although Madison alluded to other justifications in *The Spirit of the Laws*, he wouldn't say what or where they were.

Let me be clear. I am not really urging the absence of constitutional authority for separation of powers. I *am* arguing that it can't really settle anything, since its interaction with checks and balances or with Madison's doctrine of constitutional moderation leaves its application quite indeterminate. When it is said that an action by one power might threaten the independent exercise of another, how do we know that this relation is supposed to be governed by what we could formulate as a normative separation as opposed to representing an implicit setting up of some check or balance or guardrail? It seems not inappropriate to cite the separation of powers, if only for decoration, in *any* case where the extent and interaction of institutional authority is at issue. But invoking it as a deal-clincher—*that's* what I am worried about. For such a use would involve having to settle (for a particular case) on a particular formulation of separation of powers and a particular account of the weight it might have as against other rival principles—I mean rival in regard to the case at hand. And that is made immeasurably more difficult by the fact that some of the considerations which militate against the separation of powers make their way into jurisprudence as conceptions of, rather than explicit rivals to, that principle.

The separation of powers is definitely a political principle and no account of our constitutional tradition would be good without it. But of course the logic of the US Constitution, or any constitution, nowhere consists in its deference to just one principle. Multiple principles jostle with one another in the constitutional text and in the case law we have built up around it; crowding each other out, cutting each other down to size, as the framers of various generations strive to explain how the constitutional machine they putting together is supposed to work. A given legal position or the authority of one or more powers of government might represent a resultant of the application of two or more (or a dozen) such principles. For

⁴⁶ M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (1998) cited in Jeremy Waldron, *Separation of Powers and the Rule of Law*, in my collection, *POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTIONS*, p. 49.

⁴⁷ See Waldron, *Separation of Powers*, 60-62.

example, the principle of separation of powers has always jostled for space with the policy that recognizes the need for a strong and decisive central government (a policy which in turn—as we shall see—jostles with the rule of law and the principle of limited government).

3.5: Trump v United States (2024)

I would like to illustrate all this with an example from recent constitutional litigation. In *Trump v. United States*, 603 U.S. 593 (2024), decided on July 1, 2024, Chief Justice Roberts wrote for a divided Supreme Court that a former president of the United States was entitled to rely on a principle of immunity against criminal prosecution for actions performed during his presidency if the actions in question fell arguably within the ambit of his official powers.

The case had to do with prosecutions that had been launched against Donald Trump for his attempts to overturn the result of the 2020 presidential election. To be fair, Roberts’s position was a qualified one: immunity only for actions with an arguable connection to the functions of the president’s office. But it was still disturbing. The Chief Justice thought that presidential immunity had to be acknowledged as a principle implicit in the Constitution’s respect for the executive power. This he regarded as part of the interbranch deference that the separation of powers required.

Now, Roberts knew this was controversial and he acknowledged there was no text available to settle the issue. He said:

True, there is no “presidential immunity clause” in the Constitution. But there is no “separation of powers clause” either. ... Yet that doctrine is undoubtedly carved into the Constitution’s text by its three articles separating powers and vesting the Executive power solely in the President.⁴⁸

“It is these enduring principles,” he concluded, “that guide our decision in this case,”⁴⁹ even though none of them is represented by any univocal form of words in the Constitution.

⁴⁸ *Trump v. United States* No. 23–939. Decided July 1, 2024, pp. 37–3.

⁴⁹ *Ibid.*, 42.

Well, these weren't the only principles cited in *Trump v. United States*. Chief Justice Roberts also cited what seemed to be a principle of presidential decisiveness. ... And the justices who found themselves dissenting from Roberts's opinion cited other principles—notably what Justice Sonia Sotomayor called “the principle, foundational to our Constitution and system of Government, that no man is above the law.”⁵⁰ (We'll call it the principle of legality.) Justice Ketanji Brown Jackson cited the principle of the rule of law, calling it a foundational presupposition: “People are the sovereign, and the Rule of Law is our first and final security.” That is not in the founding text either, but it is etched in our constitutional consciousness. It wasn't that the dissenting justices repudiated respect for the executive. They just gave respect for the independence and effectiveness of the executive much less weight as against the other principles that they cited.⁵¹ So there's another familiar problem for us: in addition to questions of provenance, we have to ask how a norm's weighting is determined in a case where principle is matched against principle, where more than one grand principle is brought to bear.

So, for example, we have to ask: how does presidential immunity stand in relation to the principle that no one is exempt from legal accountability by virtue of their exalted position in the hierarchy of authority? No one is above the law—the principle of legality. Obviously any form of immunity is a rule-of-law *problem*, since it exempts some individual or class of individuals from legal obligations that apply to the rest of the community. But the case of *presidential* immunity might be thought of as particularly troubling, inasmuch as it fixes a lack of legal accountability at the visible apex of the state, to benefit the highest office-holder, defying Thomas Fuller's famous adage from more than 300 years ago: “Be ye never so high, the law is above you.”⁵² The application of legal restraint to the highest office-holder has in many ways been the *raison d'être* of the rule of law, as

⁵⁰ *Trump*, dissenting opinion of Sotomayor, 1.

⁵¹ On weighing and balancing of constitutional principles, see *Trump*, dissenting opinion of Sotomayor J., 13-14.

⁵² Reference to Lord Denning's invocation of Fuller's *bon mot* in the English Court of Appeal in *Gouriet v. Union of Post Office Workers* (1977). In the English satirical magazine PRIVATE EYE, the legal columnist (Justinian for the Money), used to mis-cite this saying as: “Be ye whomsoever ye may be, the law is an ass.”

it aims to overcome the pretensions of absolute monarchy. We might want to insist that an officeholder like the President has a particular obligation to respect *all* the laws and to communicate respect for the whole legal enterprise—I mean for all its processes, institutions, and requirements. This is partly because we want the message of respect for law to be communicated vividly. We want what is called ‘the highest power in the land’ ... to be associated visibly with legality. Justices Jackson and Sotomayor seemed to see the rule of law as an *uber*-principle in our political morality. And perhaps they are right about that—though it would be a further question what the rule of law entails when so understood.

Now, Chief Justice Roberts’s argument for presidential immunity in *United States v. Trump* turned crucially on his understanding of the importance of the decisional role of President—what I just referred to as a principle of presidential decisiveness—something to be encouraged (maximized perhaps; but then it’s a policy rather than a principle; I have deliberately tried not to make too much of that distinction in these lectures). What the Chief Justice said was this:⁵³

The Framers ... deemed an energetic executive essential to the protection of the community against foreign attacks, the steady administration of the laws, the protection of property, and the security of liberty. The purpose of a vigorous and energetic Executive, they thought, was to ensure good government, for a feeble executive implies a feeble execution of the government. ... The hesitation to execute the duties of his office fearlessly and fairly that might result when a President is making decisions under a pall of potential prosecution raises unique risks to the effective functioning of government....

Roberts associated this in turn with the separation of powers—or at least that is what he said his decision turned on. But the separation of powers is not the same as the importance of any particular power. Or, if it is, then separation of powers is being turned upside down rather than inside out, so that we can infer one power’s importance over all the other powers merely from the way it is mentioned in the Constitution.

In my view, the Chief Justice’s argument would have been more persuasive had he acknowledged that it involved a trade-off between the rule-of-law principle

⁵³ *United States v. Trump* 603 [U.S.](#) 593 (2024).

on the one hand, in at least some of its formulations (formulations which plainly argue *against* presidential immunity), and the value of executive effectiveness which the Chief Justice made so much of (and which may or may not be important, but can hardly be said to be a rule-of-law concern), on the other. Proponents of the rule of law should be troubled by the idea of presidential immunity; yet at the same time they may grudgingly concede that, since the rule of law is not the only important star in the firmament of political values, perhaps it has to yield sometimes to the separate, independent, and competing value of executive effectiveness. The rule of law is important but it is not the only good thing in the world; and those of us at least who use a thin conception of it do accept the possibility of trade-offs If the rule of law sometimes loses in the balance with democracy or human rights, perhaps too it sometimes loses in the balance with executive effectiveness. Or perhaps not. But the Chief Justice was not prepared to even acknowledge what his dissenting colleagues insisted on, that the rule of law was crucially at stake in the matter.

Now, there may be some pushback against this way of characterizing the issue. Maybe the principle of the rule of law can also weigh in on the side of executive effectiveness. For example, in the passages just quoted from Chief Justice Roberts, the Framers are said to have “deemed an energetic executive essential to ... *the steady administration of the laws*.” Maybe we are dealing with tensions internal to the rule of law, not external trade-offs. I see the point and it illustrates another antinomy of these appeals to principle—the conversion of inter-principle into intra-principle conflict. Personally, though, I am not convinced. If the Chief Justice had made his case solely with regard to executive effectiveness *in the administration of the laws* (as opposed to the national security and foreign invasion aspects of the presidency that make it sound so grand and king-like)—if that were all it was—I don’t think it would ever appear to outweigh convincingly the importance of the president’s acceptance of rule-of-law constraints.⁵⁴

⁵⁴ Some will say that the Constitution is higher law; so, doing what it says and permits *is* respecting the rule of law. Perhaps there is a (loose) sense in which following the Constitution (whatever it is) is a way of respecting the rule of law. But this can’t be right. We understand that some legal doctrines can be at odds with the rule of law. An example would be the legal and constitutional rules that, in Dicey’s view, spoiled the rule-of-law standing of *droit administratif* in France. So it is not unthinkable that the rule of law might condemn a constitutional provision such as a doctrine of presidential immunity.

3.6: Non-normative principles again

I want finally to bring back into our discussion the distinction made yesterday between normative and non-normative principles. Maybe the looseness of the separation of powers, which generates only controversy when we try using it to resolve cases, is less of an obstacle to the principle's usefulness as a *characterizing principle*. In that domain, its endemic looseness and in a way, its subjective dependence on the scientific interests of the analyst make it into a useful resource for positive political theory. The poorly defined quality of its formulation may enhance its usefulness for the role of characterizing principle, like the loose senses of nationhood and liberty conveyed in Fritz Schulz's 7th and 8th principles of Roman law.

Let me emphasize again, though, finally, that it is only *legal* normativity that is the problem. A characterizing principle may be politically and philosophically normative. Politicians often use characterizations of one political system to lay down strategies for building another: what Madison said about (Montesquieu's view of) the separation of powers in the British constitution can be read that way (if we discount the sarcasm). I think it is perfectly appropriate for constitution-makers to invoke and rely on a principle like the separation of powers. But being an appropriate normative resource for constitution-*making* is not the same as being an appropriate resource for constitutional interpretation. That distinction was made famous by Justice Scalia⁵⁵ when he heard his brethren discussing alternative visions in European politics of the principle of allocation of powers between the federal government and the states (there's another grand principle). Scalia said:

[The] dissent would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.

⁵⁵ Writing for the Court in *Printz v. United States* 521 US 898, 921n (1997), Scalia J. opined that a certain point or doctrine might be "inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one."

Others, however, who are less fastidious about that distinction and who see the Constitution as a work in progress may be more willing to accept some continuity between the politically normative character of a principle like separation of powers and its legally normative character.

For of course nothing written here shows that the normative use of legal principles is impossible. If they like, a judge can just take up a discernible thread of coherence from existing legal materials, announce that it's a principle, cite it as the normative ground of their decision, and (in Rousseau's words) find people simple enough to believe them.⁵⁶ They can do it; it can be done. That's what Chief Justice Roberts did in *Trump v. United States*. And in case after case, article after article, judges and scholars do the same. They take for granted that there are such things as legal principles, pitched at a pretty high level of abstraction, which they can infer from existing legal materials, turn a blind eye to alternative readings, and apply normatively to the resolution of present and future cases. The arguments given here are simply arguments for *hesitation* in the midst of that process.

3.7: Conclusion

It is time to bring this series of lectures to an end. I have tried to explore the hope that has been reposed in the category of principles to fill gaps in the law and restore the appearance of dignity and rationality to the legal process.

Inspired by Ronald Dworkin's early jurisprudence, some of us had envisaged that principles might take their place as legally normative provisions, authoritative in their own way, in the array of resources judges and lawyers could draw on to settle hard cases—in a high-minded spirit and in a way that one's adversaries in the case would have to acknowledge. And not just settle them, but unsettle them too, in order for us to have the opportunity to decide a case in a different direction from that suggested by acknowledged legal materials, including other legal principles that were already in play.

Dworkin thought that the discernment of legal principles might provide a basis for his right answer thesis: that there was a way to argue in law and go on

⁵⁶ Cf. JEAN-JACQUES ROUSSEAU, DISCOURSE ON INEQUALITY, beginning of Part II: "The first person who, having enclosed a plot of land, took it into his head to say this is mine and found people simple enough to believe him was the true founder of civil society."

arguing even when the provisions of positive law didn't seem to point to a resolution. But the defining looseness of legal principles—an artifact of their lack of authoritative provenance and the absence of canonical formulation—meant that this proved too much. *Both sides* could go on arguing along these lines. The principle cited by petitioner could be turned inside out by the respondent; other principles could be brought in too, so both sides could claim the rationalist credentials that a principled jurisprudence seemed to offer. For both sides can dip into the reservoir (midden) of platitudes and sayings, maxims and analogies, to draw out something dignified and serviceable for the particular forensic task they had in mind. One side (or both) might make something up in a high-minded spirit.

It is not enough to make a principled argument or to concoct a line of principled reasoning in the law. H.L.A. Hart was right in his “Postscript” to *The Concept of Law* to acknowledge that when rules prove indeterminate, the good lawyer or the good judge doesn't just push his law-books away and start legislating.

Very often ... they cite some general principle or some general aim or purpose which some considerable relevant area of the existing law can be understood as exemplifying and advancing, and which points towards a determinate answer for the instant hard case.⁵⁷

But available principles are abundant enough and loose enough to allow one's opponent to do the same. That's how we should read Hart's saying, immediately after the concession I just cited, that “though this procedure certainly defers, it does not eliminate the moment for judicial law-making.” For there is still the task of resolving the face-off between the principle(s) cited by me to make the case for my client and the principle(s) cited by my adversary, sometimes the very same principles (turned inside out), to make the case for his.

Law is an adversarial business and it does not become less adversarial just because the parties deploy the high-minded tones of principle. The fact that I can make an argument which seems compelling to me is but a first step—and it was only this first step that Dworkin made with his introduction of principles into jurisprudence. When I make an argument along these lines, I have to consider *all the ways in which the argument can be contested*—with the same principles

⁵⁷ Hart, *Concept of Law*, p, 274.

reconceptualized—perhaps turned inside-out, as we have seen with the separation of powers being converted into the principle of checks and balances—or with other principles being introduced by my counter-party’s attorney.

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