

Rules without regulation and regulation without rules

Giuseppe Lorini¹  | Stefano Moroni²

¹Department of Law, University of Cagliari, Cagliari, Italy

²Department of Architecture and Urban Studies, Polytechnic University of Milan, Milano, Italy

Correspondence

Giuseppe Lorini.
Email: lorini@unica.it

Abstract

In everyday discourse, and also in the academic literature, the expressions “regulatory interventions” (i.e. interventions intended to regulate behaviours) and “normative interventions” (i.e. interventions which set norms/rules) are usually assumed to be synonymous. From this perspective, any regulatory intervention is also normative, and vice versa. This article investigates the relationship between regulation and rules/norms in order to verify whether the “regulatory” and the “normative” aspects are intrinsically and essentially connected, as is usually thought (on the assumption that there is no regulation without rules and no rules without regulation).

KEYWORDS

constitutive rules, normativity, regulation, regulative rules, regulatory artifacts, rule-free regulation

1 | INTRODUCTION

In everyday discourse, and also in the academic literature,¹ the expressions “regulatory interventions” (i.e. interventions intended to regulate behaviours) and “normative interventions” (i.e. interventions which set norms/rules) are usually assumed to be synonymous. From this perspective, any regulatory intervention is also normative, and vice versa.

This article investigates the relationship between regulation and rules/norms in order to verify whether the “regulatory” and the “normative” aspects are intrinsically and essentially connected, as is usually thought (on the assumption that there is no regulation without rules and no rules without regulation). Section 2 considers five possible hypotheses concerning the relationships between rules and regulation (and assesses these various hypotheses in order to

determine which of them is viable). Section 3 delves deeper into the implications of the hypothesis we believe is the correct one (paying particular attention to the direction of fit, the possibility of satisfaction, and the possibility of sanction). Section 4 concludes by highlighting the main findings.

Before entering into the main discussion, it is necessary to specify the scope of our investigation by clarifying the extent of normative phenomena, as well as the extent of the regulatory ones which we consider in this article.

Firstly, this article investigates solely what we may call “*thetic* normativity”.² Consequently, it considers only the normativity of *thetic* norms: that is, those norms established by an act performed by a *nomothete* (e.g., a legislator, a parent, a teacher). It will therefore not investigate *athetic* norms³ such as, for instance, spontaneous, customary norms.⁴

Secondly, with the term “regulation”, we refer to all attempts to intentionally channel behaviours by an authority (that is, an actor that possesses a ruling power: e.g., a public authority), targeting standard types of behaviour (i.e., they do not target individual behaviours on an occasional basis).⁵

To avoid misunderstandings, we are not assuming that only the phenomena which satisfy these two conditions are of interest; rather, they constitute the particular focus of this specific article.

2 | WHAT IS THE RELATIONSHIP BETWEEN NORMATIVE INTERVENTIONS AND REGULATORY INTERVENTIONS?

2.1 | Five hypotheses

To explore the possible relationships between *normative* interventions and *regulatory* interventions, we consider the conceivable relationships between the set of normative interventions and the set of regulatory interventions, doing so from an “extensional” point of view.⁶ In this way, only five possible combinations can be obtained between the set of regulatory interventions and the set of normative interventions. These possible combinations correspond to five hypotheses on the relationship between regulatory and normative interventions.

First hypothesis. The set of normative interventions and the set of regulatory interventions coincide (they are perfectly superimposable). Normative phenomena are therefore coextensive with regulatory phenomena: in other words, all normative phenomena are regulatory phenomena, and conversely, all regulatory phenomena are normative phenomena. It follows that there cannot be regulation without norms and there cannot be a normative intervention without regulation; in other words, there cannot be a norm that does not perform a regulatory function. This hypothesis seems to correspond to the standard notion of regulation (“There can be no regulation without rules”) and of normativity (“There can be no rules without regulation”), which are often taken for granted – and for this reason never questioned and explored.

Second hypothesis. Normative interventions are a subset of regulatory interventions. There is regulation without rules: all normative phenomena are necessarily regulatory phenomena, but not all regulatory phenomena are necessarily normative. In other words, it is possible to “regulate without rules/norms”, but a normative intervention without regulation is impossible.

Third hypothesis. The set of normative interventions and that of regulatory interventions only partially overlap. On this view, there are normative interventions which are regulatory

(that is, interventions which perform a regulatory function) and regulatory interventions which are normative (that is, they intervene through norms). However, there are also normative interventions which are not regulatory and regulatory interventions which are not normative. In this case, there is a “regulation without norms” but, also, a “normativity without regulation”.

Fourth hypothesis. Regulatory interventions are a subset of normative interventions. As a consequence, all regulatory interventions are also normative, but not all normative interventions are also regulatory.

Fifth hypothesis. The set of normative interventions and the set of regulatory interventions are detached. In other words, normative-regulatory interventions do not exist: there are only regulatory interventions which are not normative and normative interventions which are not regulatory.

2.2 | Assessing the five hypotheses

Now that these five hypotheses on the relationship between normative and regulatory interventions have been presented and illustrated, we may ask: Which of them is correct? Let us discuss them one by one.

The hypothesis according to which the set of normative interventions and the set of regulatory interventions coincide (*first option* in Table 1) may at first sight seem to be the correct one (it is the usually accepted view, or at least the one generally taken for granted). However, it is incorrect because this notion of regulation and normativity ignores various regulatory and normative phenomena (due to a sort of theory-induced blindness: Kahneman, 2011).⁷ On the one hand, there are regulatory phenomena which are not normative, for instance “adeontic regulatory artifacts” (Lorini & Moroni, 2020b, 2022a, 2022b). Speed bumps to slow traffic provide a good example. They do not signal a precise speed limit; what they do is “hamper” the transit of a vehicle, “persuading” the driver to slow down. (Note that speed bumps may perform

TABLE 1 Five hypotheses.

Regulatory interventions and normative interventions: combinatorial relationships	First option	The set of normative interventions and the set of regulatory interventions coincide.
	Second option	Normative interventions are a subset of regulatory interventions.
	Third option	The set of normative interventions and that of regulatory interventions overlap only partially.
	Fourth option	Regulatory interventions are a subset of normative interventions.
	Fifth option	The set of normative interventions and the set of regulatory interventions are detached from each other.

their function even in the absence of speed limit signs and any traffic code). Another example is the use of dolls or mannequins to occupy chairs in order to ensure social distancing in restaurants and cafeterias during the Covid-19 pandemic (Taylor, 2020).⁸ In this case, the dolls and mannequins did not perform a deontic function: simply, by occupying a chair, they materially prevented any person from doing so.⁹ In other words, they performed a regulatory function without involving deontic instruments.¹⁰ On the other hand, there are normative interventions which are not regulatory, like many of those performed by introducing certain *constitutive rules*. An example here is article 1 of the Italian Civil Code: “Legal capacity is acquired from the moment of birth”. This rule establishes a necessary and sufficient condition (i.e. the fact of being born) for the acquisition of legal capacity. But it does not impose an action to be performed on anyone; nor does it suggest a pattern of action to follow or in any way impel someone to perform a certain action or adopt a certain behaviour. In this regard, note the structural difference between this article of the Italian Civil Code and, for example, art. 53, sub-sect. 1, of the Italian Constitution, which states that “Everyone is required to contribute to public expenditure on the basis of their ability to pay”. This latter is a deontic norm which obliges Italian citizens to contribute proportionally to public spending; it is clearly a norm which performs a regulatory function (through deontic instruments) concerning the behaviour of Italian citizens.

The hypothesis according to which normative interventions are a subset of regulatory interventions (*second option* in Table 1) recognizes that there can be non-normative regulatory interventions (for instance, regulation through adeontic regulatory artifacts); but it also seems, on a general view, to be incorrect. As already said, it is also possible to have *normative non-regulatory* interventions: that is, certain kinds of normative interventions carried out by introducing certain “*non-regulative constitutive rules*”.

The symmetrical hypothesis of considering regulatory interventions as a subset of normative interventions (*fourth option* in Table 1) is also clearly erroneous. As pointed out above, there are regulatory interventions which are not normative: for example, regulatory interventions enacted through adeontic regulatory artifacts.

Also the hypothesis assuming that the set of normative interventions and that of regulatory ones are detached (*fifth option* in Table 1) is clearly incorrect. In fact, there are regulatory interventions expressed through written or drawn deontic rules or through deontic artifacts (Lorini et al., 2021, 2023) which are patently normative; at the same time, there are normative interventions which are regulatory (for instance, all regulatory interventions performed through deontic rules of the kind “Smoking is prohibited”).

The hypothesis suggesting a partial overlap between normative and regulatory interventions (*third option* in Table 1) is instead the correct one. An example of regulatory interventions which are not normative are those performed by means of the already-mentioned adeontic regulatory artifacts. An example of normative interventions which are not regulatory is provided by those that introduce certain constitutive rules: for instance, the constitutive rule: “Only candidates who have not yet turned 25 can register for the competition”. This rule obviously does not encourage those who have already reached the age of 25 to become younger. It simply imposes a *necessary condition* for the *validity* of the application to enter the competition. On the basis of this rule, all applications submitted by subjects who have already turned 25 are invalid.

3 | THREE KINDS OF NOMOIDAL PHENOMENA

3.1 | Normative regulatory phenomena, normative non-regulatory phenomena, and regulatory non-normative phenomena

In sum, the hypothesis accepted as correct in the previous section recognizes the existence of three basic kinds of what we may call “nomoidal”¹¹ phenomena:

1. *normative regulatory phenomena*,
2. *normative non-regulatory phenomena* and
3. *regulatory non-normative phenomena*.

Normative regulatory phenomena are traditionally recognized in the literature. They are, for instance, the typical rules of the traffic code.¹² In this case, we have regulatory interventions which are undoubtedly normative, and vice versa.

The two other types of interventions are theoretically more interesting: *normative non-regulatory interventions* (i.e. a sort of *regulation-free intervention*) and *regulatory non-normative interventions* (i.e. a sort of *rule-free intervention*).

Regulatory non-normative phenomena are a new category to which we have devoted several studies (e.g. Lorini et al., 2023; Lorini & Moroni, 2020b, 2022a, 2022b). As mentioned above, regulatory interventions through “adeontic regulatory artifacts” are typical examples of phenomena of this kind.¹³ Whilst deontic artifacts are artifacts produced with an explicitly normative and deontic intent (e.g. traffic lights or roundabouts), adeontic regulatory artifacts (e.g. speed bumps) are artifacts which do not have a deontic intent and a normative function as such. Adeontic regulatory artifacts condition human behaviour without applying any specific obligation or prohibition (without normative or deontic instruments).

Let us now delve deeper into normative non-regulatory phenomena. Here the question is this: Can there be a *nomothete* ruling through non-regulative rules, that is, rules that do not directly perform a regulatory function?

There are many examples of rules *without regulation*; that is, rules that do not immediately perform a regulatory function directly applied to behaviour, i.e. certain kinds of *constitutive rules*.

Before considering some examples in this regard, it is important to specify that here we are implicitly criticizing the thesis propounded by Searle (1964, 1965, 1969) from his first works on constitutive rules in the 1960s. Indeed, Searle argued that *constitutive* rules differ from *regulative* ones because of the different ontological relationship that binds them to their object; according to him, they nonetheless have the regulatory function in common with regulative rules.¹⁴ In other words, (Searle seems to ask) how could a rule not be regulative? Searle (1969, p. 34) writes that, while regulative rules “regulate a pre-existing activity, an activity whose existence is logically independent of the rules”, constitutive rules “constitute (and also regulate) an activity the existence of which is logically dependent on the rules”. See also Searle (1969, p. 33): “Constitutive rules do not merely regulate, they create or define new forms of behaviour. The rules of football or chess, for example, do not merely regulate playing football or chess, but as it were they create the very possibility of playing such games.”¹⁵

Here Searle seems to take it for granted that all rules (whether “regulative” or constitutive in Searle’s terminology) always perform a regulatory function.

Instead, we argue that not all constitutive rules necessarily have a regulatory function. Certain constitutive rules do not concern patterns of behaviour and do not (directly) perform a regulatory function. Therefore, they do not identify behaviours to be adopted or encouraged; sometimes they do not even have any direct recipient.¹⁶ Let us consider five significant cases (here we use the typology of constitutive rules drawn up by Amedeo Giovanni Conte in the 1980s):¹⁷

1. *Thetic-constitutive rules*: for example, the constitutive rule concerning the age of majority as in article 2 of the Italian Civil Code: “The age of majority is set at the age of 18”.¹⁸
2. *Metathetic-constitutive rules*: for example, article 59 of the Italian Constitution: “Former Presidents of the Republic are Senators by right and for life unless they renounce the office”.
3. *Nomic-constitutive rules*: for example, “Legal capacity is acquired from the moment of birth” (see e.g. article 1, German Civil Code; and article 1, Italian Civil Code).
4. Certain kinds of *anankastic-constitutive rules*: for example, the rule concerning the nationality of the President of the United States of America according to the United States Constitution (Article 2, Section 1, Clause 5: “No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President”) or the rule on the age of the candidates in a competition (“Only candidates who have not yet turned 25 can register for the competition”).¹⁹
5. Certain kinds of *eidetic-constitutive rules*: for example, the checkmate rule in the chess game, the rule on a touchdown in American football, the rule on a goal in soccer.²⁰ Here is the constitutive rule of *checkmate*: There is checkmate when the king is “under attack” in such a way that no legitimate move can save it.²¹ And here is the constitutive rule of the *touchdown*: There is a touchdown (i.e. a touchdown is scored) when a player is in possession of the ball in the end zone of the opponent team while a play is in progress.²² Finally, here is the constitutive rule concerning a *goal* in the game of soccer: A goal is scored when the ball passes over the opponents’ goal line.²³ According to Conte’s further investigations, these three examples of eidetic-constitutive rules are, more precisely, cases of *ontic* eidetic-constitutive rules; that is, eidetic-constitutive rules that cannot be expressed in “deontic terms” (Conte, 1986a).²⁴ In fact, the three above-mentioned examples of eidetic-constitutive rules cannot be broken.

3.2 | Direction of fit, possibility of satisfaction, possibility of sanction

In this section we examine the three kinds of nomoidal phenomena (normative regulatory interventions, normative non-regulatory interventions, regulatory non-normative interventions) in light of three different aspects:

1. *direction of fit*,
2. *possibility of satisfaction* (through behaviours),
3. *possibility of sanctioning*.

The categorical heterogeneity of the three phenomena clearly emerges when considered in light of these three different aspects (Table 2).

TABLE 2 Direction of fit, possibility of satisfaction, possibility of sanctioning.

	Direction of fit	Possibility of satisfaction (through behaviours)	Possibility of sanctioning
Normative-regulatory phenomena	The world <i>is required to correspond</i> to words (or drawings, artifacts)	Yes	Yes
Regulatory non-normative phenomena	Not applicable	Not applicable	Not applicable
Normative non-regulatory phenomena	The world <i>cannot but correspond</i> to words (or drawings, artifacts)	Not applicable	Not applicable

As regards the *direction of fit*,²⁵ normative regulatory interventions have a world-to-word (or world-to-drawing, world-to-artifact) direction of fit: the world *is required to correspond* to words (or drawings, artifacts).

Normative non-regulatory interventions – as is evident in the case of thetic-constitutive rules – again have a world-to-word (or world-to-drawing, world-to-artifact) direction of fit, but it is of a different kind: in this case, the world *cannot but correspond* to words (or drawings, artifacts). As Searle (1983, 171-172) writes about declarations, thetic-constitutive rules bring about some new state of affairs by representing it as being the case (see also Searle, 1989, 2010). Furthermore, it is important to underline that in the case of normative non-regulatory interventions the *world* which constitutes one of the two poles of the direction-of-fit is exclusively an *institutional world*, while in the case of normative regulatory interventions it can also be the *brute world* (Searle, 1995, 2010).²⁶

Differently from the two above-mentioned types of nomoidal phenomena, regulatory non-normative interventions do not have a direction of fit (Lorini & Moroni, 2022a). A sleep-prevention bench, for example, has no propositional content to which the world may be related. Nor – *a fortiori* – does it have a direction of fit which links the world to it. As a consequence, it makes no sense to ask whether a particular behaviour fits with an adeontic regulatory artifact like a sleep-prevention bench (Lorini & Moroni, 2022a).

As regards the *possibility of satisfaction* (through behaviours), we observe that it is *not possible* to satisfy either regulatory non-normative phenomena or normative non-regulatory phenomena – even if for different reasons.

In the first place, as Searle (1983: 10) argues, we can speak of conditions of satisfaction only for those entities – he is thinking specifically of speech acts and intentional states – that have a direction of fit. Thus, we can say that a statement is true or false or that an order is obeyed or disobeyed. For this reason, satisfaction is not possible for regulatory non-normative interventions because, as we have just seen, they do not have a direction of fit. Secondly, in order to talk about satisfaction (through behaviours) of nomoidal phenomena, the direction of fit must be a world-to-word (or drawing, artifact) direction of fit, and furthermore the nomoidal phenomena must refer to a particular type of behaviour. But as we have seen, normative non-regulatory interventions do not concern patterns of behaviour and do not identify behaviours to be adopted or encouraged.

By contrast, normative regulatory phenomena can obviously be satisfied (by behaviours); and it is possible for them to be obeyed.²⁷

As regards the *possibility of sanctioning*, note that sanction is impossible both for regulatory non-normative interventions and for normative non-regulatory interventions, because in both cases violation is not possible: more precisely, neither a behaviour in compliance with them nor a behaviour not in compliance with them is possible. Sanctioning is instead perfectly possible in the case of normative regulatory interventions because it is possible to imagine a behaviour that respects or violates them (e.g. a driver stopping or not stopping at a red traffic light).

From the foregoing comparison between regulatory non-normative phenomena and normative non-regulatory phenomena, it is clear that regulatory non-normative interventions are phenomena which do not necessarily have a *semantic* nature (they are usually not semantic phenomena: Lorini & Moroni, 2022a),²⁸ whilst normative non-regulatory phenomena are *semantic* phenomena (moreover, they are propositional phenomena, that is, phenomena which have a propositional content).²⁹

4 | CONCLUSIONS

To conclude, it is as possible to regulate without rules/norms as it is to have normative intervention without any regulation. Therefore, we have not only regulation without rules, but also rules/norms without regulation.

Identifying (and distinguishing between) the set of *normative non-regulatory interventions* and the set of *regulatory non-normative interventions* helps to show that the regulatory function and the normative function can be performed separately.

The idea that normativity and regulation partially overlap shows that the connection between normativity and regulation is only an extensional relationship, and not an intensional one – as is often assumed in the literature. In other words, the idea of regulation and that of rule/norm are not intrinsically linked (i.e. conceptually inseparable). The relation between normativity and regulation is not a “relationship of ideas” (*à la* Hume) but only a “matter of facts”.

ACKNOWLEDGEMENTS

We acknowledge financial support under the National Recovery and Resilience Plan, Mission 4, Component 2, Investment 1.1, Call for tender No. 104 published on 2.2.2022 by the Italian Ministry of University and Research, funded by the European Union – NextGenerationEU – Project Title: Normative artifacts and normative drawings: investigating non-linguistic regulation – CUP: F53D23003500006 - Grant Assignment Decree No. 104 adopted on 02/02/2022 by the Italian Ministry.

DATA AVAILABILITY STATEMENT

No particular data were used.

ORCID

Giuseppe Lorini  <https://orcid.org/0000-0003-1098-4501>

ENDNOTES

¹ See e.g. Geiger (1947), Bobbio (1958), Scarpelli (1959), Conte (1962), von Wright (1963), Searle (1964, 1965, 1969), Weinberger (1970), Ganz (1971).

- ² Znamierowski (1924) uses the term “thetic norms” to denote norms that are the product of a *thésis*, that is, of a rule-making act, of a nomothetic act (for example, a command or a legislative act), such as the norms of the American Constitution.
- ³ “Athetic norms” (to use an expression introduced by Conte, 2019) are those norms that do not derive from a nomothetic act (from a rule-making act).
- ⁴ Certain customary norms spontaneously evolve in the long period (being generated by some sort of unintentional mechanism: e.g. group selection), and people start acting in compliance with them even if no one explicitly invented them and expressly set them (Moroni, 2010, 2011, 2021). Consider the rules on mushroom and truffle picking: these are athetic norms which for hundreds, or even thousands, of years have regulated foraging for mushrooms in the woods of northern Italy – until Law no. 352 of 1993 was passed. Among the first to identify and explore the phenomenon of spontaneously evolving rules were Hume, 1739 (1739/2000), Ferguson, 1767 (1767/1995), Burke, 1790 (1790/1999), Menger (1883/1963). Subsequently, see e.g. Geiger (1947), Hayek (1982, 1988), Dundees Renteln and Dundees (1995), Loasby (1999); for a recent discussion on the ontogenesis of social norms, see Stevanovic (2018). We are grateful to an anonymous reviewer for advising us to specify this point.
- ⁵ For a general, conceptual analysis of the notion of “regulation”, see e.g. Koop and Lodge (2017).
- ⁶ This exercise could be illustrated by using Venn diagrams.
- ⁷ Indeed, this notion of normativity has prevented the recognition of the existence of certain *constitutive* rules (see Carcaterra, 1974).
- ⁸ Further examples are chicanes employed as traffic-calming measures to decrease vehicle speed (Distefano & Leonardi, 2019; Lee et al., 2013; Zhang et al., 2020) and fences placed at the edge of a sidewalk near the road in order to discourage pedestrians from crossing there and steer them towards a zebra crossing. Conceptually significant here are even ethically criticizable examples of so-called hostile architecture like “sleep-prevention benches” (Rosenberger, 2014, 2017, 2020, 2023): these are benches with metal dividers, or an uneven surface, that are unusable for any purpose other than sitting.
- ⁹ On the problematic relationship between deontic concepts and the regulatory function (guidance function), see Sharadin and Van Someren Greve (2021). For a recent reflection on deontic categories, see Slade-Caffarel (2022).
- ¹⁰ For a complementary critical discussion on the role of things and artifacts in considering social order and rules, see Preda (2000).
- ¹¹ The adjective “nomoidal” is formed by combining the ancient Greek terms *nómos* (“norm”) and *eidós* (“form”), as, for example, in the nouns “metalloid”, “humanoid”, “planetoid”, and in the adjectives “factoidal”, “helicoidal”, “logoidal”.
- ¹² Normative regulatory phenomena can be created, for example, through written or even drawn rules (on the latter, see e.g. Moroni & Lorini, 2017, 2020, Lorini, 2019, Lorini & Moroni, 2020a; Maynard, 2017).
- ¹³ Other examples are “regulation by giving an example” (i.e. cases in which influence is exerted on behaviour without laying down new rules but merely by providing a positive example: consider the positive influence of parents’ and teachers’ good conduct on their children and students) and “regulation by mere presence” (consider the activity of patrolling by the police: the mere presence of the police may influence behaviour) (Lorini & Moroni, 2020b). Note that even irony and humour (Grabosky, 2016; Wolf, 2002) can be employed as regulatory non-normative tools (in our meaning of the expression). As Grabosky (2016, p. 373) notes: “Ridicule has been an instrument of social control in a variety of disparate cultures, traditional and modern. In a more specific and more contemporary sense, it has also been employed as a means of influencing organizational behaviour.”
- ¹⁴ For critical debates on Searle’s contribution to social ontology and the theory and philosophy of rules, see e.g. Martins (2009), Bauwens (2018), Ikuenobe (2019).
- ¹⁵ See also Searle (2018, p. 51): “There is an intuitive distinction between two kinds of rules: those that regulate antecedently existing behaviors and those that constitute new forms of behavior and thus regulate the very

- behavior that they constitute". And Searle (2018, p. 51): "The rules of chess, on the other hand, do not just regulate, but they constitute the activity they regulate".
- ¹⁶ Clearly, all these rules are *uti singuli* non-regulative. They cannot be used as direct instruments of behavioural regulation, even if they can act as an indirect "ingredient" of regulation in a more general sense and only in conjunction with other (regulative) rules.
- ¹⁷ Conte (1983, 1985, 1986a, 1986b, 1988, 1997) distinguishes six types of constitutive rules (on the basis of the kind of condition – necessary condition, sufficient condition, and necessary and sufficient condition – and on the basis of their "being a condition" or their "setting of a condition"): (1) eidetic-constitutive rules (these are the *necessary* condition of what they concern, of what they are rules of), (2) thetic-constitutive rules (these are a *sufficient* condition of what they concern), (3) noetic-constitutive rules (these are a *necessary* and *sufficient* condition of what they concern), (4) anankastic-constitutive rules (these set a necessary condition – a *condicio sine qua non* – of what they concern), (5) metathetic-constitutive rules (these set a *sufficient* condition of what they concern), (6) nomic-constitutive rules (these set a *necessary* and *sufficient* condition of what they concern). On this, see also Azzoni (1988), Ceci et al. (2018).
- ¹⁸ This particular category of constitutive rules has been studied especially by Carcaterra (1974).
- ¹⁹ Alongside anankastic-constitutive rules that can perform a regulatory function (for instance, art. 602 of the Italian Civil Code: "The holographic will must be [...] signed by hand by the testator"), there are therefore anankastic-constitutive rules that are not satisfiable: in other words, it is not possible to act in accordance with these rules.
- ²⁰ As we underlined in the introduction, in this article we investigate only thetic norms. The examples of constitutive rules of games referred to here are examples taken from the official regulations of the games themselves. Clearly, this does not mean that all game rules are always and necessarily *thetic rules* (we are again grateful to an anonymous reviewer for advising us to clarify this point). For instance, a certain game can be an occasional and ephemeral invention of a child. Furthermore, for many traditional codified games it is difficult to identify who was the inventor of the game itself. This also applies to the rules of the game of chess, which has a thousand-year history. The game of chess probably derives from the development of the Indian game that originated in the 7th century AD and was called (in Sanskrit) "*chaturanga*". Persians subsequently transformed the word into "*chatrang*", by which it was known in Iran (Davidson, 1981; see also Gollon, 1974; Cincotti et al., 2007; Averbakh, 2012).
- ²¹ This is the original version of the checkmate rule in the FIDE laws of chess (art. 1.2): "The objective of each player is to place the opponent's king 'under attack' in such a way that the opponent has no legal move. The player who achieves this goal is said to have 'checkmated' the opponent's king and to have won the game" (<https://handbook.fide.com/chapter/E01pre2014>; accessed March 2023).
- ²² This is the original version of the touchdown rule as it appears in the 2022 NFL rulebook (Rule 11 "Scoring", Section 2, art. 1): "A touchdown is scored when: (a) the ball is on, above, or behind the plane of the opponents' goal line (extended) and is in possession of a runner who has advanced from the field of play into the end zone; (b) a ball in possession of an airborne runner is on, above, or behind the plane of the goal line, and some part of the ball passed over or inside the pylon; (c) a ball in player possession touches the pylon, provided that, after contact by an opponent, no part of the player's body, except his hands or feet, struck the ground before the ball touched the pylon; (d) any player who is legally inbounds catches or recovers a loose ball (3-2-4) that is on, above, or behind the opponent's goal line [...]" (<https://operations.nfl.com/the-rules/2022-nfl-rulebook/>; accessed March 2023).
- ²³ See FIFA's Laws of the Game 20/21: "Law 10 – Determining the Outcome of the Match: A goal is scored when the whole of the ball passes over the goal line, between the goalposts and under the crossbar, provided that no offence has been committed by the team scoring the goal." (<https://digitalhub.fifa.com/m/1cf301829f1cf996/original/ifab-laws-of-the-game-2020-21.pdf>; accessed March 2023).
- ²⁴ Within eidetic-constitutive rules, Conte further distinguishes two sub-types: *deontic* eidetic-constitutive rules (e.g., the rule in chess that "The bishop *must* move diagonally") and *ontic* eidetic-constitutive rules (e.g., the constitutive rule of checkmate in chess). In the former case, compliance between behaviour and rule is possible, whilst in the latter case it is impossible to act in compliance with the rule. In short, *deontic* eidetic-

constitutive rules are *regulative*, whilst *ontic* eidetic-constitutive rules are *non-regulative*. This distinction is not merely superficial: it does not concern the mere syntactic aspect of the linguistic formulation of a rule (i.e. the presence of deontic terms in the sentence). The difference is more profound, as revealed by a test concerning the translation of normative sentences: *deontic* eidetic-constitutive rules can be formulated in *ontic* form, while *ontic* eidetic-constitutive rules cannot be translated in *deontic* form (Conte, 1986a, pp. 42–43). On this, see Żelaniec (2013, p. 79).

²⁵ On the idea of the *direction of fit*, see especially Anscombe (1957), Austin (1953), Searle (1979, 1984).

²⁶ On this, see also Lorini (2000).

²⁷ On the satisfaction of “normative entities”, see Lorini (2012).

²⁸ To use Searle's terminology, regulatory non-normative phenomena have no “representative content” (Searle, 1983, p. 6).

²⁹ This seems to hold for both linguistic and drawn norms. In the latter case, an example (of a normative non-regulatory phenomenon) is that of a border established by drawing a line on a map, as happens for instance when administrative territories are defined (Moroni & Lorini, 2020).

REFERENCES

- Anscombe, G. E. M. (1957). *Intention*. Harvard University Press.
- Austin, J. L. (1953). How to talk: Some simple ways. *Proceedings of the Aristotelian Society*, 53(1), 227–246. <https://doi.org/10.1093/aristotelian/53.1.227>
- Averbakh, Y. (2012). *A history of chess: From chaturanga to the present day*. Russell.
- Azzoni, G. M. (1988). *Il concetto di condizione nella tipologia delle regole*. Cedam.
- Bauwens, M. (2018). Institutions as dispositions: Searle, Smith and the metaphysics of blind chess. *Journal for the Theory of Social Behaviour*, 48(3), 254–272. <https://doi.org/10.1111/jtsb.12161>
- Bobbio, N. (1958). *Teoria della norma giuridica*. Giappichelli.
- Burke, E. (1790). *Reflections on the revolution in France*. Oxford University Press, 1999.
- Carcatera, G. (1974). *Le norme costitutive*. Giuffrè.
- Ceci, M., Butler, T., O'Brien, L., & Al Khalil, F. (2018). Legal patterns for different constitutive rules. In U. Pagallo, M. Palmirani, P. Casanovas, G. Sartor, & S. Villata (Eds.), *AI approaches to the complexity of legal systems* (pp. 105–123). Springer.
- Cincotti, A., Iida, H., & Yoshimura, J. (2007). Refinement and complexity in the evolution of chess. In P. P. Wang (Ed.), *Information sciences 2007* (pp. 650–654). World Scientific.
- Conte, A. G. (1962). *Saggio sulla completezza degli ordinamenti giuridici*. Giappichelli.
- Conte, A. G. (1983). Paradigmi d'analisi della regola in Wittgenstein. In R. Egidi (Ed.), *Wittgenstein. Momenti di una critica del sapere* (pp. 37–82). Guida.
- Conte, A. G. (1985). Materiali per una tipologia delle regole. *Materiali per una Storia della Cultura Giuridica*, 15(2), 345–368.
- Conte, A. G. (1986a). Fenomeni di fenomeni. *Rivista Internazionale di Filosofia del Diritto*, 63(1), 29–57.
- Conte, A. G. (1986b). Idealtypen für eine Theorie der konstitutiven Regeln. In T. Eckhoff, L. M. Friedman, & J. Uusitalo (Eds.), *Vernunft und Erfahrung im Rechtsdenken der Gegenwart* (pp. 243–250). Dunker und Humblot.
- Conte, A. G. (1988). Eidos. An essay on constitutive rules. *Poznan Studies in the Philosophy of the Sciences and the Humanities*, 11, 251–257.
- Conte, A. G. (1997). Eidetic-constitutive rules. In A. Pintore & M. Jori (Eds.), *Law and language: The Italian analytical school* (pp. 133–146). Deborah Charles Publication.
- Conte, A. G. (2019). Athetic validity. *Phenomenology and Mind*, 17, 20–31.
- Davidson, H. A. (1981). *A short history of chess*. McKay.
- Distefano, N., & Leonardi, S. (2019). Evaluation of the benefits of traffic calming on vehicle speed reduction. *Civil Engineering and Architecture*, 7(4), 200–214. <https://doi.org/10.13189/cea.2019.070403>
- Dundeas Renteln, A. & Dundeas, A. (Eds.) (1995). *Folk law: Essays in the theory and practice of lex non scripta*. Routledge.

- Ferguson, A. (1767). *An essay on the history of civil society*. Cambridge University Press, 1995.
- Ganz, J. S. (1971). *Rules: A systematic study*. Mouton.
- Geiger, T. (1947). *Vorstudien zu einer Soziologie des Rechts*. København.
- Gollon, J. (1974). *Chess variations: Ancient, regional, and modern*. Rutland (Vermont).
- Grabosky, P. (2016). Regulation by ridicule: Humorous denigration as a regulatory instrument. *Law, Culture and the Humanities*, 12(2), 373–400. <https://doi.org/10.1177/1743872113493079>
- Hayek, F. A. (1982). *Law, legislation and liberty*. Routledge.
- Hayek, F. A. (1988). *The fatal conceit*. Routledge.
- Hume, D. (1739). *A treatise of human nature*. Oxford University Press, 2000.
- Ikuenobe, P. (2019). Social ontology, practical reasonableness, and collective reasons for action. *Journal for the Theory of Social Behaviour*, 49(3), 264–281. <https://doi.org/10.1111/jtsb.12202>
- Kahneman, D. (2011). *Thinking, fast and slow*. Farrar, Straus and Giroux.
- Koop, C., & Lodge, M. (2017). What is regulation? An interdisciplinary concept analysis. *Regulation & Governance*, 11(1), 95–108. <https://doi.org/10.1111/rego.12094>
- Lee, G., Joo, S., Oh, C., & Choi, K. (2013). An evaluation framework for traffic calming measures in residential areas. *Transportation Research Part D: Transport and Environment*, 25, 68–76. <https://doi.org/10.1016/j.trd.2013.08.002>
- Loasby, B. J. (1999). *Knowledge, institutions and evolution in economics*. Routledge.
- Lorini, G. (2000). *Dimensioni giuridiche dell'istituzionale*. Cedam.
- Lorini, G. (2012). *Il valore logico delle norme*. Adriatica D.A.
- Lorini, G. (2019). Corporeal drawn norms. An investigation of graphic normativity in the material world of everyday objects. *Phenomenology and Mind*, 17, 80–90.
- Lorini, G., & Moroni, S. (2020a). How to make norms with drawings: An investigation of normativity beyond the realm of words. *Semiotica*, 233, 55–76. <https://doi.org/10.1515/sem-2018-0062>
- Lorini, G., & Moroni, S. (2020b). Ruling without rules: Not only nudges. Regulation beyond normativity. *Global Jurist*, 20(3), 1–11. <https://doi.org/10.1515/gj-2019-0051>
- Lorini, G., & Moroni, S. (2022a). Non-propositional regulation. *Philosophical Investigations*, 45(4), 512–527. <https://doi.org/10.1111/phih.12343>
- Lorini, G., & Moroni, S. (2022b). Rule-free regulation: Exploring regulation 'without rules' and apart from 'deontic categories. *Journal for the Theory of Social Behaviour*, 52(1), 22–36. <https://doi.org/10.1111/jtsb.12291>
- Lorini, G., Moroni, S., & Loddo, O. G. (2021). Deontic artifacts. Investigating the normativity of objects. *Philosophical Explorations*, 24(2), 185–203. <https://doi.org/10.1080/13869795.2021.1908584>
- Lorini, G., Moroni, S., & Loddo, O. G. (2023). Regulatory artifacts: Prescribing, constituting, steering. *International Journal for the Semiotics of Law*, 36(1), 211–225. <https://doi.org/10.1007/s11196-022-09926-1>
- Martins, N. (2009). Rules, social ontology and collective identity. *Journal for the Theory of Social Behaviour*, 39(3), 323–344. <https://doi.org/10.1111/j.1468-5914.2009.00406.x>
- Maynard, P. (2017). Drawn norms: The example of traffic signs. In P. L. Lecis, G. Lorini, V. Busacchi, O. G. Loddo, & P. Salis (Eds.), *Verità, immagine normatività* (pp. 327–352). Quodlibet.
- Menger, C. (1883). *Untersuchungen über die Methode der Socialwissenschaften und der politischen Ökonomie insbesondere*. University of Illinois Press. English translation: Problems of economics and sociology, 1963.
- Moroni, S. (2010). An evolutionary theory of institutions and a dynamic approach to reform. *Planning Theory*, 9(4), 275–297. <https://doi.org/10.1177/1473095210368778>
- Moroni, S. (2011). The role of deliberate intervention on organizations and institutions. *Planning Theory*, 10(2), 190–197. <https://doi.org/10.1177/1473095210389996>
- Moroni, S. (2021). Evolutionary approaches and planning: Dynamics of activities and dynamics of institutions. *Scienze Regionali*, 20(2), 267–288.
- Moroni, S., & Lorini, G. (2017). Graphic rules in planning: A critical exploration of normative drawings starting from zoning maps and form-based codes. *Planning Theory*, 16(3), 318–338. <https://doi.org/10.1177/1473095216656389>
- Moroni, S., & Lorini, G. (2020). Multiple functions of drawings. *Journal of Urban Design*, 26(3), 374–394. <https://doi.org/10.1080/13574809.2020.1801341>

- Preda, A. (2000). Order with things? Humans, artifacts, and the sociological problem of rule-following. *Journal for the Theory of Social Behaviour*, 30(3), 269–298. <https://doi.org/10.1111/1468-5914.00130>
- Rosenberger, R. (2014). Multistability and the agency of mundane artifacts: From speed bumps to subway benches. *Human Studies*, 37(3), 369–392–392. <https://doi.org/10.1007/s10746-014-9317-1>
- Rosenberger, R. (2017). *Callous objects: Designs against the homeless*. University of Minnesota Press.
- Rosenberger, R. (2020). On hostile design: Theoretical and empirical prospects. *Urban Studies*, 57(4), 883–893. <https://doi.org/10.1177/0042098019853778>
- Rosenberger, R. (2023). A classification scheme for hostile design. *Philosophy of the City Journal*, 1(1), 49–70. <https://doi.org/10.21827/potcj.1.1.40323>
- Scarpelli, U. (1959). *Contributo alla semantica del linguaggio normativo*. Giuffrè.
- Searle, J. R. (1964). How to derive ‘ought’ from ‘is’. *Philosophical Review*, 73(1), 43–58. <https://doi.org/10.2307/2183201>
- Searle, J. R. (1965). What is a speech act? In M. Black (Ed.), *Philosophy in America* (pp. 221–239). Cornell University Press.
- Searle, J. R. (1969). *Speech acts: An essay in the philosophy of language*. Cambridge University Press.
- Searle, J. R. (1979). *Expression and meaning: Studies in the theory of speech acts*. Cambridge University Press.
- Searle, J. R. (1983). *Intentionality: An essay in the philosophy of mind*. Cambridge University Press.
- Searle, J. R. (1984). Intentionality and its place in nature. *Synthese*, 61(1), 3–16. <https://doi.org/10.1007/bf00485486>
- Searle, J. R. (1989). How performatives work. *Linguistics and Philosophy*, 12(5), 535–558. <https://doi.org/10.1007/bf00627773>
- Searle, J. R. (1995). *The construction of social reality*. Allen Lane.
- Searle, J. R. (2010). *Making the social world. The structure of human civilization*. Oxford University Press.
- Searle, J. R. (2018). Constitutive rules. *Argumenta*, 4(1), 51–54.
- Sharadin, N., & Van Someren Greve, R. (2021). Is deontic evaluation capable of doing what it is for? *Journal of Ethics and Social Philosophy*, 19(3), 203–229. <https://doi.org/10.26556/jesp.v19i3.843>
- Slade-Caffarel, Y. (2022). Rights and obligations in Cambridge social ontology. *Journal for the Theory of Social Behaviour*, 52(2), 392–410. <https://doi.org/10.1111/jtsb.12332>
- Stevanovic, M. (2018). Social deontics: A nano-level approach to human power play. *Journal for the Theory of Social Behaviour*, 48(3), 369–389. <https://doi.org/10.1111/jtsb.12175>
- Taylor, S. (2020). The socially distant servicescape: An investigation of consumer preferences during the re-opening phase. *International Journal of Hospitality Management*, 91, 5–9. <https://doi.org/10.1016/j.ijhm.2020.102692>
- von Wright, G. H. (1963). *Norm and action*. Routledge & Kegan Paul.
- Weinberger, O. (1970). Die Norm als Gedanke und Realität. *Osterreichische Zeitschrift für öffentliches Recht*, 20, 203–216.
- Wolf, M. P. (2002). A grasshopper walks into a bar: The role of humour in normativity. *Journal for the Theory of Social Behaviour*, 32(3), 330–343. <https://doi.org/10.1111/1468-5914.00190>
- Żelaniec, W. (2013). *Create to rule: Studies on constitutive rules*. LED.
- Zhang, C., Qin, S., Yu, H., Zheng, B., & Li, Z. (2020). A review on chicane design based on calming theory. *Journal of Engineering Science and Technology Review*, 13(4), 188–197. <https://doi.org/10.25103/jestr.134.18>
- Znamierowski, Cz. (1924). *Podstawowe pojęcia teorii prawa. Część pierwsza: Układ prawny i norma prawna*. Poznań: Fiszer i Majewski.

How to cite this article: Lorini, G., & Moroni, S. (2024). Rules without regulation and regulation without rules. *Journal for the Theory of Social Behaviour*, 54(2), 216–228. <https://doi.org/10.1111/jtsb.12417>