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The Thrusts and Parries of Policy Arguments

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April 2025

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This Article has benefited from many helpful discussions and comments from Holger Spamann, to whom I am especially grateful. For other discussions and comments I am also grateful to Ryan Doerfler, Jared Ellias, Lisa Fairfax, Jill Fisch, Elisabeth de Fontenay, Win Gustin, Kobi Kastiel, Aneil Kovvali, Dorothy Lund, Amelia Miazad, Geeyoung Min, Mariana Pargendler, Alex Platt, Elizabeth Pollman, Adriana Robertson, Michael Simkovic, Roberto Tallarita, Robert Thompson, Andrew Tuch, Tess Wilkerson-Ryan, David Walker, David Webber, and participants in the Institute for Law & Economics Junior Faculty Workshop, the BYU Winter Deals Workshop, the Boston University Faculty Workshop, and the USC Corporate and Commercial Law Seminar. I owe special thanks to the editors of this volume of the Michigan State Law Review for their assistance with the preparation and publication of this Article.

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Abstract

Anyone who has ever put forward a policy proposal has heard the response, “if it ain’t broke, don’t fix it.” But despite the ubiquity of this attack on policy proposals, there has been little sustained inquiry into how the attack works and how it can be defended. The goal of this Article is to identify policy attacks like this, and to show their underlying logical structure, and how they function to attack policy proposals. The Article demonstrates this approach by considering three generic attacks on policy proposals, which I refer to as ain’t broke attacks, partial framing attacks, and dollar in the street attacks. But these are just three particular ways that policy proposals can be attacked. To capture a broader set of policy attacks, the Article puts forward a general model of policy proposals, and the premises that they rely on. Since all policy proposals rely on these premises, all policy proposals can be undermined by rebutting these premises. The Article demonstrates the application of these attacks on three particular kinds of policy proposals: cost-benefit policy proposals, proposals for mandatory arrangements, and, what I refer to as Goldilocks proposals. By showing the thrusts and parries by which policy arguments can be attacked and defended, the Article aims to improve policy arguments. Modeling the structure of policy arguments abstracted from their particular contexts allows us to analyze them more deeply, and to amplify the benefits of that analysis for a broader set of applications. Identifying and labeling potential attacks on policy proposals facilitates responses to those proposals by others, and also allows authors to better defend against such attacks. Better policy arguments, both for and against, mean better policy debates, and therefore, better policy.

Keywords: policy, regulation, argumentation

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ABSTRACT

Anyone who has ever put forward a policy proposal has heard the response, "if it ain't broke, don't fix it." But despite the ubiquity of this attack on policy proposals, there has been little sustained inquiry into how the attack works and how it can be defended. The goal of this Article is to identify policy attacks like this, and to show their underlying logical structure, and how they function to attack policy proposals. The Article demonstrates this approach by considering three generic attacks on policy proposals, which I refer to as ain't broke attacks*,* partial framing attacks*, and* dollar in the street attacks*. But these are just three particular ways that policy proposals can be attacked. To capture a broader set of policy attacks, the Article puts forward a general model of policy proposals, and the premises that they rely on. Since all policy proposals rely on these premises, all policy proposals can be undermined by rebutting these premises. The Article demonstrates the application of these attacks on three particular kinds of policy proposals:* cost-benefit policy proposals*,* proposals for mandatory arrangements*, and, what I refer to as* Goldilocks proposals*.*

By showing the thrusts and parries by which policy arguments can be attacked and defended, the Article aims to improve policy arguments. Modeling the structure of policy arguments abstracted from their particular contexts allows us to analyze them more deeply, and to amplify the benefits of that analysis for a broader set of applications. Identifying and labeling potential attacks on policy proposals facilitates responses to those proposals by others, and also allows authors to better defend against such attacks. Better policy arguments, both for and against, mean better policy debates, and therefore, better policy.

[*] Associate Professor, Boston University School of Law; ECGI Research Member. This Article has benefited from many helpful discussions and comments from Holger Spamann, to whom I am especially grateful. For other discussions and comments I am also grateful to Ryan Doerfler, Jared Ellias, Lisa Fairfax, Jill Fisch, Elisabeth de Fontenay, Win Gustin, Kobi Kastiel, Aneil Kovvali, Dorothy Lund, Amelia Miazad, Geeyoung Min, Mariana Pargendler, Alex Platt, Elizabeth Pollman, Adriana Robertson, Michael Simkovic, Roberto Tallarita, Robert Thompson, Andrew Tuch, Tess Wilkerson-Ryan, David Walker, David Webber, and participants in the Institute for Law & Economics Junior Faculty Workshop, the BYU Winter Deals Workshop, the Boston University Faculty Workshop, and the USC Corporate and Commercial Law Seminar. I owe special thanks to the editors of this volume of the Michigan State Law Review for their assistance with the preparation and publication of this Article.

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"You are using Bonetti's defense against me, ah?"
"I thought it fitting, considering the rocky terrain—"
"Naturally, you must expect me to attack with Capo Ferro—"
"Naturally—but I find Thibault cancels out Capo Ferro, don't you?"
"Unless the enemy has studied his Agrippa—which I have!"
—*The Princess Bride*[1]

INTRODUCTION

Over the last few years, I have proposed a number of policy changes, some that I argue should be adopted by the Securities and Exchange Commission (SEC) and others by investment managers.[2] They have varied in important ways, but each was consistently met with the same handful of objections:

"The system works fine; we shouldn't mess with it."
"If investment managers wanted to do that, they would have done it already."
"That wouldn't have any effect; companies will adjust so the outcome is the same as before."

These kinds of objections are no doubt very familiar to those of us who make policy proposals—most of us have heard versions of these attacks on our work, and many of us have also used these kinds of attacks to respond to policy proposals by others. The aim of this Article is to think systematically about these thrusts and parries of policy arguments—to explain the logical structure of policy proposals, and how they can be attacked and defended.[3] By doing so, the Article hopes to improve individual policy arguments, and thereby also improve policy debates.

The first part of the Article demonstrates this approach by analyzing the structure of the three generic attacks mentioned above, which I label *ain't broke attacks*, *dollar in the street attacks*, and *partial framing attacks*. Understanding the premises on which these attacks depend also shows how they can be parried. But these are just three particular attacks out of many different kinds that can be used against policy proposals. The second part of the Article broadens this approach by considering the logical structure of *all* policy proposals and the premises that all policy proposals depend on. Because all policy proposals rely on these premises, the general model of policy proposals therefore provides

[1] THE PRINCESS BRIDE (20th Century Fox 1987).

[2] *See, e.g.*, Scott Hirst, *The Case for Investor Ordering*, 8 HARV. BUS. L. REV. 227 (2018) (proposing that the SEC adopt "investor-ordered" rules for corporations instead of mandatory rules); Scott Hirst, *Saving Climate Disclosure*, 28 STAN. J.L. BUS. & FIN. 91 (2023) (proposing that the SEC make its climate disclosure rule "investor-optional" for corporations rather than mandatory); Scott Hirst, *Social Responsibility Resolutions*, 43 J. CORP. L. 217 (2018) (proposing that investment managers vote in ways that reflect the preferences of their investors); Scott Hirst, *Initiation Payments*, 48 J. CORP. L. 719 (2023) (proposing that investment managers support payments to investors that initiate corporate changes).

[3] This Article borrows the metaphor of thrusts and parries from Karl Lewellyn's canons of construction. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950). The Appendix of this Article sets out proposals, attacks, and defenses in a condensed format similar to the appendix of Lewellyn's famous article.

a menu of general forms of attack that can be used to attack any policy proposal.[4] These include arguments that the proposal is not practical or possible, that there is a better alternative, and that the proposed action would have side effects that would make it undesirable. The third part of the Article shows how these attacks apply to three common and important policy proposals—*cost-benefit claims*, *mandatory arrangement claims*, and claims that action should be taken to increase (or decrease) the level of a particular phenomenon, which I refer to as *Goldilocks claims*.[5]

The ultimate goal of this Article is to make policy arguments better. By this I mean both individual policy arguments, but also combinations of those arguments in policy debates. Making policy debates better has the obvious payoff of improving policy outcomes. But policy proposals—normative claims about what the law *should* do—are also central to legal scholarship.[6] And yet, we spend little time thinking about the analytical nature of how we make these claims. Doing so has the potential to improve the rigor and quality of our policy arguments, and thus of legal scholarship, in two ways.[7]

First, modeling the structure of policy proposals and policy attacks has the potential to improve *individual* policy arguments. Policy proposals by stakeholders, policymakers, and academics are often opaque and difficult to parse.[8] They are typically presented in discursive language where premises are unlabeled and often implied rather than articulated—whether inadvertently, for brevity, or possibly to obscure the weaknesses of the argument.[9] This opacity makes it challenging to parse the structure of those arguments, and therefore, to determine how they can be attacked. Modeling the structure of policy arguments overcomes these challenges in three ways. First, the models provide a framework for recognizing and parsing arguments. They function like a cognitive schema to facilitate the identification of types of arguments, and the recognition of the explicit and implicit premises of those arguments.[10] Understanding these premises makes it easier to assess them—and to identify their weaknesses.[11] Second, breaking down claims into their constituent parts enables more effective evaluation of arguments, thereby allowing readers

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[4] These attacks differ from the four generic attacks examined in Part I not in their breadth of application—both sets apply to effectively all policy claims—but rather in their specificity. The general attacks discussed in Part II can function as the building blocks for more particular attacks, including the particular generic attacks described in Part I. Of course, particular policy claims will rely on additional premises in addition to the ones in the general model, permitting additional specific attacks, so the menu of attacks is not exhaustive.

[5] The attacks described in Part III differ from those in Part I and Part II in that they are attacks on particular types of policy claims and do not apply to all policy claims, as do those in Part I and Part II.

[6] *See, e.g.*, Robin West, *The Ethics of Normative Legal Scholarship*, 101 MARQ. L. REV. 981, 984 (2018) ("What most mainstream legal writing may, and typically does, suggest is that 'while the law of some subject is widely viewed as x, . . . it really *should* be y.' This is true now, of most academic legal writing, and it has been true for the last century's worth of the genre."); Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1847–53 (1988) (discussing "[l]egal scholarship as prescriptive and normative discourse").

[7] *See generally infra* Part IV (explaining how policy arguments can be improved by the application of the models in this Article and how improving policy arguments would lead to better policy debates).

[8] *See* Georg Brun & Gregor Betz, *Analysing Practical Argumentation*, *in* THE ARGUMENTATIVE TURN IN POLICY ANALYSIS: REASONING ABOUT UNCERTAINTY 39 (Sven Ove Hansson & Gertrude Hirsch Hadorn eds., 2016) (describing the shortcomings of typical policy arguments).

[9] Arguments with missing premises have classically been referred to as *enthymemes*. For a discussion of enthymemes, see, generally, D. Walton & C.A. Reed, *Argumentation Schemes and Enthymemes*, 145 SYNTHESE 339 (2005).

[10] *See infra* Section IV.A. (relating schemas of arguments to the well-developed literature on schema theory).

[11] *See infra* Section IV.A.

to assess the strength of individual premises and inferential steps. Compared to prose descriptions, this approach simplifies and clarifies the specification of the models proposed in this Article, and allows the premises and their structure to be grasped more quickly and effectively, and with less ambiguity.[12] Third, the models presented in this Article offer a checklist of ready-made structures for attacking different types of policy proposals, from generic attacks that apply broadly to all policy proposals, to specific attacks for important classes of policy proposals.[13] Such a checklist not only facilitates attacks on policy proposals, but also enables authors of policy proposals to strengthen their arguments in anticipation of such attacks.[14] This may involve revising their claims to avoid the potential attacks, or defending their claims "proleptically," that is, addressing anticipated attacks before they are raised.[15]

Modeling the thrusts and parries of policy arguments also has the potential to improve policy debates, thereby improving policy. A policy debate is only as good as the individual arguments that make it up.[16] Better individual arguments thus mean better policy debates. More thorough and incisive individual attacks help identify weaknesses in policy proposals, and therefore encourage policy proponents to develop stronger proposals.[17] There are two additional ways that the approach put forward in this Article could improve policy debates. One way is by preempting certain attacks altogether. Proposals that anticipate potential attacks, and that armor their claims against such attacks by providing proleptic responses, make policy debates more efficient, as they mean eliminate the need for readers to request those responses.[18]

A second way that this Article can help improve policy debates is by offering a common vocabulary to label policy proposals and attacks. Using such labels to describe the concepts in these models could streamline policy discussions and reduce the need for extensive exposition, allowing debates to focus more quickly on substantive issues. Consider the apocryphal tale of the new prisoner in a jail, sitting around with fellow inmates when they begin to tell jokes.[19] One of them yells out "Number twenty–one," and the other prisoners break out in laughter.[20] Another shouts "Number forty–five," and again everyone laughs heartily.[21] Curious, the new prisoner asks a fellow inmate what's going on. "We've been here so long that we don't need to hear the full joke. Just hearing the number reminds us of the joke and cracks us up."[22] Frequent presenters of policy proposals will recognize

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[12] *See infra* Section IV.A.

[13] *See infra* Appendix (providing various policy argument in forms that can be applied checklists).

[14] *See infra* Sections IV.A–B (advocating the use of policy models as checklists to strengthen policy proposal arguments).

[15] I borrow this term from Douglas Walton, who used it to refer to "the anticipation and answering of an objection or opposed argument before one's opponent has actually put it forward." Douglas Walton, *Proleptic Argumentation*, 44 ARGUMENTATION & ADVOC. 143, 143 (2008).

[16] *See infra* Section IV.B. (arguing that the use of checklists will improve policy debate).

[17] *See infra* Section IV.A. (discussing the formulation of better policy proposals due to more incisive attacks).

[18] *See infra* Section IV.A. (discussing the reduction of weak arguments in policy proposals).

[19] The version presented here is taken from JOEL SHERZER, SPEECH PLAY AND VERBAL ART 50–51 (2002), with slight modifications.

[20] *See id.*

[21] *See id.*

[22] *Id.* The point of the tale is to set up a punch line; in Sherzer's version, "the new prisoner figures he'll tell one too. He yells out, 'Number nine.' But no one laughs; he is met by stony silence. He asks the others, 'What

the analogy to academic workshops. We use the same attacks and defenses again and again, though unlike the prisoners, we have yet to recognize this, let alone develop and apply labels in policy discourse. To be clear, I am not advocating a rote recitation of labels as in the setup of the joke. Instead, I argue for greater identification and labeling of arguments and assumptions in policy debates. This is akin to the use of labels in diverse areas of discourse, such as canons of statutory interpretation,[23] or the "instrumental variables" approach in econometrics, with its "exclusion restrictions."[24] In both of those cases, labels mean that approaches are clearly recognizable, and that those using the approaches and those responding to them, can argue explicitly about whether they are appropriate and whether their assumptions are met.[25] Those familiar with the labels and their underlying analysis can use labels in debates to shortcut considerable exegesis about the claims, the attacks, and how they can be rebutted. This would streamline attacks and defenses and allow the debate to proceed more efficiently and effectively.[26]

This Article contributes to three bodies of literature. The most general of these are works that analyze the structure of arguments in various areas of law. A prominent example is the work of Phillip Bobbitt and the extensive literature that has followed, which can be understood as an investigation of a set of common (non-policy) moves in constitutional law.[27] Other work in this area includes the work of Eric Posner and Adrian Vermeule analyzing what could be considered a particular policy move in constitutional law theory.[28] Despite the thematic similarities, however, the application of argumentation theory in this Article goes further, by precisely articulating premises and argument structures. This approach thus allows for the identification of instances of policy attacks, and the generation of responses to them.

This Article also contributes to literature that applies formal and informal models of argumentation to the law. This is part of a broader literature on law and logic.[29] However, it is more specific, in applying insights developed in the growing literature on the nature

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happened? I thought all you had to do was call out a number.' To which they respond, 'Some people know how to tell a joke and some people don't.'" *Id.* at 50–51.

[23] *See, e.g.*, Llewellyn, *supra* note 3, at 401–06.

[24] *See* Joshua D. Angrist et al., *Identification of Causal Effects Using Instrumental Variables*, 91 J. AM. STAT. ASS'N 444, 447 (1996) (explaining the "exclusion restriction" as an assumption that "captures the notion underlying instrumental variables procedures that any effect of *Z* [the instrumental variable] on *Y* [the outcome] must be via an effect of *Z* [the instrumental variable] on *D* [the treatment]").

[25] Similarly, this Article would allow a workshop presenter, faced with an argument that the system they propose changing is working just fine, to be able to say something like, "I see you're using an 'ain't broke' attack; you're thus assuming two things. Let me respond by questioning your 'ain't broke' premise and your burden-shifting move and asserting the benefits of policy change even in a satisfactory status quo."

[26] Those who are not familiar with these terms or analyses will have an incentive to become familiar with them or risk being at a competitive disadvantage to those who are.

[27] For the foundational work in this literature, see, generally, PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982). For two recent examples in the extensive literature that has followed, see Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389 (2013); Colin Starger, *Constitutional Law and Rhetoric*, 18 J. CONST. L. 1347 (2016). I am grateful to Aneil Kovvali for suggesting this analogy.

[28] *See generally* Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743 (2013). I am grateful to Ryan Doerfler for suggesting this analogy.

[29] Leading contributors to this literature have included Scott Brewer, Henry Prakken, Kevin Ashley, Giovanni Sartor, and Trevor Bench-Capon, among others. For a survey of the application of argumentation and logic to legal reasoning, see TREVOR BENCH-CAPON ET AL., *Argumentation in Legal Reasoning*, *in* ARGUMENTATION IN ARTIFICIAL INTELLIGENCE (2009).

of arguments and informal logic, including the work on argumentation schemes developed by Douglas Walton and others.[30] These subjects have received surprisingly little attention in law reviews;[31] what little attention they have received has largely been focused on legal evidence and judicial proceedings.[32] The application of argumentation theory in this Article instead focus on policy, applying an important stream of the argumentation literature that considers practical reasoning.[33]

The third, and most specific, body of literature that this Article builds on and contributes to is a small set of earlier articles that consider the structures of arguments in policy debates.[34] However, this Article operates at a different level of generality from previous works, by focusing on the set of arguments that can be used for policy proposals.[35] This approach aims to be both systematic and general, but also concrete and practical, in order to develop a comprehensive set of models for common policy proposals and attacks. All of these are readily applicable by legal scholars, practitioners, and other analysts of policy debates.

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[30] The general field of argumentation has many different groups of participants. Of these, this Article follows most closely Douglas Walton's work on presumptive reasoning and argumentation schemes. For an early and important work in this literature, see, generally, WALTON, *supra* note **Error! Bookmark not defined.**. Another important view of argumentation is the pragma-dialectics approach. *See, e.g.*, FRANS H. VAN EEMEREN ET AL., *The Pragma-Dialectical Theory of Argumentation*, *in* HANDBOOK OF ARGUMENTATION THEORY 517, 517–601 (2014).

[31] Notable exceptions are a handful of articles by Douglas Walton, Bryan Larson, and Vern Walker. *See* Douglas Walton, *Argumentation Schemes: The Basis of Conditional Relevance*, 2003 MICH. ST. DCL L. REV. 1205 (2003)*;* Douglas Walton, *Defining Conditional Relevance Using Linked Arguments and Argumentation Schemes: A Commentary on Professor Callen's Article:* Rationality and Relevancy: Conditional Relevancy and Constrained Resources, 2003 MICH. ST. DCL L. REV. 1305 (2003)*;* Douglas N. Walton, *Pragmatic Model of Legal Disputation Symposium*, 73 NOTRE DAME L. REV. 711 (1998); Brian N. Larson, *Law's Enterprise: Argumentation Schemes & Legal Analogy*, 87 U. CIN. L. REV. 663, 697–719 (2019); Brian N. Larson, *Precedent as Rational Persuasion*, 25 LEGAL WRITING: J. LEGAL WRITING INST. 135 (2021); Brian N. Larson, *The Dialogical Roots of Deduction: Historical, Cognitive, and Philosophical Perspectives on Reasoning*, 26 LEGAL WRITING: J. LEGAL WRITING INST. 227 (2022); Vern R. Walker, *A Default-Logic Paradigm for Legal Fact–Finding*, 47 JURIMETRICS 193 (2007); Vern R. Walker, *Discovering the Logic of Legal Reasoning Idea*, 35 HOFSTRA L. REV. 1687 (2007).

[32] *See supra* note 31.

[33] *See, e.g.*, DOUGLAS N. WALTON, PRACTICAL REASONING: GOAL-DRIVEN, KNOWLEDGE-BASED, ACTION-GUIDING ARGUMENTATION (1990); Katie Atkinson & Trevor Bench-Capon, *Practical Reasoning as Presumptive Argumentation Using Action Based Alternating Transition Systems*, 171 A.I. 855 (2007); Douglas Walton, *Evaluating Practical Reasoning*, 157 SYNTHESE 197 (2007); Fabrizio Macagno & Douglas Walton, *Practical Reasoning Arguments: A Modular Approach*, 32 ARGUMENTATION 519 (2018).

[34] The clearest precursors to this Article's analysis are an article by Henry Prakken demonstrating the application of argumentation schemes to a particular policy debate in the Netherlands and an article by Georg Brun & Gregor Betz analyzing practical argumentation in policy debate. *See generally* Henry Prakken, *Formalising Debates About Law-Making Proposals as Practical Reasoning*, *in* LOGIC IN THE THEORY AND PRACTICE OF LAWMAKING 301 (Michał Araszkiewicz & Krzysztof Płeszka eds., 2015); Brun & Betz, *supra* note 8. Other work regarding argumentation in policy includes Trevor Bench-Capon & Henry Prakken, *A Lightweight Formal Model of Two-Phase Democratic Deliberation*, LEGAL KNOWLEDGE & INFO. SYS. 27 (2010); Trevor Bench-Capon et al., *Using Argumentation to Structure E-Participation in Policy Making*, *in* TRANSACTIONS ON LARGE-SCALE DATA- AND KNOWLEDGE-CENTERED SYSTEMS XVIII: SPECIAL ISSUE ON DATABASE- AND EXPERT-SYSTEMS APPLICATIONS 1 (Abdelkader Hameurlain et al. eds., Springer 2015).

[35] In contrast, Professor Prakken focuses on modeling a single, specific policy argument made by a single person, and Professors Brun and Betz focus on the philosophical foundations of practical reasoning in the policy context in general. The focus on policy arguments in this Article is also more concrete—and less general—than that applied by Douglas Walton and others in their development of argumentation schemes. *See, e.g.*, DOUGLAS WALTON, GOAL-BASED REASONING FOR ARGUMENTATION (2015) (analyzing all goal-based arguments); DOUGLAS WALTON ET AL., ARGUMENTATION SCHEMES 308–46 (2008) (compiling a compendium of sixty-five different types of argument schemes).

The Article is structured as follows. Part I introduces three common types of generic policy attacks, which can be used to attack almost all policy proposals, whatever their subject matter. They apply generically because the essential nature of policy proposals is circumscribed by the logic of policymaking. Part II develops a general theory of policy proposals and, from it, the general categories of ways they may be attacked. It makes the claim that essentially all policy attacks fall into these categories.[36] It therefore provides a comprehensive general set of policy attacks—and ways of defending against them. Part III goes from general to specific. It considers three important types of policy proposals—*cost-benefit claims*, *mandatory arrangement and private ordering claims*, and *Goldilocks claims*—and shows how each can be attacked and defended using both the general theory of policy attacks and features specific to those types of claims. Part IV argues that we can, and should, use and develop the analysis and approach proposed in this Article to improve policy arguments. The Appendix provides a concise playbook of the policy proposals, attacks, and defenses described in the Article.

I. GENERIC POLICY ATTACKS

Those of us who make policy proposals in our writing hear the same responses again and again.[37] Those of us who read and respond to policy proposals often make many of these attacks ourselves.[38] Three attacks are close to universal, applying to nearly all policy proposals: *ain't broke attacks*, *partial framing attacks*, and *dollar in the street attacks*.[39] These attacks are close to universal because they respond to a circumscribed set of features that are inherent in the systems that the policies aim to improve, or in the nature of policy proposals themselves.[40] The near-universality of these attacks, and the corresponding frequency with which they occur, means that there is an obvious payoff to analyzing their structure.

A. Ain't Broke Attacks

In 2020, the SEC made broad changes to how proxy rules apply to proxy advisors like ISS and Glass, Lewis & Co.[41] Commissioner Allison Herren Lee, who voted against adopting the rules, explained:

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[36] In this way it differs from the description of generic attacks in Part I, which are merely three examples of general attacks, and not a comprehensive set.

[37] By "policy claims," I refer, especially, to claims about what policymakers should do. Here, policymakers would obviously include regulators and legislators but could also include courts. However, I also include claims directed not to a policymaker but to a set of private actors—individuals or organizations—urging them to take private action.

[38] Many scholarly contributions may be nominally addressed to a policymaker, but may actually be intended to influence or inform other participants in the debate, notably other scholars (perhaps because of the difficulty or unlikelihood of actually having the influence that they hope to).

[39] In Section II.C, I consider a fourth type of generic policy attack, of which dollar in the street attacks can be considered a subset: incentive incompatibility attacks.

[40] For each of the generic policy claims in this Part, I describe the conditions in which they apply, which also makes clear the edge cases in which they *do not* apply.

[41] Exemptions from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55082, 55082–185 (Sept. 3, 2020) (codified in scattered sections of 17 C.F.R. pt. 240).

> The final rules will still add significant complexity and cost into a system that just isn't broken, as we still have not produced any objective evidence of a problem with proxy advisory firms' voting recommendations.[42]

This is a version of what is perhaps the broadest and most common attack on policy proposals, reflecting the folk wisdom, "if it ain't broke, don't fix it." This attack suggests that the status quo policy is working satisfactorily and thus should not be changed. This Section first considers the simple and straightforward version of this attack used by Commissioner Lee, and then discusses a more sophisticated version that also incorporates a "burden-shifting" move.

Commissioner Lee's claim is that the SEC should not take a certain action, the adoption of the final rules. This is an attack on the policy proposal of the SEC commissioners approving the rule, that the SEC *should* place certain restrictions on the activities of proxy advisors.[43] Both the commissioners' proposal and Commissioner Lee's attack are arguments consisting of a set of propositions, including a number of premises that support the claim (or conclusion) of the argument. In this case, the ain't broke attack can be understood as being supported by two premises: that the status quo is satisfactory, and that policymakers should not take actions when the status quo that the action would change is satisfactory. The premises lead to the claim or conclusion through an inference rule—in this case, defeasible modus ponens.[44] As opposed to convergent premises, in which only one of multiple premises need be true in order to lead to the inference that the conclusion is true, here the two premises are linked premises, all of which must be true in order to lead to the inference that the conclusion is true.[45] Arguments are *defeasible* claims—they can be defeated by a successful attack, such as by adding another premise that combines with the existing premises so that the conclusion becomes different.[46] For example, if there were a substantial cost that the SEC had not included in its analysis, incorporating it could change the SEC's conclusion that the rule should be adopted.[47] Figure 1 illustrates the ain't broke attack, together with a key explaining the visual vocabulary used in this and subsequent figures.[48]

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[42] Allison Herren Lee, Comm'r, SEC, Paying More for Less: Higher Costs for Shareholders, Less Accountability for Management (July 22, 2020), https://www.sec.gov/newsroom/speeches-statements/lee-open-meeting-2020-07-22 [https://perma.cc/K9PR-LN8Z].

[43] For a more detailed discussion of what I mean by the term "policy claim," see *infra* Part II.

[44] If there are two premises, "A" and "If A, then B," and both are true, defeasible modus ponens infers that "B" is true. For a discussion of the defeasible modus ponens structure of argument, see WALTON ET AL., *supra* note 35, at 364–67.

[45] For a succinct summary of structures such as convergent premises and linked premises, see John Lawrence & Chris Reed, *Argument Mining: A Survey*, 45 COMPUTATIONAL LINGUISTICS 765, 777 (2019).

[46] This is also known as non-monotonic reasoning. *See* Douglas Walton, *Reasoning About Knowledge Using Defeasible Logic*, 2 ARGUMENT & COMPUTATION 131, 143 (2011) (describing defeasible logic as "a rule-based non-monotonic formal system that models reasoning used to derive plausible conclusions from partial and sometimes conflicting information." (internal citation omitted)).

[47] In this way, arguments differ from deductive logic, which is monotonic—a given set of premises leads inexorably to the conclusion, regardless of what additional premises are added.

[48] The visual vocabulary I use is known as the "standard approach" in the argumentation literature, in contrast to diagram forms used by Stephen Toulmin and others. *See* JAMES B. FREEMAN, ARGUMENT STRUCTURE: REPRESENTATION AND THEORY 3 (2011) (describing "the standard approach" as "the system of representing argument macrostructure by diagrams where the component statements of an argument are represented primarily by encircled numbers, and logical support is represented by arrows."). The notational conventions I

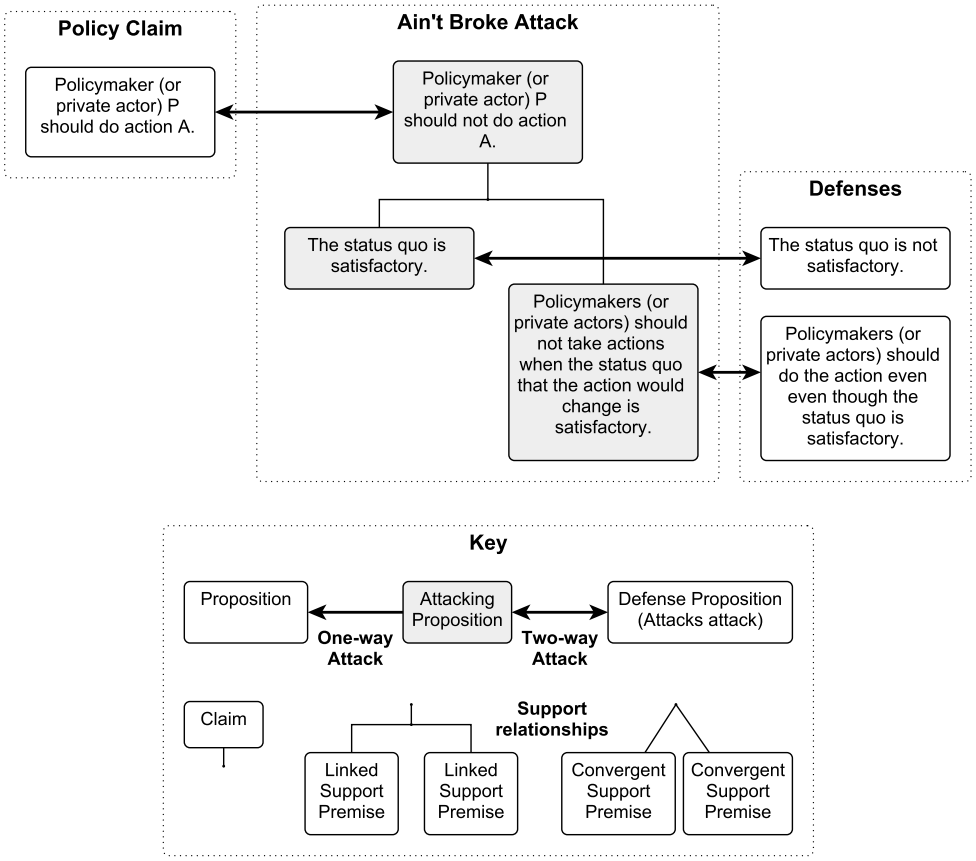

Figure 1. Ain't Broke Attacks, and Defenses

The main claims—the policy proposal "Policymaker P should do action A" and the policy attack "Policymaker P should not do action A"—are located at the top of the diagram, with their supporting premises below them. Premises that are part of the policy proposal are shown with a white background, and those that are part of the policy attack are shown with a light grey background. Where premises are implicit rather than articulated (such as in Section II.B), the implicit premises are shown with a dashed border.

Support relationships between a claim and its supporting premises (such as between the attack "Policymaker P should not do action A" and its two supporting premises) are connected with solid lines. That those two premises are linked premises (which must both be satisfied to support the claim) is shown by the split of the support line

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use are based on those used by Henry Prakken. *See* Henry Prakken, *An Argumentation-Based Analysis of the Simonshaven Case*, 12 TOPICS COGNITIVE SCI. 1068, 1077 (2020) (describing the notational conventions used in that article). These introduce attack relationships but are otherwise similar to versions used by Douglas Walton and Chris Reed in the argument visualization tool known as Araucaria, which includes the full proposition in the nodes, and moves from unsupported premises at the bottom of the diagram to the claim or conclusion at the top. *See* Douglas Walton & Chris Reed, *Diagramming, Argumentation Schemes and Critical Questions*, *in* ANYONE WHO HAS A VIEW: THEORETICAL CONTRIBUTIONS TO THE STUDY OF ARGUMENTATION 195, 205–08 (Frans H. Van Eemeren et al. eds. 2003) (demonstrating the use of Araucaria to generate argument diagrams).

into two or more lines (where convergent premises appear, they are shown by separate lines to the supported proposition).

Attack relationships are shown with bold line segments, such as those between the policy proposal "Policymaker P should do action A" and the policy attack "Policymaker P should not do action A," and also between the supporting premises of the claim and the supporting premises of the attack. The proposition being attacked is shown with an arrowhead; where both sides of the line segment end in an arrowhead each attacks the other. A defense of a claim is simply an attack on an attack on that claim, such as the two premises on the right of Figure 1. Defenses are shown with white backgrounds.

Figure 1 shows two types of attacks. The attack on the policy proposal that "Policymaker P should do action A" by the claim that "Policymaker P should not do action A" is a direct or "rebutting" attack, which operates by negating the conclusion of the claim. The two defense premises on the right are "undermining" attacks on the claim that "Policymaker P should not do action A" because they attack premises supporting that claim, rather than the claim itself.[49] Because the two premises supporting the claim that "Policymaker P should not do action A" are linked premises and must both hold for the attack to succeed, the claim can be defeated by rebutting either premise. Whether an attack "defeats" the initial claim or is defeated by the counterattack depends on the premises given to support the initial claim, the attack, and the defense.[50]

Let us first consider the second premise of the attack, that the status quo is satisfactory. Any policy proposal includes, explicitly or implicitly, an explanation of why the author believes the status quo is *not* satisfactory (in a way that the policy intervention would improve upon). The second premise attacks this premise, suggesting that the status quo *is* satisfactory. This may be a reasoned explanation for why the problems complained of by the proponent do not apply. Or it may be a simple assertion that the system is functioning effectively.

One way for the proponent to rebut the ain't broke attack is to argue that the status quo is not, in fact, satisfactory (even if it *seems* satisfactory). Such an "unsatisfactoriness" defense may involve reaffirming their initial supporting arguments explaining the problems with the status quo. If the attacker has provided reasons why they claim this is not the case, the rebuttal would require addressing these to show that they are incorrect or do not apply.

A critical definitional question is what it means for the status quo to be "broken"—that is, what level of problems is required to make the status quo no longer satisfactory? This will be open for debate. It is also possible that the question is sufficiently vague to allow the attacker to keep insisting that it has not been satisfied.

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[49] *See, e.g.*, Henry Prakken, *Logics of Argumentation and the Law*, *in* LAW AND THE NEW LOGICS 23 (H. Patric Glenn & Lionel D. Smith eds., 2017) ("An argument *A undermines* an argument *B* if a conclusion of *A* contradicts a premise of *B*.").

[50] This Article's approach to modeling policy arguments can be understood as an instance of the ASPIC+ framework for structured argumentation with several modifications. For a description of ASPIC+, see, generally, Sanjay Modgil & Henry Prakken, *A General Account of Argumentation with Preferences*, 195 A.I. 361 (2013). For an application of the framework to a specific argument, see, generally, Prakken, *supra* note **Error! Bookmark not defined.**. The main modification of that approach in this Article is to expressly state general inference rules as premises. The inference rule from the premises to the conclusion is thus simply defeasible modus ponens. This Article does not specify how arguments can be defeated, so it is not a full instance of the ASPIC+ framework, which provides rules for defeats.

A second approach to defend the policy proposal is to reject the status quo bias in the first premise, that policymakers should not take actions when the status quo is satisfactory. That is, to argue that in certain circumstances a policymaker should change policies, even though the status quo is satisfactory (and that those circumstances apply in the given argument). This defense goes against the rhetorical appeal of the ain't broke attack, but it is nonetheless surprisingly straightforward, and it can be done in at least two ways.

First, even if a set of rules produces satisfactory results, another set of rules might produce *better* results.[51] And those results might still be better even after taking into account whatever costs may be involved in changing the rule. Of course, what "better" means will also be up for grabs. In Section II.C I argue that the appropriate way to think of what is "better" is in relation to the goals of the policymaker. A second and slightly different version of the anti-status-quo-bias defense is to argue that a status quo that seems satisfactory could lead to an unsatisfactory future.[52] If that is the case, forestalling an unsatisfactory future scenario may justify changes to a satisfactory status quo.

Let us now consider a more sophisticated version of the ain't broke attack. This version is also based on a premise that policymakers should not take action when the status quo is satisfactory, but it adds a "burden-shifting" move, shown in Figure 2.[53]

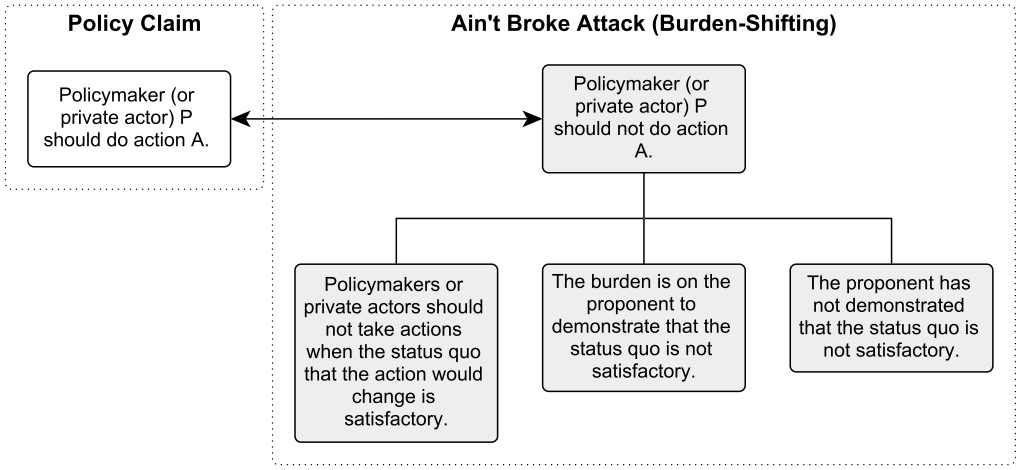

Figure 2. Burden-Shifting Ain't Broke Attacks

The burden-shifting move involves two additional premises: that the burden for showing that the status quo is not satisfactory is on the policy proponent, and that the

[51] The task of finding the best approach among several alternatives is similar to the challenge of abductive reasoning, of finding the best explanation. *See* DOUGLAS WALTON, GOAL-BASED REASONING FOR ARGUMENTATION, *supra* note 35, at 17 ("The problem with this kind of practical reasoning is similar to the problem of abductive reasoning as inference to the best explanation.").

[52] This differs in an important respect from the claim that a status quo that *seems* satisfactory is really unsatisfactory because it will necessarily lead to an unsatisfactory future. The difference is between *could lead* and *will lead*. To understand otherwise would be to argue that a status quo that has any chance of leading to an unsatisfactory future is, itself, unsatisfactory.

[53] For a book-length treatment of the role of the burden of proof in argumentation, see, generally, DOUGLAS WALTON, BURDEN OF PROOF, PRESUMPTION AND ARGUMENTATION (2014).

proponent has not satisfied the necessary standard to do so. These two premises thus replace the second premise supporting the ain't broke attack in Figure 1, that the status quo is satisfactory.

Burdens and standards of proof are longstanding and familiar topics for legal scholars.[54] However, we are mostly familiar with these from situations where caselaw or statutes allocate the burden, or define the required standard of proof.[55] In a policy debate there are no such definitive rules for determining who bears the burden of proof and what standard they must meet; these questions are also up for grabs, and the subject of claims and supporting premises of their own.[56]

Understanding the ain't broke attack in this way makes clear two other ways that *it* can be attacked, thus defending the original policy proposal. The first is by challenging the premise that the burden is on the proponent to demonstrate that the status quo is unsatisfactory. This is likely to be an uphill battle. The burden of showing that the policymaker should take an action is conventionally considered to fall on the proponent.[57] The presumed aim of contributions to the policy debate is to persuade the policymaker to take the desired action.[58] The nature of the debate has implications for who bears the burden of persuasion.[59] By convention, the person urging the act has the burden of showing why the policymaker should follow their suggested action.[60]

A different form of defense is to attack the premise that the opponent has not demonstrated that the status quo is satisfactory, by claiming that the proponent has indeed satisfied its burden. This means that the proponent of a policy proposal will have to make an argument that the status quo is not satisfactory. If they do not, an attacker can call them out for failing to do so, and insist that they either do so or withdraw their policy proposal. It may be harder for the proponent to support their policy proposal in this second stage, as not having done so may be taken as a signal of the weakness of the argument. Instead, if the proponent initially supported their claim with reasons why the status quo is unsatisfactory, the attacker must then show why those reasons are incorrect or insufficient, rather than simply asserting that the proponent has not met their burden.

This raises the question of the *standard* the proponent must meet to persuade the policymaker.[61] The premise that the proponent has not demonstrated that the status quo is not satisfactory is essentially a claim that they have not met some requisite standard to

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[54] For a discussion of burdens of proof in legal argumentation, see *id.* at 19–23.

[55] *See* Ulrike Hahn & Mike Oaksford, *The Burden of Proof and Its Role in Argumentation*, 21 ARGUMENTATION 39, 41 (arguing that "the burden of proof is used by both legislature and judiciary to favor certain substantive outcomes.").

[56] One potential justification for the burden-shifting ain't broke attack is that any potential change to a system requires special justification by the proponent because of the uncertainty of the effects of the changes, and the possibility that the results of the change might actually be worse than the original.

[57] WALTON, *supra* note 53, at 45 (discussing the burden placed upon the protagonist in asymmetrical dialogue).

[58] *See id.*

[59] *See id.* (discussing different burdens depending on the type of dialogue).

[60] *See id.* (summarizing the burden of proof as dependent on whether the debate is a symmetric "dispute" between two parties with opposing theses or an asymmetric proposal of a claim and "dissent" by the other party: "In the asymmetrical type of dialogue, the protagonist has to prove any statement that was challenged. That is his burden. In the symmetrical type of dialogue, the first one to fail to prove any statement that was challenged loses the dialogue. Both parties have the same burden.").

[61] For a discussion of the appropriate standards of proof in different dialogue types, see *id.* at 234–36.

demonstrate that. However, it is the policymaker who will ultimately decide whether their argument is sufficiently convincing.[62] The attacker is simply making an argument to attempt to persuade the policymaker that the proponent has not satisfied their burden. Usually such attacks elide a key part of the attack—the attacker generally does not actually specify what the standard should be. If the party to be persuaded is the regulator, it is likely to have its own (regulatory) rules regarding the appropriate standard.[63] The attacker may reference these expressly, or their attack may do so by implication. For instance, in order for rules that it adopts to be able to survive judicial review, the SEC must show that it has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[64]

B. Partial Framing Attacks

In 2011, law firm Wachtell, Lipton, Rosen & Katz[65] proposed that the SEC shorten its requirement that any person acquiring five percent or more of a public company disclose its position within ten days.[66] The disclosure requirement was initially implemented in 1968.[67] Wachtell Lipton argued that it was now obsolete, since improvements in technology had made it possible to report changes much more quickly,[68] and that the initial purpose of the rule—to alert investors in securities markets to potential changes in corporate control—was no longer being effectively served.[69]

In an attack on this policy proposal, Lucian Bebchuk and Robert Jackson argued that Wachtell Lipton's analysis was too narrowly focused on benefits of market transparency and the objectives of the original legislation.[70] They instead suggested an

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[62] Policymakers will also decide *how* they will decide. However, they may have obligations to decide in a certain way based on the regulatory framework that applies to their activities.

[63] *See, e.g.*, Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (providing the regulatory standard a regulatory agency must meet to adopt change).

[64] *See id* (internal quotation marks omitted).; *see als*o Bus. Roundtable v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (indicating that the court would use that passage to determine whether the SEC had violated the Administrative Procedure Act).

[65] Henceforth, "Wachtell Lipton."

[66] *See* Petition for Rulemaking Under Section 13 of the Securities Exchange Act of 1934 from Wachtell, Lipton, Rosen & Katz to Elizabeth M. Murphy, Sec'y, SEC, (Mar. 7, 2011), https://www.sec.gov/files/rules/petitions/2011/petn4-624.pdf [hereinafter Wachtell, Lipton, Rosen & Katz] (requesting that the SEC "initiate a rulemaking project regarding the beneficial ownership reporting rules under Section 13 of the Securities Exchange Act of 1934 . . . specifically, to propose amendments to shorten the reporting deadline and expand the definition of beneficial ownership under the reporting rules").

[67] Williams Act of 1968, Pub. L. No. 90-439, § 2, 82 Stat. 454, 454 (1968) (codified as amended in scattered sections of 15 U.S.C.).

[68] Wachtell, Lipton, Rosen & Katz, *supra* note 66, at 3 ("The pragmatic reasons which may have motivated the inclusion of a ten-day reporting lag in the Williams Act are simply obsolete. Changes in technology, acquisition mechanics and trading practices have given investors the ability to make these types of reports with very little advance preparation time.").

[69] *Id.* at 2–3 ("[T]he purpose of the Section 13(d) disclosure rules has always been to 'alert investors in securities markets to potential changes in corporate control and to provide them with an opportunity to evaluate the effect of these potential changes.' This purpose is no longer being properly served." (internal citation omitted)).

[70] Lucian A. Bebchuk & Robert J. Jackson, Jr., *The Law and Economics of Blockholder Disclosure*, 2 HARV. BUS. L. REV. 39, 59 (2012) ("Such tightening cannot be justified by an appeal to general intuitions about market transparency or by the claim that tightening is required to achieve the objectives of the Williams Act.").

expanded framing.[71] They included in their arguments effects of the proposed rule change on factors outside Wachtell Lipton's framing, such as the value of blockholders on companies,[72] the negative effects on incentives to acquire blocks from tightening the disclosure window,[73] and other changes in the legal landscape since the rule was initially enacted.[74] I refer to these attacks as *partial framing attacks*. They are illustrated in Figure 3.

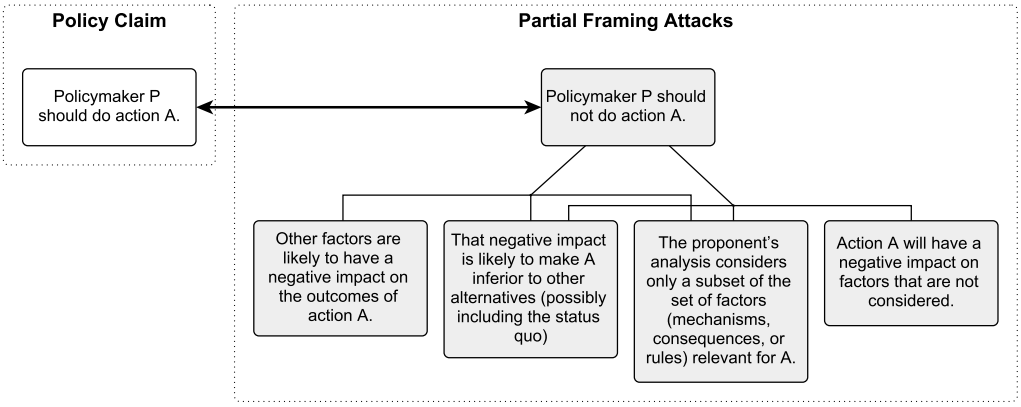

Figure 3. Partial Framing Attacks

The partial framing attack argues that the proponent's policy analysis considers only part of a set of factors relevant for the policy, and that factors outside the frame of reference of the proponent's analysis are likely to have a negative impact on the outcomes of the policy, such that it would be inferior to other policies (possibly including the status quo). These are the two supporting premises in the center of Figure 3. There are two versions of the attack, each containing those two linked premises, and each containing a different additional linked premise, shown (respectively) on the left and right of the supporting premises in Figure 3.

The two different versions of the attack operate in two different directions. The first of these directions—exemplified by Bebchuk and Jackson's attack on Wachtell Lipton's petition—focuses on the consequences *outside* the framing of the policy proposal that will result from the proposed action. This type of attack suggests that the proposed policy will have negative consequences that are outside the frame of considerations addressed in the proposal, which would make the policy undesirable.[75] In economic terms, these could also be thought of as negative externalities of the policy.[76]

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[71] *Id.* at 59–60 (encouraging "the Commission to undertake a comprehensive examination of the rules governing blockholders" and listing a number of factors that should also be considered).

[72] *Id.* at 47–49 (discussing the evidence of the value of blockholders).

[73] *Id.* at 49–51 (discussing the effects of tightening the rules on blockholder positions and consequences for companies).

[74] *Id.* at 42 ("[C]hanges in the legal landscape since that time have tilted the balance of power between incumbents and blockholders against the latter—and therefore counsel against tightening the rules in a way that would further disadvantage blockholders.").

[75] This can be understood as a form of a "side effects" attack, which I discuss further in Subsection II.B.3.

[76] For a discussion of the origins and meaning of the concept of externalities, see, generally, Donald J. Boudreaux & Roger Meiners, *Externality: Origins and Classifications*, 59 NAT. RES. J. 1 (2019).

The alternative version is an attack that focuses on the consequences *within* the frame of reference of the policy proposal that will result from mechanisms outside the frame. This type of attack is essentially a "partial equilibrium" argument.[77] That is, it argues that the analysis considers only a partial equilibrium, and that incorporating the impact of other mechanisms in a more general equilibrium would lead to a different impact than had been anticipated. The mechanisms outside the frame of the proposal would negatively impact the claimed consequences of the policy within the frame, which would make the policy inferior to other policies. For instance, a system in which the frame of analysis is a subset might be in equilibrium with its current outcome. If a policy attempts to change that the part within the frame to achieve a different outcome, parts of the system that are outside the frame may adjust to re-equilibrate the system so that it returns to the status quo outcome, rendering the policy ineffective. Or the combination of the effects of the policy and the mechanisms outside the frame of analysis might cause the system to move to some other equilibrium that makes the policy inferior to the status quo or other policies.

Of particular interest to legal scholars are framing attacks based on regulatory inconsistency.[78] These partial framing attacks argue that the policy proposal does not consider other legal rules that are relevant to the policy change.[79] This could go in either direction, or both: external legal rules might make the consequences of the policy proposal within its frame less desirable; or the policy could negatively impact the functioning and consequences of legal rules outside the policy proposal's frame of analysis, or both may be the case.

For the partial framing attack to be successful, it must show that the unforeseen internal or external consequences of the proposal would make the policy undesirable compared to some other policy. Most obviously, the proposed policy might be inferior to the status quo. However, the policy can also be attacked by conceding that the outcomes would be better than the status quo but inferior to some other specified potential policy.[80]

C. Dollar in the Street Attacks

An economist and her friend are walking along the street.[81] The friend sees a $20 bill on the street, and says, "Look, a $20 bill."[82] Without even looking, the economist replies, "Nonsense. If there were actually a $20 bill lying in the street, someone would have picked it up by now."[83] This, in essence, is the dollar in the street attack: the claim that a proposed policy cannot be effective, because if it were, it would have been implemented

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[77] *See, e.g.*, William W. Bratton & Simone M. Sepe, *Corporate Law and the Myth of Efficient Market Control*, 105 CORNELL L. REV. 675, 678 (2020) (describing partial equilibrium models as dealing "with one market at a time, taking the market in isolation in determining the equilibrium outcome" and proceeding "on the key assumption that all 'other things [are] equal.'" (internal citation omitted)).

[78] *See* Bebchuk & Jackson, *supra* note 70, at 59.

[79] *See id.*

[80] This can be understood as a "better alternative" attack, which I discuss further in Section II.B.2.

[81] *See* ERIC D. BEINHOCKER, THE ORIGIN OF WEALTH: EVOLUTION, COMPLEXITY, AND THE RADICAL REMAKING OF ECONOMICS 53 (2006).

[82] *See id.*

[83] *Id.* (describing a version of the joke involving "an old economist and a young economist").

already.[84] Figure 4 sets out the dollar in the street attack and its supporting premises, as well as potential defenses.

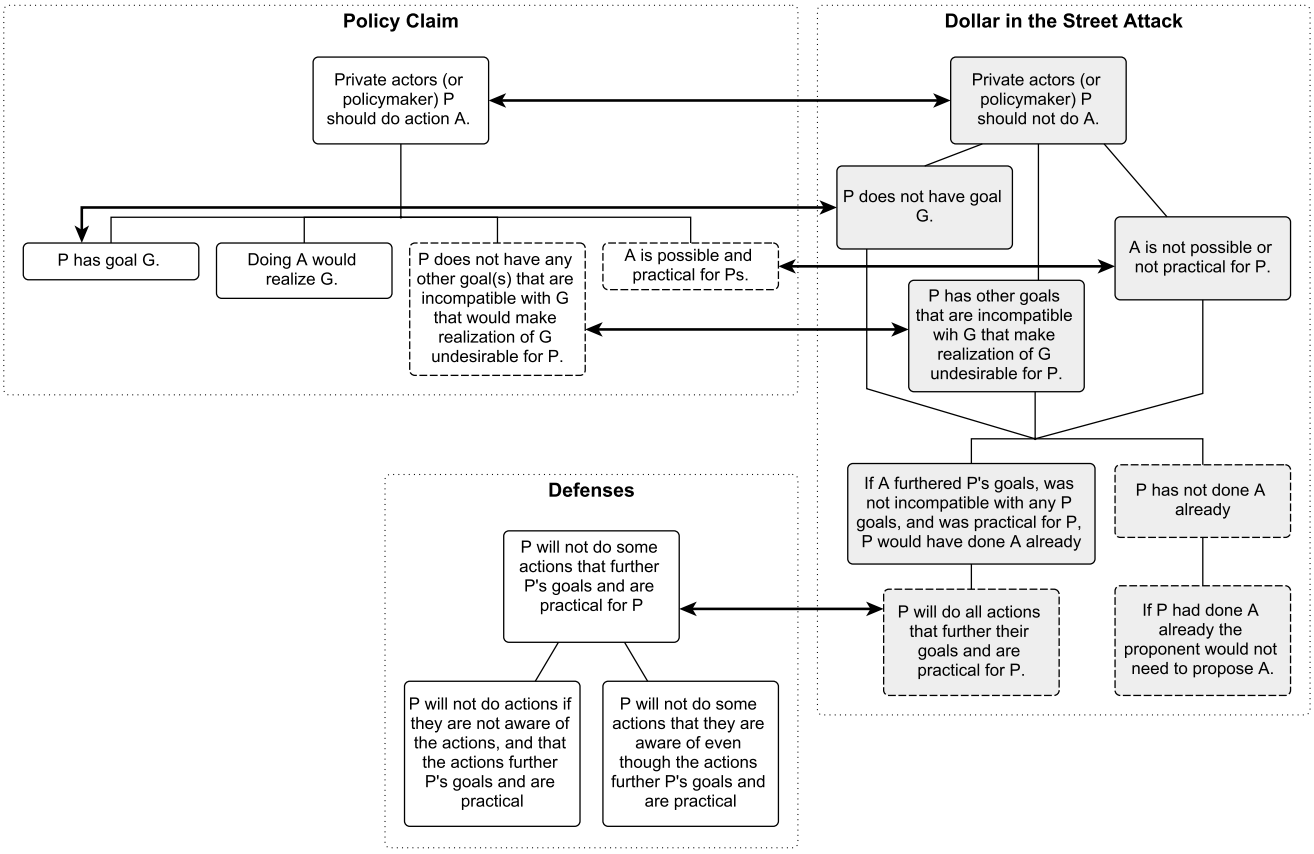

Figure 4. Dollar in the Street Attacks, and Defenses

The dollar in the street attack makes a number of assumptions about the nature of the policy proposal it is attacking. It assumes that the reason a policymaker or private actor would take the proposed action is to further some particular goal that the action would realize. It also assumes that it would be possible and practical to do the proposed action, and that the policymaker or private actor does not have any competing goal that the action would harm. As I explain in Part II, these are all either core premises of any policy proposal, or implicit assumptions of policy proposals.

The dollar in the street attack undermines the policy proposal by arguing that one or more of these premises is not true and, therefore, the policymaker or private actor should not take the proposed action. That the policymaker or private actor has not already taken

[84] This could be understood as a defeasible form of *modus tollens*, the form of an argument that posits that "If *A*, then *B*. Not *B*. Therefore, not *A*." *See, e.g.*, Walton, *supra* note 46, at 147 (describing *modus tollens* as having the form "if *p* then *q*; ~*q*; therefore ~*p*" and "[d]efeasible modus tollens [as] the inference from premises *p* => *q* and ~*q* to the conclusion ~*p*," where ~ indicates "not" and "=>" indicates defeasible implication, such that "*p* => *q*" can be understood as "if *p* then generally *q*").

the action is the evidence that one or more of these premises is not true, because if they were all true, the policymaker or private actor would have already taken the action.[85]

The dollar in the street attack fits better with policy proposals that *private actors*—rather than a policymaker—should take a particular action. The most obvious types of policy proposals are those aimed at specific policymakers, such as the SEC. But this Article also applies to a broader set of normative claims often made by legal scholars and other policy analysts. Consider, for example, the claim that corporate directors and executives should take into account the interests of all of the stakeholders in the corporation, rather than just the shareholders of the corporation.[86] Or the claim that investment managers should influence the directors and executives of the companies they invest in to take into account the impact of their actions on the environment or society more broadly.[87] These are policy proposals directed not at a policymaker, but rather at a set of private actors—individuals or organizations—urging them to take private action.

The dollar in the street attack fits better with this type of policy proposal because—as in the old saw about the economist and the $20 bill—our reasons for believing that private actors will act to further their self-interested goals are likely to be stronger than our confidence that regulators will do all things that further their purported goals. This may be because of challenges on the regulator's side. For instance, we may understand that the individuals that constitute the regulator have their own private incentives that are often incompatible with the goals of the regulator itself (i.e., agency problems).[88] Or it may also be that the regulator's interpretation and prosecution of its goals varies over time, because of changes in its constituent individuals and the policy priorities of governments. The result is that we may be more likely to accept that policies proposed to regulators may be efficacious.

The reasons we may more confidently expect private actors to take an action if it would be in their own self-interest are two key sets of assumptions that are embedded in the dollar in the street attack, which I refer to as *Chicago moves*. These assumptions are incentive- and market-based premises characteristic of the Chicago School of Economics.[89] The main set of Chicago-move assumptions that are relevant to the dollar in the street attack are the micro-level assumptions outlined above: that individuals reliably behave in a way that maximizes their welfare.

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[85] The dollar in the street attack can be understood as overlapping with the incentive incompatibility attack I discuss in Section II.C, which argues that a policymaker or private actor should *not* take an action that would purportedly further a particular goal, either because the policymaker or private actor does not have the assumed goal, or because they have an alternative goal that conflicts with it. But these are not the only reasons why a policymaker might not have undertaken the action. In particular, a third reason the policymaker or private actor may not have undertaken the action is because the proposed goal is not actually possible or practical, or because the policy would not actually realize the goal.

[86] *See, e.g.*, Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 103–07 (2020) (describing the rise of "stakeholderism").

[87] This concept has long been referred to as corporate social responsibility. More recently, it has been understood as the "E&S" in "ESG," or environmental, social, and governance. For a discussion of the origins and significance of the "ESG" label, see generally Elizabeth Pollman, *The Making and Meaning of ESG*, 14 HARV. BUS. L. REV. 403 (2024).

[88] *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 309–10 (1976) (discussing agency problems).

[89] For a description of the Chicago School of Economics, see, generally, H. Laurence Miller, Jr., *On the "Chicago School of Economics,"* 70 J. POL. ECON. 64 (1962).

What conditions must be satisfied for private actors to take a particular action? First, the action must be possible and practical for the private actors. And second, it must be compatible with the goals of the private actor. If either or both of these is not satisfied, it would explain why private actors have not already taken an action. This is the basis for the dollar in the street attack: the fact that the private actor has not already taken the proposed action can be seen as evidence either that the proposed action is not possible or practical for the private actor, or that it is not compatible with her goals, or both. And if the proposed action is either not possible or not practical, or not compatible with the goals of the private actor, then she will continue not to do the action, and the proposed policy will fail.

There are several lines of defense against dollar in the street attacks that relate to these micro-level premises. One straightforward defense is to rebut the premise that private actors have not done the proposed action already. But this defense is likely to be weak. If the private actors have done the proposed action already, why is the proponent proposing it? Perhaps some, but not all, of the private actors have taken the action, and the proposal is aimed at those who have not. However, the fact that most private actors have not taken the action remains grounds for the same dollar in the street attack.

A stronger defense relies on the intuition that private actors do not always act in their own best interests. One possibility, an *ignorance defense*, is that the private actors may not be aware of the proposed action, or of the likelihood that it would benefit them. This amplifies rather than endangers the value of the proponent's policy proposal—it serves (arguably) to make the private actors aware of the possible action and of its benefit for them.

The suggestion that the actors might be ignorant of the proposed action can in turn be avoided by the attacker. Perhaps they can show that the private actors are indeed aware of the proposed action but have still chosen not to take it. Or they can put forward a theory to explain why the private actors could be expected to be aware of the proposed action and its purported benefits for them. The typical basis for such a claim is the premise that, if the action were indeed in the private actors' self-interest, they would have figured it out. Of course, this can also be attacked by the proponent—it depends on the questionable assumption that private actors will figure out *all* actions that are in their self-interest. In addition, raising the possibility that the private actors may not act in their own self-interest might also suggest that they may not take the proposed action, even though it is (arguably) in their self-interest.

An alternative to the ignorance defense can be thought of as an *inaction against interest* defense.[90] That is, we cannot rely on the absence of the action to conclude that it is not in the best interests of the actors because those private actors' lack of action may not be in their own self-interest.[91] It requires the defender to posit a plausible alternative explanation for *why* private actors have not taken the action, one that does not endanger

[90] A related but weaker defense would be an "*action* against interest" defense. In this case, the proponent could argue that private actors sometimes do actions that are against their own interest, for instance, for altruistic reasons, and the proposed action falls into this category. I mention this only in passing because it would appear to apply only rarely to actions proposed to private actors.

[91] This could alternatively be understood as a claim that their true (or revealed) preferences do not reflect their apparent preferences.

the feasibility of the policy. The reasons the actors may fail to take the action may be error or oversight on their part. Where the private actors in question are organizations, the reasons may relate to the deficiencies in the organizational structure, such as agency problems or collective action problems among members of the organization.[92] Where the relevant private actors are individuals, there may be deeper, cognitive reasons why individuals do not act in their own (ostensible) self-interest, such as an endowment effect.[93]

A second set of Chicago move premises may bolster the dollar in the street attack, though they are not necessary for it to succeed. These are macro-level claims, relating to the actions of private actors *en masse*, like in a market.[94] This move argues that where there are many private actors competing, like in a market, then at least some of those private actors will succeed in maximizing their own self-interest, and their actions to do so will have outcomes that are observable for all of the interacting actors.[95] In the canonical market example this is the mechanism by which information is incorporated into prices in an efficient market.[96] But it could also lead to the discovery of other information in other contexts, such as competition leading to innovation.[97] Here, I frame the premise more generally, so that it applies to competing private actors that are the subject of the policy proposal, even if they cannot reasonably be characterized as a market.

A different set of defenses relates to these macro-level premises of the dollar in the street attack. These are generally analogous to claims of irrational pricing, or market failures: that in certain cases, the activity of a large number of private individuals or organizations may not lead to accurate pricing or efficient outcomes.[98] This might arise for several reasons. Most generally, the transaction costs may be too high for the market to clear.[99] One reason is regulatory limitations.[100] Another reason is contracting problems, perhaps due to information asymmetries (where parties lack the knowledge needed to identify or evaluate optimal arrangements),[101] holdup problems (where parties refrain from

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[92] For the foundational discussion of agency problems and collective action problems, see, generally, Jensen & Meckling, *supra* note 88, and MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971), respectively.

[93] For a discussion of the endowment effect, see, generally, Keith M. Marzilli Ericson & Andreas Fuster, *The Endowment Effect*, 6 ANN. REV. ECON. 555 (2014).

[94] The Chicago school is distinguished in its faith in the efficacy of the market. *See, e.g.*, Miller, *supra* note 89, at 66 (describing Chicago school economists as "differ[ing] in this advocacy from many other economists in [their] dogmatism and in assuming that the actual market functions like the ideal market. [They give] less weight than the rest of the profession to problems of adjustment to change, to inequalities in market power, and to uncaptured external economies and diseconomies.").

[95] *See generally* Richard J. Gilbert, *Competition and Innovation*, 1 J. INDUS. ORG. EDUC. 1 (2006) (establishing a link between the success of one actor and market-wide progress).

[96] For a further review of the efficient markets hypothesis, see, generally, Burton G. Malkiel, *The Efficient Market Hypothesis and Its Critics*, 17 J. ECON. PERSPS. 59, 60–61 (2003) ("Many of us economists who believe in efficiency do so because we view markets as amazingly successful devices for reflecting new information rapidly and, for the most part, accurately. . . . In short, we believe that $100 bills are not lying around for the taking . . . .").

[97] *See* Gilbert, *supra* note 95 (discussing the relationship between competition and innovation).

[98] For a discussion of pricing anomalies and irrational pricing in capital markets, see Malkiel, *supra* note 96, at 72–76.

[99] For a discussion of the relationship between transaction costs and market failure, see Richard O. Zerbe Jr. & Howard E. McCurdy, *The Failure of Market Failure*, 18 J. POL'Y ANALYSIS & MGMT. 558, 562–64 (1999).

[100] *See id.* at 570.

[101] *See, e.g.*, George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 490–91 (1970) (discussing how information asymmetries between buyers and sellers can prevent optimal market arrangements).

efficient investments out of fear of ex post expropriation),[102] or coordination failures (where the transaction costs of coordinating multi-party agreements prove prohibitive).[103] A set of closely related alternative reasons are collective action problems, which can arise when the benefits of a policy are diffuse, but the costs are concentrated, leading to sub-optimal provision of a public good.[104] Each of these could impose costs such that the market does not function effectively.

Another response is to argue that the market may be stuck in an inefficient equilibrium.[105] This could occur for many reasons, including due to factors like path dependence or entrenched interests. For instance, even if a proposed policy would be better for participants than the status quo, transitioning to that new policy might impose significant costs on private actors, which they may be unwilling to bear voluntarily.[106] As a result, the participants could remain "locked in" to a suboptimal steady state unless there is some external action (such as regulation) to disrupt the equilibrium.[107]

* * *

The attacks discussed in this Part are near-universal in their applicability, and also common in their use in responding to policy proposals. However, they represent only a partial set of the premises necessary to support a policy proposal. Part II develops a general model of policy proposals that describes *all* policy proposals and their premises, thereby showing how *any* policy proposal can be attacked and defended.[108]

II. A GENERAL THEORY OF POLICY PROPOSALS AND ATTACKS

The main claim of this Part is that all policy proposals share a common structure and common premises, and all policy proposals are therefore subject to the same sets of attacks rebutting these premises. The three generic attacks discussed in Part I illuminate key aspects of the common structure underlying policy arguments. For instance, the ain't broke attack highlights that policy arguments implicitly contain a premise asserting that present circumstances are suboptimal with respect to a particular goal.[109] The partial

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[102] For a discussion and example of holdup problems, see Oliver Hart & John Moore, *Property Rights and the Nature of the Firm*, 98 J. POL. ECON. 1119, 1124 (1990) (explaining how appropriate ownership structures "leads to fewer holdups and greater efficiency").

[103] For a discussion of coordination costs, see Robert C. Ellickson, *The Case for Coase and Against "Coaseanism"*, 99 YALE L.J. 611, 615 (1989) (describing "get-together costs" as a type of transaction cost).

[104] For the canonical discussion of public goods and collective action problems, see, generally, OLSON, *supra* note 92.

[105] This would extend to multiple-person games with a Nash equilibrium that is not the optimal equilibrium for the participants. *See, e.g.*, Charles A. Holt & Alvin E. Roth, *The Nash Equilibrium: A Perspective*, 101 PROC. NAT'L ACAD. SCIS. 3999, 3999 (2004).

[106] *See, e.g.*, S.J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-In, and History*, 11 J.L. ECON. & ORG. 205, 211 (1995) (describing how "[i]n some instances the costs of institutional change will preclude adjustment even where experience reveals preferable alternatives").

[107] *See, e.g.*, Holt & Roth, *supra* note 105, at 4000 (discussing "the social institutions that have been invented to change games from prisoner's dilemmas to games in which cooperation is sustainable as an equilibrium").

[108] Since an attack is simply a rebuttal of a claim or premise, identifying the premises of policy claims makes very clear how they can be attacked. Understanding the premises of all policy claims suggests a set of attacks that similarly apply to *all* policy claims.

[109] *See supra* Section I.A.

framing attack draws attention to the premise that the proposed policy would improve circumstances in a way that realizes the stated goal.[110] The dollar in the street attack emphasizes the premise that the proposed change is practical and feasible.[111] Understanding the common structure of policy proposals allows us to generalize and systematize approaches to critiquing policy proposals.

The basis for the argument in this Part—that the attacks I present apply to *any* policy proposal—is that a policy proposal is simply an instance of practical reasoning. By definition, it is a claim about what a policymaker (or a group of private actors) *should do*.[112] The premises of policy proposals that I identify, and the ways of attacking them, are based on the premises of practical reasoning as they have been laid out by scholars of argumentation, though with a number of modifications and refinements.[113]

What I mean by a "policy proposal" is a normative claim that a policymaker (or a set of private actors) *should take a specified action*.[114] The purpose of the claim is to persuade the policymaker—or others engaged in the debate—that the policymaker should take that action. Why should they? A policy proposal is simply an instance of goal-based reasoning: that the policymaker should take those actions that further the policymaker's goals.[115] This premise is normally assumed and left implicit, rather than explicitly articulated. The structure of this claim is shown in Figure 5, together with three ways it can be attacked. In this and subsequent figures, I use dashed borders to indicate premises that are generally left implicit.[116]

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[110] *See supra* Section I.B.

[111] *See supra* Section I.C.

[112] *See, e.g.*, Brun & Betz, *supra* note 8, at 39 (arguing that "Practical reasoning is an essential cognitive task that underlies policy making and drives public deliberation and debate.").

[113] A number of different argumentation schemes have been put forward for practical reasoning. In 1990, Douglas Walton put forward basic schemes for practical reasoning involving necessary conditions and sufficient conditions. *See* WALTON, PRACTICAL REASONING, *supra* note 33. In 2006, Katie Atkinson, Trevor Bench-Capon, and Peter McBurney proposed a more extensive scheme for values-based reasoning. As they pointed out, the "necessary" form of the argumentation scheme is a special case of the "sufficient" form of the argumentation scheme. *See* Katie Atkinson et al., *Computational Representation of Practical Argument*, 152 SYNTHESE 157, 163 (2006). The basis for the schemes for policy claims in this Article is practical reasoning schemes put forward by Walton in 2015 that incorporate features suggested by Bench-Capon, Atkinson, and McBurney. *See* WALTON, GOAL-BASED REASONING FOR ARGUMENTATION, *supra* note 35, at 92–94. I add labels for clarity, where possible, by reincorporating labels used by Walton in 1990, and I also modify the schemes to reflect their more general usage outside that system. In particular, what I refer to as the "goal premise" was not included in the version in 2015, but was included in Walton's 1990 version and the Bench-Capon, Atkinson, and McBurney version.

[114] What I refer to as a "policy proposal" is thus different from simply identifying a potential action that a policymaker (or private actor) *could* take without arguing that the policymaker (or private actor) *should* take the action.

[115] *See, e.g.*, WALTON, GOAL-BASED REASONING FOR ARGUMENTATION, *supra* note 35, at 1 ("Practical reasoning of the kind described by philosophers since Aristotle . . . is identified as goal-based reasoning that works by finding a sequence of actions that leads toward or reaches an agent's goal."). This is a more general approach to that taken by Henry Prakken in his explanation of a particular policy argument, in which he uses an argument from consequences. *See* Prakken, *supra* note 34, at 310 (explaining that "The case is reconstructed in terms of argument schemes from good and bad consequences recently proposed by Bench-Capon et al. (2011) and some other schemes."). There, Prakken reconstructs an argument that legislators should enact mandatory minimum sentences because doing so would have good consequences. *See id.* at 312. The goal-directed version that I use would make explicit the implicit premise in the argument reconstructed by Prakken, that legislators should take actions that have good consequences. By making this explicit, it also allows for a closer consideration of the goal in question.

[116] For a discussion of implicit premises, see *infra* Section II.B.

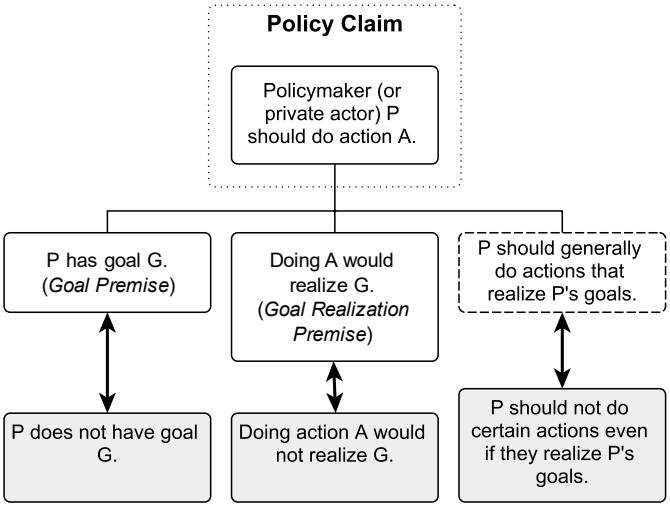

Figure 5. Top Level Premises and Attacks

As with any instance of goal-based reasoning, a policy proposal depends on two premises: the policymaker has a certain goal (what I call the *goal premise*), and the proposed action will realize that goal (which I call the *goal realization premise*).[117] I model the goal-based reasoning as including an additional premise that connects these two premises to the conclusion of the claim: that policymakers should generally take those actions that realize the policymaker's goals.[118] There is also an inference, represented in Figure 5 by the line segment between the three premises and the claim, that where the three premises are satisfied, they warrant the conclusion of the claim, that the policymaker should do the action.[119]

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[117] Simply putting forward a policy proposal without arguing that the policymaker *should* take the proposed action does not require the goal premise. For instance, someone wishing to simply float a potential policy could make the goal-realization premise that the action would realize a certain goal and leave the goal premise conditional, such as "if the policymaker has that goal, then they should adopt the proposed policy."

[118] This is part of what Stephen Toulmin referred to as a "warrant." *See* STEPHEN E. TOULMIN, THE USES OF ARGUMENT 91 (updated ed. 2003) (describing warrants as "general, hypothetical statements, which can act as bridges, and authorise the sort of step to which our particular argument commits us"). The other part of Toulmin's warrant is the defeasible *modus ponens* inference. Because the aim of this Article is to make clear the structure of policy claims and attacks, I generally take the approach of explicitly articulating premises such as this. My choice to set out this premise explicitly simplifies the inferential step between the three premises and the conclusion to defeasible *modus ponens*. For a discussion of *modus ponens*, see *infra* note 119. My approach contrasts with the "argumentation scheme" approach of Douglas Walton. In his argumentation scheme for practical reasoning, this premise is not set out explicitly but rather is included in the inference from the premises to the conclusion. *See, e.g.*, WALTON, GOAL-BASED REASONING FOR ARGUMENTATION, *supra* note 35, at 545 (modeling a goal-directed argument as having only a goal premise and a goal-realization premise).

[119] Defeasible *modus ponens* is the defeasible version of the logical argument *modus (ponendo) ponens*, "If A, [then] B. . . . A. Therefore B." *See, e.g.*, Susanne Bobzien, *The Development of* Modus Ponens *in Antiquity: From Aristotle to the 2nd Century AD*, 47 PHRONESIS 359, 360 (2002) (describing *modus ponens* and its origins). Douglas Walton describes defeasible *modus ponens* as a scheme that "sets a number of requirements representing the premises of the scheme as the antecedent of a conditional premise, and states that if all these antecedents are met by the argument in the case, the consequent of the conditional follows defeasibly as the conclusion of the argument." WALTON, GOAL-BASED REASONING FOR ARGUMENTATION, *supra* note 35, at 82.

A policy proposal can be attacked in three ways. It can be directly rebutted by arguing that the policymaker *should not* take the action.[120] It can be undermined by rebutting any of these premises—especially, by showing that the policymaker *does not* have that particular goal, or that the proposed action would not realize that goal.[121] The policy proposal can also be undercut by attacking the inference connecting the three premises to the conclusion, such as by introducing some additional reason why the policymaker should *not* take the action, even though the three premises are true.[122]

In most policy proposals, most of the work is being done by the goal realization premise. Section II.A. addresses the nature of the goal realization premise, how it is supported, and how it can be attacked. Section II.B. then considers the additional premises that are implicit in the inference from the two supporting premises to the claim that the policymaker should do the particular action. The goal realization premise and the additional implicit premises are essentially descriptive. However, the goal in the goal premise is an embedded normative claim, which involves different kinds of reasoning and different attacks; these are discussed in Section II.C.

A. Goal Realization Supporting Premises and Their Attacks

Most of the work of any policy proposal is in the premise that the proposed policy would realize the goal of the policymaker.[123] With trivially simple examples involving very concrete goals, the argument might not need to go further.[124] But in almost any situation involving a policymaker, the goal will be more complex, and the goal realization premise must thus be supported by at least three linked premises, shown in Figure 6.

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[120] *See* Prakken, *supra* note 49, at 15.

[121] It could also theoretically be undermined by rebutting the third premise, that policymakers should generally take actions that realize their goals, though it is harder to conceive of such an attack.

[122] For a description of undercutting attacks, see, for example, Prakken, *supra* note *supra* note 49, at 23 ("An argument *A undercuts* an argument *B* if a conclusion of *A* says of some defeasible rule used in *B* that it is not applicable.").

[123] The goal-realization premise is the *only* claim in a simple proposal of a policy without the assertion that the policymaker should adopt it, as discussed in *supra* note 114.

[124] To give a simple example, if a private actor's goal is "to make a profit," selling an asset at a profit may realize that goal without the need for further elaboration. However, even in this case, it is likely that the private actor's goal is actually more complex than that—e.g., encompassing making a profit over a certain period of time—and the realization of that goal would, therefore, involve further considerations, such as premises supporting why selling the asset at the current point in time (rather than in the future) would best meet the goal.

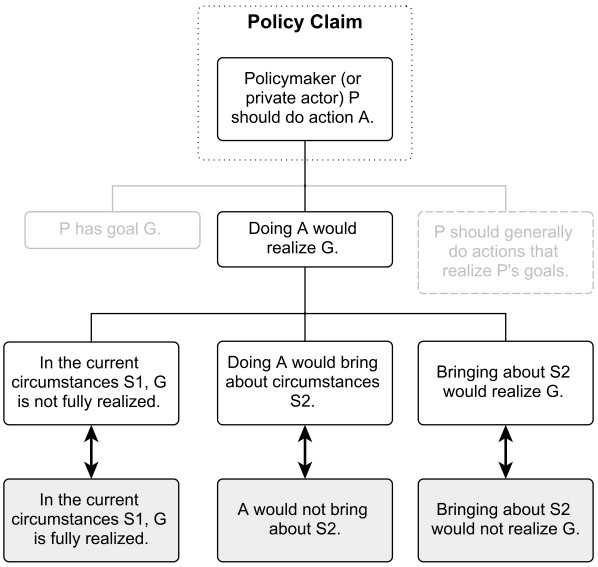

Figure 6. Goal Realization Sub-Premises, and Attacks

The argument is that doing the action would realize the goal, because of a combination of these three premises. First, in the current circumstances, the goal is not fully realized. Second, doing the action would bring about new circumstances. And third, the goal would be realized in those new circumstances. For instance, the SEC's argument for its climate disclosure rule can be understood as a claim that requiring corporations to disclose their climate risks would protect investors (the goal of the rule),[125] through the combination of three separate premises: first, that corporations do not currently fully disclose information that investors require to determine corporations' climate risks;[126] second, that imposing the proposed rules would result in corporations fully disclosing the information that investors require to determine corporations' climate risks;[127] and third, that corporations fully disclosing the information that investors require to determine climate risks would result in investors being protected.[128] A policy proposal can be attacked by rebutting any of these three premises.

For example, one way the ain't broke attack can function is by rebutting the premise that the goal is not realized in the current circumstances. With respect to the SEC's climate disclosure rule, this would be a claim that corporations are already disclosing all of the information that investors require. A second way to attack a policy proposal is to attack the consequences premise, by arguing that performing the action in the proposed policy would not *actually* bring about the anticipated circumstances. For instance,

[125] Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668, 21671 (Mar. 28, 2024) (codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249) ("[O]ur objective is limited to advancing the Commission's mission to protect investors, maintain fair, orderly, and efficient markets, and promote capital formation by providing disclosure to investors of information important to their investment and voting decisions.").

[126] *Id.* at 21669 ("The climate-related information that these companies currently provide, however, is inconsistent and often difficult for investors to find and/or compare across companies.").

[127] *Id.* ("The requirements adopted in this release meet that need by . . . improving the consistency, comparability, and reliability of climate-related information for investors.").

[128] *Id.* ("As a result, investors will be able to make more informed investment and voting decisions.").

opponents of the climate disclosure rule could argue that the proposed disclosure rules would not actually result in the disclosure of consistent and comparable information that investors require to assess corporations' climate risks.[129] A third way to attack a policy proposal is to argue that the goal would not be realized in the anticipated circumstances. For instance, an opponent of climate disclosure could argue that disclosing information that investors require to assess corporations' climate risks would not actually protect investors.[130] By attacking premises supporting the goal-realization premise, each of these attacks undermines the policy proposal.

B. Implicit Premises, and Their Attacks

Section II.A described a set of core premises that are inherent in the nature of any policy proposal, and how those policy proposals can be attacked by rebutting those premises. A second set of attacks are those that target a series of additional, *implicit* premises supporting the policy proposal. My argument here is that, in addition to the core premises of any policy proposal, there are an additional series of premises that are also necessary for the policy proposal to succeed. These are often not articulated in the presentation of the policy proposal, but rather are simply presumed to be true.[131] The policy proposal can therefore be attacked by arguing that these implicit premises are not in fact true.[132] Each such attack would undermine the main policy proposal, by rebutting a premise upon which it relies, albeit implicitly.[133]

The attacks on the implicit premises of policy proposals that I articulate are inspired by the critical questions asked of practical reasoning by Douglas Walton.[134] Critical questions are a component of Walton's argumentation schemes that are designed to raise potential issues with the claim being made.[135] This Article goes one step further and articulates the implicit premises that critical questions point to, as well as the way that

[129] *See id.* at 21731 ("Some commenters further stated that the proposed requirement to disclose a registrant's GHG emissions per unit of production . . . would not result in comparable disclosure for investors."); *see also id.* at 21784 ("Other commenters were concerned that a one percent disclosure threshold would not result in consistent and comparable disclosure . . . .").

[130] *See, e.g.*, *id.* at 21690 ("Some commenters stated that the proposed requirement would result in overly granular disclosure that would not be decision-useful for investors and would be burdensome for registrants to produce.").

[131] Most, if not all, arguments in natural language omit certain premises, as including all premises would be cumbersome. Arguments with missing premises are often referred to as *enthymemes*. *See* Walton & Reed, *supra* note 9, at 340 (noting that "[t]he term 'enthymeme' has been taken, since the earliest commentators on Aristotle, to refer to an argument with premises (or a conclusion) that is not explicitly stated[,]" though also suggesting that this may be historically inaccurate).

[132] I am effectively making explicit the nature of the inference from the goal premise and goal realization premises to the conclusion. This claim could be undercut by any of these attacks against the inference, which would be undercutting attacks.

[133] *See, e.g.*, Prakken, *supra* note 49, at 23 ("An argument *A undermines* an argument *B* if a conclusion of *A* contradicts a premise of *B*.").

[134] *See* WALTON, GOAL-BASED REASONING FOR ARGUMENTATION, *supra* note 35, at 30 (setting out five critical questions for practical reasoning).

[135] *See, e.g.*, *id.* at 25 ("[I]t is these critical questions that are helpful in determining weak points in the argument that are open to criticism or counterattack.").

those premises can be attacked, thereby undermining the policy proposal.[136] This is important for a theory of attacks because it allows us to specify and discuss potential attacks, as well as the premises that they attack, which are also the proleptic defenses to the potential attack.

1. Possibility and Practicality Premises and Attacks

Several attacks on the SEC's climate disclosure rules argued that it was not permissible because the SEC lacked the statutory authority to enact the rule.[137] Others argued that it would not be practical, or even possible, for some organizations to comply with the climate disclosure rules.[138] These arguments illustrate a set of attacks that I refer to as *impossibility attacks* and *impracticality attacks*. They attack a set of corresponding implicit premises in policy proposals that I refer to as *possibility premises* and *practicality*

[136] Many of the implicit premises in this section are based on "critical questions" in Walton's argumentation scheme. An early work by Douglas Walton and Chris Reed recognized the possibility of reflecting these as implicit premises. *See* Walton & Reed, *supra* note **Error! Bookmark not defined.**, at 208 ("One possible theory is that the critical questions represent additional premises that are additional assumptions of the argument at a deeper level. They are like unstated premises."). This effectively resolves a criticism of Walton's approach raised by Christoph Lumer, that it is "mostly *enthymematic*, even if one could easily add the premise that, according to other approaches, is missing, and that would, for example, make the argument conclusive." *See* Christoph Lumer, *An Epistemological Appraisal of Walton's Argument Schemes*, 42 INFORMAL LOGIC 203, 205 (2022). But as Walton and Reed point out, when transforming critical questions to implicit premises, it is important to think about whether the proponent or the attacker has the burden of proof in establishing the premise. *See* Walton & Reed, *supra* note **Error! Bookmark not defined.**, at 209 (considering the difference in the burden of proof between premises implied by different critical questions); *see also* FREEMAN, *supra* note **Error! Bookmark not defined.**, at 193–94 (discussing this approach and the problems it raises, including for the burden of proof).

[137] Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668, 21678 (Mar. 28, 2024) (codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249) ("[O]ther commenters asserted that the Commission lacks statutory authority to adopt the proposed climate-related disclosure rules.").

[138] *See, e.g.*, *id.* at 21691 ("Commenters stated that the proposed definition would impose impractical burdens on registrants . . . .").

premises. These are shown in Figure 7, together with a third set of premises and attacks, which I call *no intervening action* premises and *intervening action attacks*.

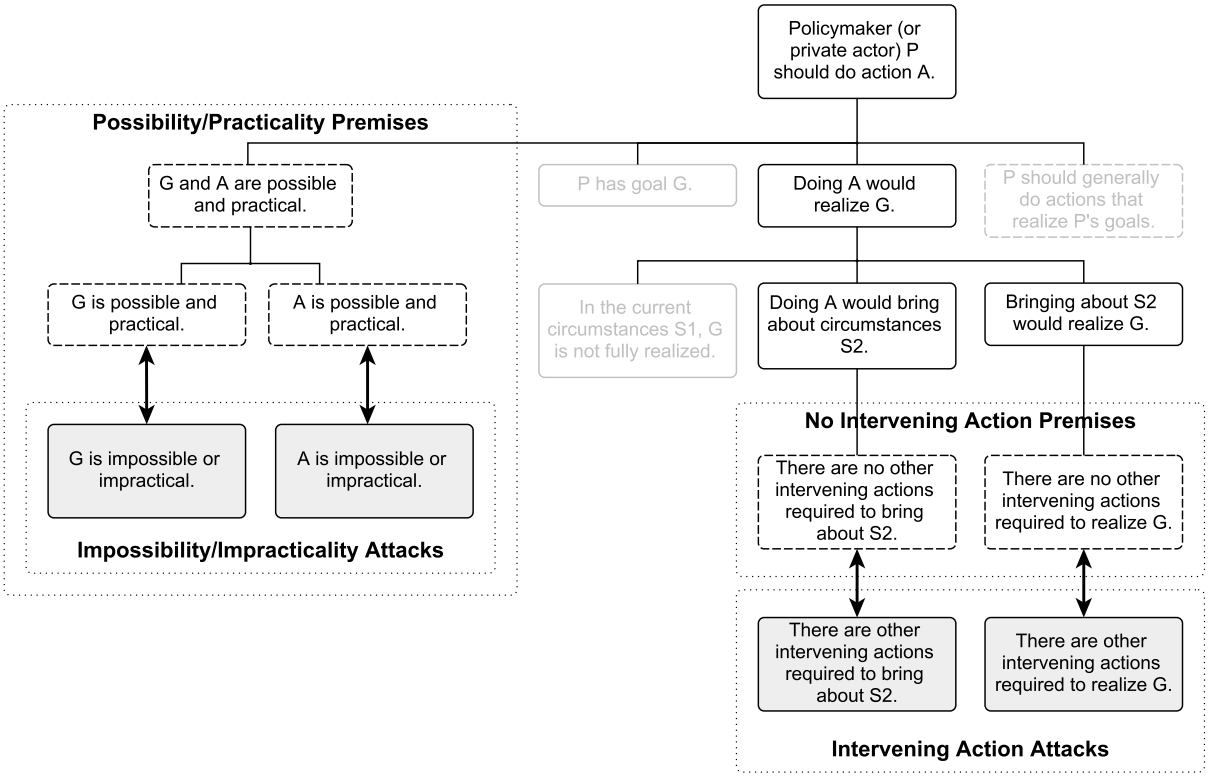

Figure 7. Possibility, Practicality, and No Intervening Action Premises

An *impossibility attack* undermines a policy proposal by arguing that the proposed action is impossible. An *impracticality attack* is more moderate, but also more difficult to defend, claiming that the proposed action is impractical and, thus, cannot be reasonably achieved. An *intervening action attack* argues that the proposed action is not possible (or not practical) at the current time because there is some other, intervening action that has not yet been performed, but that must be performed before the proposed action would be effective. These attacks point to three corresponding premises implicit in any policy proposal—a *possibility premise*, a *practicality premise*, and a *no-intervening-action premise.* These three premises argue, respectively, that it is possible to take the action, and practical to take the action, and that there are no intervening actions that are necessary to do so.

So far, I have focused on attacks on the possibility or practicality of the proposed action itself. But a more extreme set of attacks argues that *the goal itself* is impossible to achieve, or impractical to achieve, or first requires some other intervening action to occur. If successful, these would not only defeat the particular policy proposal, but also *any* policy proposal aimed at the achievement of that goal. The reasons why might include legal, technical, or economic reasons. Furthermore, there might be excessive cost to the proposed action, resource limitations, lack of political will (or other incentive problems), logistical or practical challenges, or resource or capacity constraints that might make the proposed

action impractical. For instance, it could be that limitations in resources, expertise, or political will make executing the policy prohibitively difficult or costly. The more specific and well-supported the reasons for why the action is impractical, the more effective the attack is likely to be.

Practicality attacks are particularly difficult to defend. The clearest evidence that a proposed action is practical is that it has been successfully attempted. But the reason regulatory action is being suggested is that it has not yet been attempted.[139] A successful attack may itself therefore preempt evidence that could defend against the attack. One response is to argue that the proposal should be attempted in some limited form, to determine whether it is indeed impractical.[140] Other defenses require carefully rebutting individual challenges to the practicality of the policy raised by the attacker or preempting likely challenges that could be raised.

2. Better Alternative Attacks

In 2018, Exxon Mobil Corporation, the largest energy producer in the United States, committed $1 million to promote a national carbon tax, which it reportedly saw as a better alternative to a patchwork of state regulations and regulatory uncertainty.[141] Exxon Mobil's motives may not have been sincere—a Greenpeace sting operation later revealed an Exxon Mobil executive's view that a carbon tax would never happen.[142] The company's claim that a carbon tax would be a better way to address climate change is likely to have been a tactic to attack other, more tractable regulatory reforms. This is an example of a *better alternative attack*, which argues that there is a better way of achieving the desired goal. The structure of better alternative attacks, and the premises they attack, are shown in Figure 8.

[139] *See, e.g.*, *id.* at 21669.

[140] For an argument for regulatory experimentation, see Zachary J. Gubler, *Experimental Rules*, 55 B.C. L. REV. 129, 130 (2014) ("The benefits of experimentation could be realized in the governmental policy-making sphere as well, particularly in situations where the payoffs from a given policy are extremely uncertain.").

[141] *See* Timothy Puko & Bradley Olson, *Exxon Puts Up $1 Million to Promote Carbon Tax*, WALL ST. J., https://www.wsj.com/articles/exxon-puts-up-1-million-to-campaign-for-a-carbon-tax-1539079200 [https://perma.cc/JN7Q-SDAF] (Oct. 9, 2018, 7:23 PM) ("Exxon sees a carbon tax as an alternative to patchwork regulations, putting one cost on all carbon emitters nationwide and eliminating regulatory uncertainty hovering over Exxon's business in states that might seek to target oil companies . . . .").

[142] *See* Hiroko Tabuchi, *In Video, Exxon Lobbyist Describes Efforts to Undercut Climate Action*, N.Y. TIMES (June 30, 2021), https://www.nytimes.com/2021/06/30/climate/exxon-greenpeace-lobbyist-video.html [https://perma.cc/G6C9-QQYW] (describing how a lobbyist "said on the recording that Exxon's support for a tax on carbon dioxide was 'a great talking point' for the oil company, but that he believes the tax will never happen").

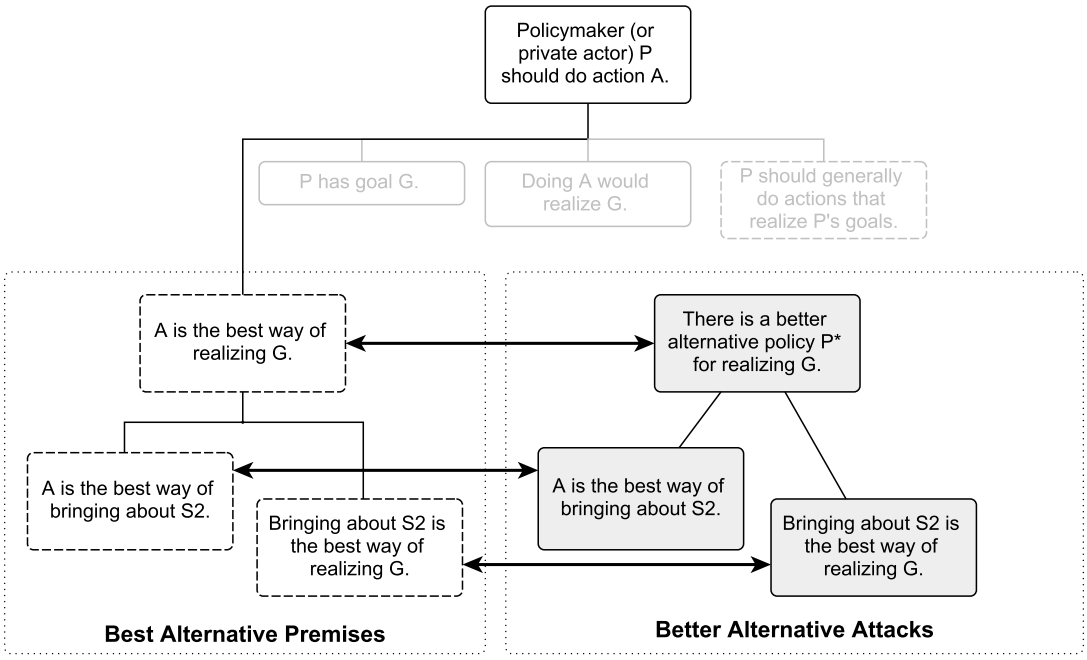

Figure 8. Best Alternative Premises, and Better Alternative Attacks

Better alternative attacks point to an implicit premise in any policy proposal: that the proposal is not just *a* way to realize the goal, but the *best* way to realize the goal. I refer to this as the *best alternative premise*.[143] Section II.A discussed how two of the goal–realization sub–premises are that the proposed action will lead to new circumstances, and that the goal will be realized in those circumstances. There are two corresponding best alternative sub-premises—that the proposed action is the best way to bring about the new circumstances, and that bringing about the new circumstances is the best way to realize the intended goal. A better alternative attack could attack either of these premises—suggesting that there is either a better way to bring about the new circumstances, or a better way than bringing about the new circumstances to realize the intended goal.

The key for an attacker in making a successful better alternative attack is to identify a plausible and compelling alternative to the proposed policy. The attacker must provide reasons for why the alternative would be better—such as its greater benefits, lower cost, better ease or speed of implementation, or lower levels of unintended consequences. But they must also fully specify how the alternative action would work, and how it would realize the intended goal of the policy.

The better alternative attack can also be rebutted directly, by arguing that the alternative is not actually better, because the reasons that the attacker suggested do not apply, or because there are other costs to the alternative that would make it worse than the proposal. And since a better alternative attack involves its own policy proposal, it can be

[143] The task of finding the best approach among several alternatives is similar to the challenge of abductive reasoning, of finding the best explanation. *See* WALTON, GOAL-BASED REASONING FOR ARGUMENTATION, *supra* note 35, at 17.

counterattacked by using many of the attacks detailed in this Article to attack that other policy proposal.

One strategy for preempting better alternative attacks is to explicitly consider and compare different policy options in the initial proposal, making a case for why the chosen approach is superior to potential alternatives. Some regulators may be effectively required to take this approach. For instance, in order for rulemaking subject to the Administrative Procedure Act to avoid being considered arbitrary and capricious, the regulator imposing the rule must have considered reasonable alternatives to the rulemaking.[144] A better alternative attack could argue that the *status quo* is a better alternative than the proposed policy. But if it argues for a different alternative to the status quo, then it likely concedes that either proposed alternative is better than the status quo.

One defense could be that it is not possible to definitively determine which of the two alternatives is the best, but that either is better than the status quo. If a policymaker has already proposed a policy, this would suggest that it may be better to adopt the policy rather than not doing anything because there might be some potentially better policy available. This could be thought of as a "perfect is the enemy of the good" defense.[145]

3. Side Effects Attacks and Alternative Goal Attacks

Responding to the SEC's proposed climate disclosure rule, the National Association of Manufacturers argued that the proposed rule would "impose significant costs . . . on public companies without a concomitant benefit to shareholders."[146] This can be understood as a *side effects attack*, a claim that the proposed action would have consequences that, when they are included in the calculus, would make the proposed policy undesirable. Closely related to side effects attacks are *alternative goal attacks*. For example, in addition to the SEC's goal of protecting investors that it intended to further by implementing climate disclosure rules, the SEC also has a statutory goal of promoting capital formation.[147] A claim that requiring climate disclosure would harm capital formation (in a way that would outweigh the benefits to investor protection) would be an

[144] *See* Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto. Ins. Co, 463 U.S. 29, 46–57 (1983) (finding that the NHTSA's rescission of a passive restraint requirement of Standard 208 was arbitrary and capricious because it failed to consider modifying the Standard to require airbags and the safety benefits of automatic seatbelts); *see also* Cincinnati Bell Tel. Co. v. FCC, 69 F.3d 752, 761 (6th Cir. 1995) (concluding that the Federal Communications Commission (FCC) is required "to provide a reasoned explanation as to why the less restrictive alternatives . . . are insufficient" and because it had not that the rule adopted by the FCC was arbitrary).

[145] *See, e.g.,* VOLTAIRE, DICTIONNAIRE PHILOSOPHIQUE (1764), "Art Dramatique", in *Œuvres complètes de Voltaire,* Tome 17, 428 (Garnier, 1878), https://fr.wikisource.org/wiki/Dictionnaire_philosophique/Garnier_(1878)/Art_dramatique ("Il meglio è l'inimico del bene.").

[146] *See* Charles Crain, Senior Director, Nat'l Ass'n of Mfrs., Comment Letter on The Enhancement and Standardization of Climate-Related Disclosures for Investors 3 (June 6, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20130306-296969.pdf [https://perma.cc/2QNS-UPK9].

[147] For a discussion of this criterion, see *infra* notes 153–154 and accompanying text.

alternative goal attack.[148] The structure of side effects attacks and alternative goal attacks are illustrated in Figure 9, together with the premises they attack.

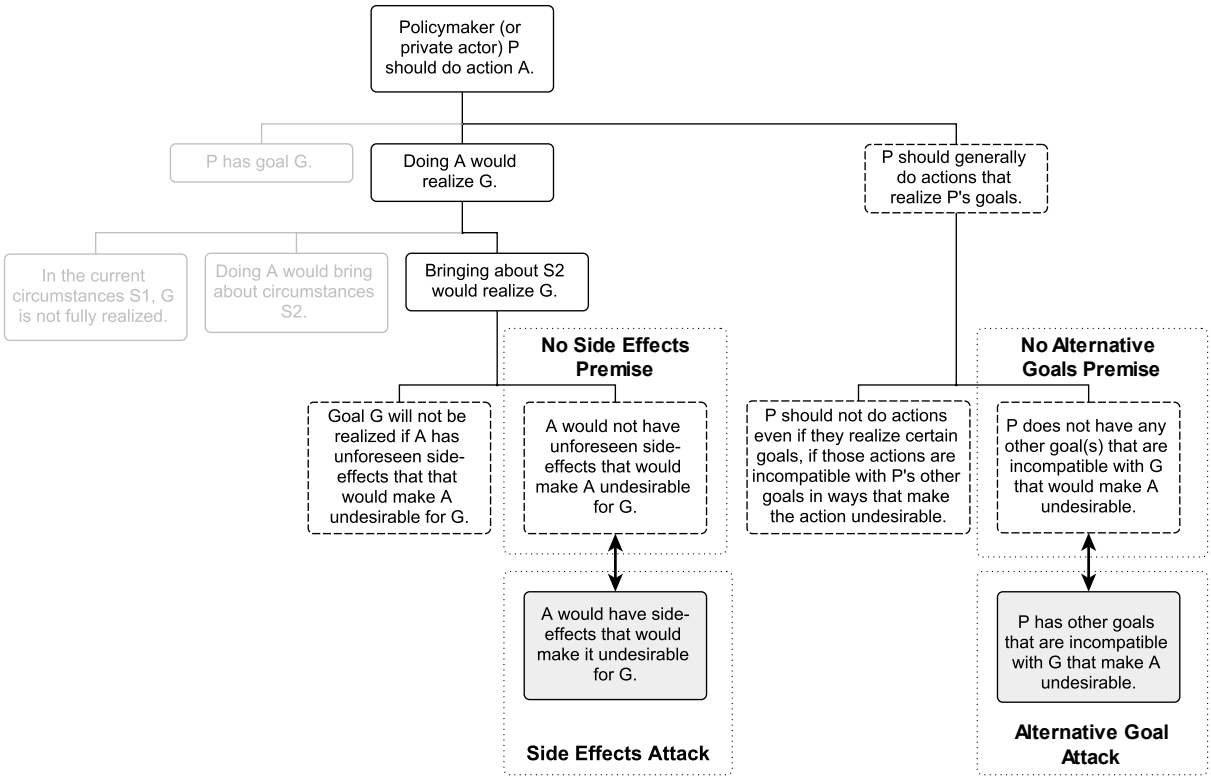

Figure 9. Side Effect and Alternative Goal Premises and Attacks

Side effects attacks rebut an implicit *no side effects premise* underlying all policy proposals—that the proposed action would not have any unforeseen consequences that would make it undesirable. A side effects attack focuses on unforeseen costs to the purported goal the policymaker would further by taking the proposed action. To mount a side effects attack, critics must identify specific negative externalities or unintended consequences that could plausibly arise from the proposed policy. These might include economic costs, social disruptions, environmental harms, or other adverse impacts on stakeholders or systems beyond the immediate scope of the policy. The more severe, probable, and well-evidenced these potential side effects appear, the more powerful the attack becomes.

To defend against side effects attacks, proponents of a policy must be prepared to argue that the potential negative side effects are either unlikely to occur, not as severe as claimed, or outweighed by the policy's positive impacts. They might provide evidence to

[148] For a discussion of the lack of consideration of capital formation in the SEC's climate disclosure rule that implies that the rule could hurt capital formation, see John Berlau, *Next SEC Must Restore Capital Formation Mission*, FORBES, https://www.forbes.com/sites/johnberlau/2024/11/03/next-sec-must-restore-capital-formation-mission/ [https://perma.cc/52C9-PXBQ] (Nov. 5, 2024, 3:28 PM) (reviewing the "scant discussion [in the climate disclosure rule] of its effects on capital formation, such as whether the costs will discourage new entrants from entering the public markets or existing publicly traded firms from remaining there").

show that the feared side effects are speculative or exaggerated, or that the policy includes safeguards or mitigation measures to minimize any unintended harms. Advocates could also contend that some level of side effects is inevitable with any policy change, and that the benefits of the proposed action justify accepting some marginal risks or costs. Policy proponents preemptively address potential side effects attacks by carefully recognizing and considering potential consequences in their calculus, and by showing why the proposal would nonetheless achieve its intended goal.

An alternative goal attack can be understood as a different framing of a side effects attack. Rather than arguing that the action would have undesirable effects for a goal that is part of the policymaker's calculus, an alternative goal attack considers undesirable effects for some other, alternative goal held by the policymaker. It thus attacks an implicit *no alternative goals premise*—that the policymaker does not have any other goals that would be harmed by the proposed action—which, if taken into account, would make the proposed action undesirable. The alternative goal attack argues that in addition to that purported goal, the policymaker has one or more alternative goals that have not been considered in the policy analysis, and the costs of the proposed action to those alternative goals would make the proposed policy undesirable for the policymaker. The attack suggests that cost to the alternative goal(s) would outweigh any potential benefit to the purported goal of the proposed policy.[149]

Alternative goal attacks require the attacker to point out specific alternative goals, and to explain why they are harmed by the policy, and why that harm makes the policy undesirable. In this way they are a more specific version of a side effects attack, which does not explicitly specify the normative objective that would be harmed by the side effects of the policy.[150] For example, alternative goal attacks on SEC policies requiring disclosure may argue that the policy would harm the SEC's alternative objective of fostering efficiency, competition, and capital formation.[151]

To defend against alternative goal attacks, proponents of a policy must be prepared to argue for the priority and relevance of the goal being pursued. Proponents might make the case that the identified alternative goals, while important, are less urgent or critical than the goal of the proposed policy. Or they might argue that the proposed policy does not actually conflict with or undermine the alternative goals, and instead complements or advances those goals in some way.

Alternative goal attacks might encourage proponents of policies to clarify and justify their priorities, either proleptically, or in response. Any reasonably contentious policy proposal is likely to involve difficult tradeoffs between competing goals and values. By questioning whether a proposed policy is focused on the most important or appropriate goals, these attacks can spur deeper reflection by analysts and the policymaker itself about those tradeoffs, and the underlying values and objectives driving policy choices. This could lead to more robust and well-reasoned policy decisions that take into account a broader range of societal needs and aspirations.

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[149] Because goals may not be precisely articulated, or because it may not be clear who will bear particular costs of a proposed action, it may be difficult to distinguish whether a cost relates to the intended goal (and is thus a side effects attack) or relates to some other goal (and is thus an alternative goal attack).

[150] Instead, it likely assumes a general "social benefit" goal that is harmed.

[151] *See infra* note 154 and accompanying text.

C. Goal Premises, and Their Attacks

The *goal premise* of any policy proposal is that the policymaker (or each of a set of private actors) has one or more goals, which the proposed action will realize.[152] Where the policymaker is a regulator, it is likely to have certain statutorily prescribed objectives. For instance, the SEC's governing statutes generally grant it authority to make rules "in the public interest or for the protection of investors."[153] The SEC's statutory authority also requires it to consider the effects of its rules on "efficiency, competition, and capital formation."[154] So the SEC's climate rule had a goal "to advance these investor protection, market efficiency and capital formation objectives."[155]

A policy proposal could be formulated with just one goal premise, or there might be several. For example, the overarching goal may be to protect investors, but the proposed policy would realize that goal by providing disclosure regarding carbon emissions to investors. This is an example of a *goal chain*, where an overarching goal is to be achieved by accomplishing a more specific goal. Figure 10 illustrates the structure of a goal chain.[156]

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[152] For an examination of the nature of goal premises, see WALTON, GOAL-BASED REASONING FOR ARGUMENTATION, *supra* note 35, at 8–12 (summarizing different positions in the "longstanding controversy" regarding the formulation of the goal premise).

[153] *See, e.g.*, 15 U.S.C. § 78m (2022). For a discussion of this criterion, see Yoon-Ho Alex Lee, *The Efficiency Criterion for Securities Regulation: Investor Welfare or Total Surplus*, 57 ARIZ. L. REV. 85, 94 (2015) (relating it to the requirement that the SEC take into account "efficiency, competition, and capital formation").

[154] *See, e.g.*, 15 U.S.C. § 78c(f) (2022) (requiring the SEC, when engaged in rulemaking and determining whether an action is in the public interests to "also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation"). For an analysis of the implications of the "efficiency, competition, and capital formation" standard, see Lee, *supra* note 153, at 93–99.

[155] *See* Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668, 21671 (Mar. 28, 2024) (codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249) ("We are adopting the final rules to advance these investor protection, market efficiency and capital formation objectives . . . .").

[156] It is also possible that the highest-level goal could be some general "value" and the next-level goal something more concrete. For a discussion of values and goals, see WALTON, GOAL-BASED REASONING FOR ARGUMENTATION, *supra* note 35, at 19–23.

The distinction between values and goals may not always be clear-cut, and it may be more accurate to conceptualize values and goals as existing on a continuum of normative objectives from general to specific. On the general end of the continuum, values can be understood as fundamental, enduring beliefs or ideals that guide behavior and represent what an individual, organization, or society considers important or desirable. They are typically abstract, broad, and relatively stable over time, embodying concepts such as justice, equality, freedom, sustainability, or innovation. Goals, in contrast, can be understood as more specific, concrete objectives. The distinction between values and goals does not affect the analysis of policy claims and attacks, as a link in a goal chain between a value and a goal will be the same as the link between a goal and another goal.

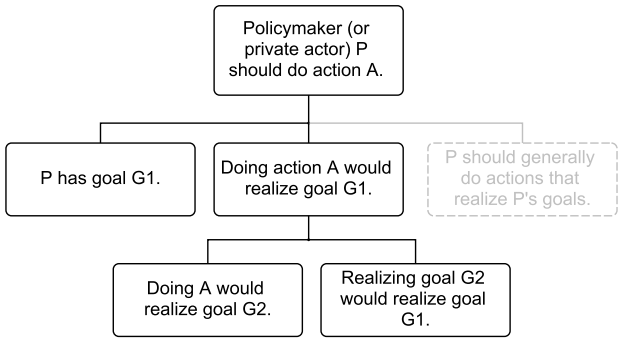

Figure 10. Goal Chains

The goal premise differs from the other premises in policy proposals because it has an inherently normative element, an *ought claim*. We must therefore consider how ought claims in policy proposals fit together with *is claims*—non-normative claims about what *is*. Consequently, we must deal with Hume's "is-ought" problem—the argument that an *is* claim cannot give rise to an *ought* claim.[157] To illustrate, consider a policy proposal that Congress should reduce disclosure requirements for emerging public companies, because doing so would make it easier for those companies to raise capital, and Congress has the goal of making it easier for emerging companies to raise capital. Congress's (purported) goal is an ought claim—Congress *ought* to make it easier for emerging companies to raise capital. But for our purposes, the *ought*-ness of the goal is not relevant, because it is embedded in the goal premise, which is an *is* claim: an empirical claim that Congress does actually have that particular goal.

Returning to our example, let us assume that the factual assumption that reducing disclosure would make capital formation easier is correct. Whether the policy proposal is an effective argument to persuade Congress to take the action therefore depends on whether Congress's goal is indeed to make it easier for emerging public companies to raise capital. If Congress instead had some other goal, such as protecting investors, and reducing disclosure for emerging public companies would harm that other goal, then the argument for easier capital formation would be ineffective. The result is that the goal premise, an *is* claim, is consistent with the goal realization premise, another *is* claim, avoiding potential problems with Hume's is-ought thesis.[158]

But Hume's is-ought thesis has an additional implication for goal premises. Because the goal premise is an *is* claim, Hume's is-ought distinction saves it from normative attacks. For instance, the argument that Congress *should not* have a goal of

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[157] For the canonical version of this claim, see DAVID HUME, A TREATISE OF HUMAN NATURE 469–70 (L.A. Selby-Bigge ed., Clarendon Press 1896) (1739). *See also* GERHARD SCHURZ, THE IS-OUGHT PROBLEM: AN INVESTIGATION IN PHILOSOPHICAL LOGIC 1 (1997) (quoting Hume's oft-quoted passage and investigating the question at length).

[158] My approach here follows that of Douglas Walton, who in turn follows John Searle. *See* WALTON, GOAL-BASED REASONING FOR ARGUMENTATION, *supra* note 35, at 20 ("Searle (2001, 44) has famously denied [Hume's principle that an 'ought' cannot be derived from an 'is'], based on his theory that institutional facts can be included as facts about the circumstances in which an agent arrives at a decision about what to do. The model of practical reasoning in this book will not only accept Searle's rejection of Hume's law, but will broaden the basis for rejecting it even further.").

capital formation (e.g., because it should have a goal of investor protection) is a normative (*ought*) claim. According to Hume's thesis, it cannot be an attack on the policy proposal, which is an *is* claim, and depends only on whether the policymaker *does* have the purported goal. A different policy proposal could of course be made that Congress *should* adopt a different goal (e.g., because it would be better for some supervening goal, such as social welfare). But that claim does not affect whether Congress *actually* has that goal at the current time.

The only way to attack the policy proposal by reference to the goal premise is by rebutting the goal premise directly—by arguing that the policymaker (or private actor) *does not* actually have the goal that the author claims. Consider the argument that the SEC should require disclosure of political spending.[159] Or that corporations should restrict their own political spending.[160] An obvious attack on these claims is that they *shouldn't* (and *won't*), because it would not further their actual goals. That is, the policymaker or private actors that are the subject of the claim do not have the goal of limiting political spending, but rather have different incentives that are incompatible with taking the proposed action. I refer to this as an *incentive incompatibility attack*.[161] This kind of attack is generally made in advance of an actual policy proposal by a policymaker—either by a third-party stakeholder or an academic, or even by an individual member of the relevant policymaking body, such as an SEC Commissioner or a Congressperson.[162]

One way to defend against an incentive incompatibility attack is to reaffirm the goal premise—that the policymaker *does indeed* have the purported goal (that the proposed policy would realize), and that it does not have overriding inconsistent goals. The debate over this point will be difficult to resolve because it depends on individuals' states of mind, which are likely to be unknown. Where the policymaker is a collective body, it will also depend on the function by which those states of mind will be aggregated into the goal of the collective body, which may be even more difficult to determine. One possible means of supporting claims about the actual incentives of a policymaker is by considering what the policymaker has done in the past. However, this assumes that the constitution of the policymaker will be the same at the time the policy is implemented as when its incentives were previously observed.

An alternative approach for supporting the policy proposal against an incentive incompatibility attack is to argue that the only way to know what the policymaker will do is to try—that is, to observe what they *actually* do after considering the proposal. For instance, a proponent might claim that "if an investment manager really wished to

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[159] *See, e.g.*, Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 925 (2013) ("[W]e argue that the SEC should develop rules requiring public companies to disclosure political spending to shareholders").

[160] One source of such claims is shareholder proposals requesting that companies provide a report on their political spending. For a study of such shareholder proposals from 1997 to 2014, see Geeyoung Min & Hye Young You, *Active Firms and Active Shareholders: Corporate Political Activity and Shareholder Proposals*, 48 J. LEGAL STUD. 81 (2019).

[161] In both cases, the incentive incompatibility attack implicates incentives of the members or agents of a collective body that are incompatible with the purported goals of the body itself, akin to agency problems.

[162] For a discussion of the incentives of the SEC and its Commissioners, see, generally, Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 HARV. J.L. & PUB. POL'Y 639 (2010).

maximize value for its investors it would support a particular action," and propose that whether or not they do take that action will be a test of whether they have that goal or not.[163]

III. COMMON TYPES OF POLICY PROPOSALS AND THEIR ATTACKS

This Part applies the general theory of policy proposals developed in Part II to three specific *types* of policy proposals that are common in business law. One goal of this Part is to show how claims in a particular area fit into the framework developed in Part II. A second goal is to explore important categories of claims in business law, and to show how they can be attacked and defended. I consider three main categories of policy proposals: proposals for more or less regulation based on comparisons to the status quo, cost-benefit policy proposals, and proposals for mandatory arrangements and private ordering.

A. Goldilocks Policy Proposals

The climate risk disclosure proposal argued that the level of disclosure of climate risk and carbon emissions by U.S. public companies was too low.[164] In 2019, Lucian Bebchuk and I published an article that argued the level of stewardship activity undertaken by the three largest investment managers on behalf of their clients was too low, and that advocated for policy measures that would lead them to undertake greater stewardship activities.[165] In a 2007 article, Bebchuk argued that the number of contested elections at U.S. companies was too low and proposed policies to increase their number.[166] Both of these are examples of a common type of policy proposal that I refer to as *Goldilocks policy proposals*. A Goldilocks policy proposal is one that bases the argument for the policy on the premise that the level of a certain phenomenon is currently too high or too low, and that the policy should be implemented to bring about a preferred level, thereby realizing the goal of the policymaker. Figure 11 illustrates the structure of the Goldilocks policy proposal.

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[163] *See, e.g.*, Hirst, *Initiation Payments*, *supra* note 2, at 727 (arguing that initiation payments would reduce under-initiation of corporate change, and therefore, if institutional investors support (or do not support) initiation payments allows us to infer that they believe (or do not believe) (1) that there is under-initiation of corporate change and (2) that it is in their interests to rectify it).

[164] *See* Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668, 21671 (Mar. 28, 2024) (codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249).

[165] Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2030 (2019).

[166] *See* Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 677 (2007).

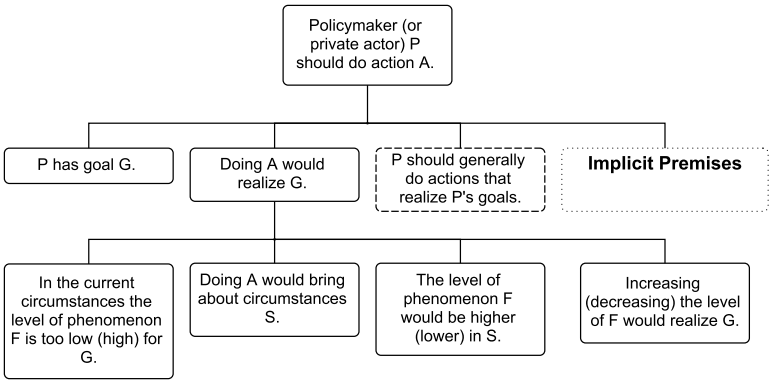

Figure 11. Goldilocks Policy Proposals

Goldilocks policy proposals vary from the model of the general policy proposal in Part II because they incorporate an additional, *normative circumstances premise* about the level of the phenomenon in the current circumstances—that it is too low (or too high) given the policymaker's goal. Otherwise, Goldilocks proposals follow the same basic structure as the general policy proposal, *mutatis mutandis*. As a result, Goldilocks proposals are also subject to the same basic set of attacks as those outlined for the general policy proposal, but with the addition of attacks on the circumstance premise that the level of the phenomenon is actually too low (or high). Such an attack could be a simple negation, that the level is not too low (high).

For instance, in response to claims by Lucian Bebchuk and myself that the level of stewardship by investment managers was too low, Barbara Novick, then a leader of the largest investment manager, responded with an article arguing that the level of stewardship that her company undertook was not too low, and criticizing our metrics for measuring stewardship.[167] Alternatively, the attack could argue that the burden is on the proponent to show that the level of the phenomenon is too low (high), and that the proponent has not done so.[168] For example, in response to the SEC's proposed climate disclosure rule, many commenters responded that the SEC had not demonstrated that the level of climate risk and carbon disclosure was too low.[169] The attack could also be epistemological in nature, arguing that it is not possible to determine whether the current level of the phenomenon is too low (high). To illustrate, in response to Bebchuk's claim that the level of contested elections at U.S. companies was too low, two partners from Wachtell Lipton responded with an article opposing Bebchuk's proposals, arguing that the level of contested elections was impossible to determine, and that Bebchuk had not discharged his burden to do so.[170]

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[167] Barbara Novick, *"The Goldilocks Dilemma": A Response to Lucian Bebchuk and Scott Hirst*, 120 COLUM. L. REV. F. 80, 81-82 (2020).

[168] This is a burden-shifting move. For a discussion of burden-shifting moves, see *supra* Section I.A.

[169] For an analysis of comments responding to the proposed rule, see Jacob H. Hupart et al., *What Public Comments on the SEC's Proposed Climate-Related Rules Reveal—and the Impact They May Have on the Proposed Rules*, MINTZ (July 20, 2022), https://www.mintz.com/insights-center/viewpoints/2022-07-20-what-public-comments-secs-proposed-climate-related-rules [https://perma.cc/8XMS-B2YU].

[170] Martin Lipton & William Savitt, *The Many Myths of Lucian Bebchuk*, 93 VA. L. REV. 733, 734 (2007) ("Bebchuk has utterly failed to carry the burden of justifying the radical reform he proposes.").

B. Cost-Benefit Policy Proposals

The cost-benefit approach has become a central way of making policy proposals.[171] This is especially true of proposals in those fields that analyze costs and benefits as part of their work, such as economics, and by extension, law and economics. Most importantly, most regulators use a cost-benefit approach to justify their proposed rules.[172] Cost-benefit analysis is therefore familiar to anyone who has reviewed a formal regulatory proposal for rulemaking. Executive orders have required agencies to conduct cost-benefit analyses since the Reagan administration.[173] While these requirements do not apply to independent regulatory agencies such as the SEC, the SEC's practice has been to conduct cost-benefit analyses of their rulemaking.[174] Judicial review of SEC decisions has scrutinized whether the SEC has satisfactorily apprised itself "of the economic consequences of a proposed regulation," and has vacated rules where they have not.[175] The nature and appropriateness of cost-benefit analysis has also been the subject of extensive work by legal scholars.[176]

In this Section I show how the general form of policy proposal in Part II can be reformulated in cost-benefit analysis terms. Doing so extends the ways in which the policy proposal can be attacked because the cost-benefit approach narrows the general form of policy proposal. It does so in two ways. First, cost-benefit analysis assumes a goal of increasing aggregate social welfare, and claims to achieve that goal by increasing net benefits for a defined set of factors.[177] Second, cost-benefit analysis imposes a particular methodology for showing how aggregate net benefits for those factors are increased, including measuring and aggregating the present value of the various expected benefits and costs with respect to those factors.[178]

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[171] What I refer to as cost-benefit analysis is also referred to as benefit-cost analysis. *See, e.g.*, Eric Posner & E. Glen Weyl, *Benefit-Cost Analysis for Financial Regulation*, 103 AM. ECON. REV. 393 (2013). SEC rulemaking simply refers to it as "economic analysis." *See, e.g.*, Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21412 (Apr. 11, 2022) (codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

[172] *See, e.g.*, Posner & Weyl, *supra* note 171, at 393–97.

[173] *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1982) (requiring "Regulatory Impact Analysis" by agencies).

[174] Memorandum from the Div. of Risk, Strategy, and Fin. Innovation and the Off. of Gen. Couns., Current Guidance on Economic Analysis in SEC Rulemakings 3 (Mar. 16, 2012), available at https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf ("[A]s SEC chairmen have informed Congress since at least the early 1980s—and as rulemaking releases since that time reflect—the Commission considers potential costs and benefits as a matter of good regulatory practice whenever it adopts rules.").

[175] *See* Bus. Roundtable v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (vacating the SEC's proxy access rule for having failed to "adequately to assess the economic effects of a new rule").

[176] *See, e.g.*, MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS 3 (2006). For two business law articles considering cost–benefit analysis in light of the *Business Roundtable* decision, see generally John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 915 (2015); Jeffrey N. Gordon, *The Empty Call for Benefit-Cost Analysis in Financial Regulation*, 43 J. LEGAL STUD. S351, S371 (2014).

[177] I use the terms "social welfare" and "social benefit" interchangeably in this Section.

[178] *See infra Figure 14* (visualizing the methodology of measuring the present value of the various expected benefits).

1. Core Premises of Cost-Benefit Proposals

The basic structure of cost-benefit policy proposals is the same as that of the general policy proposal: the policymaker has a particular goal, and taking the proposed action would achieve that goal. However, cost-benefit analysis makes the goal premise more specific: to increase aggregate net social benefit. As a result, the goal realization premise becomes a claim that taking the proposed action would increase aggregate net social benefit. Figure 12 shows the core premises in cost-benefit analysis claims.

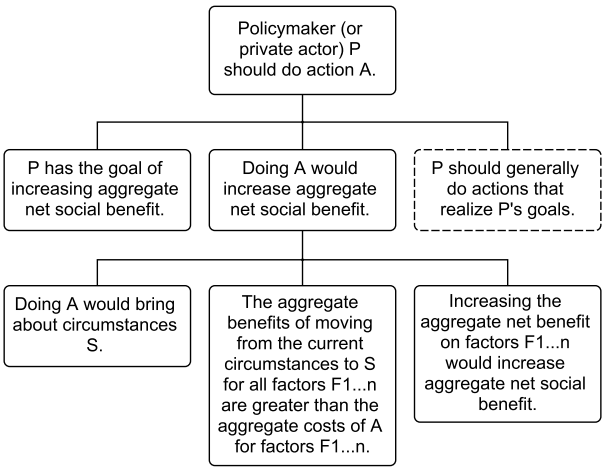

Figure 12. Cost-Benefit Policy Proposals

As with the general policy proposal, the goal realization premise for cost-benefit proposals also relies on the premise that the proposed action would bring about new circumstances. It differs in how it assesses the impact of the new circumstances. For tractability, it considers the circumstances against a set of factors that are considered relevant to the policy. And it argues that the benefits for those factors of moving to the new circumstances are greater than the costs for those circumstances of moving to the new circumstances. A different way of putting this is that there is a net aggregate benefit for those factors in moving to the new circumstances. In addition, the goal realization premise of cost-benefit proposals argues that increasing the aggregate net benefit for those factors would increase aggregate net social benefit. The most obvious way to attack cost-benefit proposals is by rebutting one or more of these core premises, by arguing its negation.

2. Cost-Benefit Versions of General Implicit Premises

In addition to these core premises, cost-benefit proposals have a large number of implicit premises. Several of these are simply cost-benefit versions of the implicit premises from the general policy proposal, which are shown in Figure 13. Many more relate to the methodological assumptions of cost-benefit analysis, which are discussed further below.

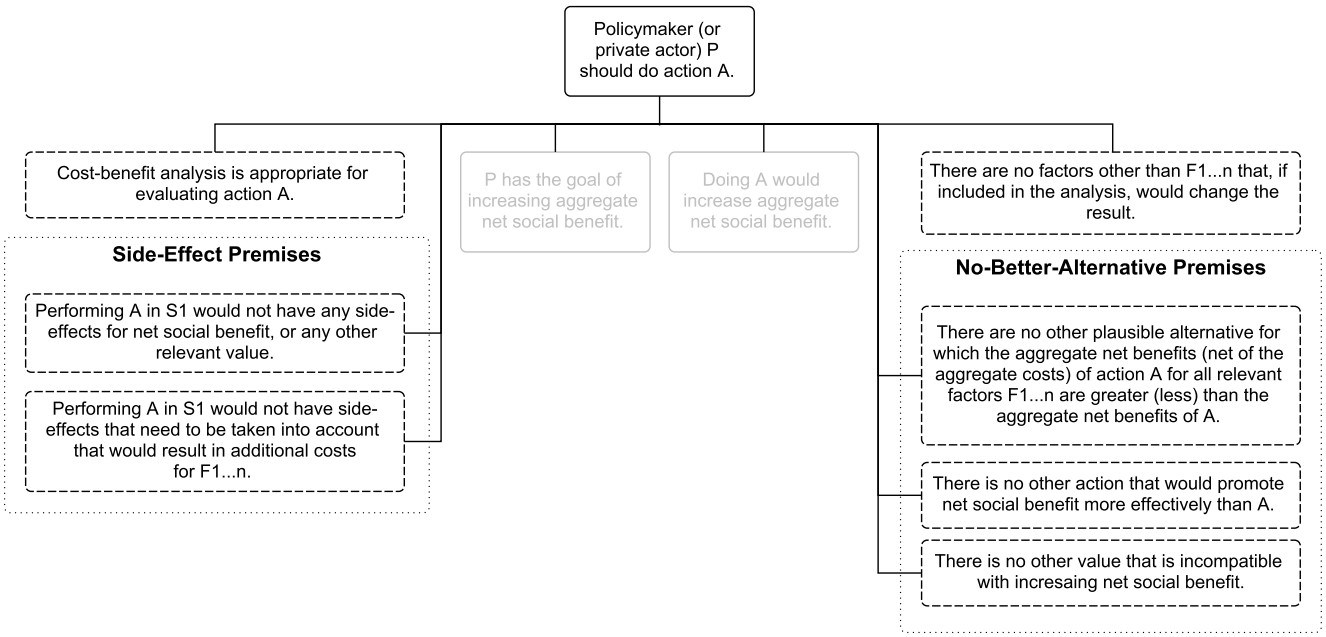

Figure 13. Cost-Benefit Versions of General Implicit Premises

An implicit premise that arises from the use of cost-benefit analysis is that it is appropriate for evaluating the proposed action. An implicit premise that arises from the limitation of the goal realization premise to specific factors is that there are no other factors that are relevant for determining whether the proposed action increases aggregate net social benefit that, if included in the analysis, would change the result.

The implicit premises outlined in the general policy proposal—and the potential attacks on them—also apply, *mutatis mutandis*, to cost-benefit analysis claims. The side effect premises in a cost-benefit proposal also include a premise that taking the proposed action would not have any side effects that would result in costs for the relevant factors, or for aggregate welfare more generally. The best alternative premise of a cost-benefit proposal includes premises that there are no better alternatives for which the aggregate net benefits are greater than those of the proposed action, and that there is no other action that would increase aggregate welfare more than the proposed action. The no alternative goal premise becomes a premise that there is no other goal (or value) that is incompatible with increasing aggregate welfare.

3. Methodological Premises of Cost-Benefit Analysis Claims

The cost-benefit approach involves estimating the various costs and benefits of the proposed policy for the relevant factors and aggregating and comparing them to determine whether the benefits of the policy exceed its costs or, alternatively, whether the policy provides a net benefit. Cost-benefit claims therefore assume that it is *possible* to reliably measure the costs and benefits for the relevant factors, and to compare and aggregate them. These assumptions can be understood as a set of implicit premises regarding how aggregate

welfare is to be calculated and, thus, an additional set of potential attacks. These are shown Figure 14.

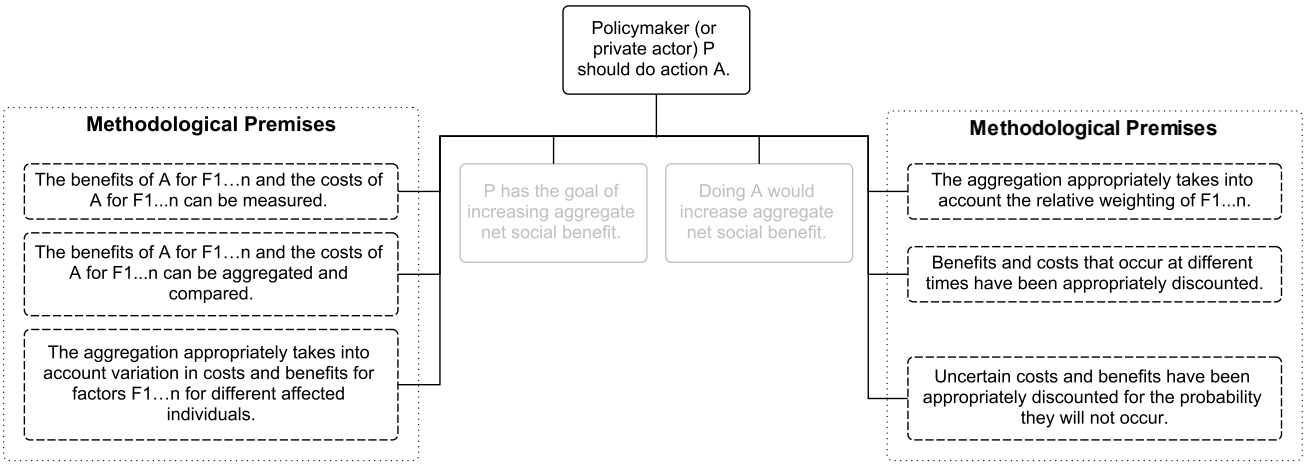

Figure 14. Cost-Benefit Proposal Methodological Premises

There are several ways in which costs and benefits differ—including across the relevant factors, across individuals or organizations, and across different time periods.[179] Aggregating these different costs and benefits requires reducing them to some common unit, such as monetary value. Aggregating costs and benefits that occur at different times requires discounting them to a common time period, such as calculating their present value. Comparing costs and benefits across different organizations or individuals requires taking into account individual circumstances and how they are likely to influence how the organization or individual experiences the action. For instance, even if a policy has the same monetary cost to all individuals, an individual with high wealth or income is likely to be affected differently than an individual with low wealth or income. Aggregating differential costs and benefits across the different factors that are relevant to the policy may also involve some differential weighting of different factors, or tradeoffs between different factors. The effects of many policies are also likely to be influenced by uncertain future events. To the extent that this is the case, the cost-benefit approach assumes that the policy analyst can generate a reasonable estimate of the probability of relevant events occurring, and adjust the costs or benefits based on that likelihood to get an expected cost or benefit.

The methodological premises create significant challenges for cost-benefit analysis. In many cases, the inability to satisfy one or more of these premises may make a comprehensive quantitative cost-benefit analysis impossible. Where a policy proponent has attempted, at least in part, a quantitative cost-benefit analysis, rebutting any of these premises is an opportunity to undermine that quantitative cost-benefit analysis. Respondents may challenge particular parts of the analysis, on the grounds that the

[179] *See, e.g.*, ANTHONY E. BOARDMAN ET AL., COST-BENEFIT ANALYSIS: CONCEPTS AND PRACTICE 9–10 (5th ed., Cambridge Univ. Press 2018) (1996) ("It is important to try to include the full range of consequences of each project. . . . The [next] task is to predict all of the impacts in each year during the discount period (the life of the project) for each alternative.").

estimates—and thus the conclusions—are unreasonable. A general line of attack across all of the premises is that difficulties in overcoming these challenges make the estimates of costs and benefits unreliable, and, therefore, insufficient to draw a conclusion regarding whether the aggregate welfare effects of the policy would be positive or negative.

4. Cost-Benefit Analysis-Lite

Where the challenges in satisfying any one or more of the methodological premises are insuperable, comprehensive and reliable quantitative cost-benefit analysis will be impossible. If the policy proponent does not wish to relinquish cost-benefit analysis entirely, they must rely on qualitative assessments to deal with the parts of the analysis where quantitative assessment is impossible. This is particularly relevant for policymakers such as the SEC that are required to perform economic analyses of potential rules, even though many parts of that analysis will not be quantifiable.[180] The result is what I refer to as "cost-benefit analysis-lite," a hybrid form of cost-benefit analysis where some cost and benefit premises are quantified, and other premises of the claim are mere qualitative claims—e.g., that the benefits of a proposed rule for investors would be positive and substantial. Of course, qualitative claims cannot be easily aggregated with quantitative claims. In order to support the goal realization premise—that taking the action would result in an increase in aggregate social benefit—the qualitative claim about part of the analysis must also relate to that condition. For instance, in the previous example, the relevant premise would be that the benefits of the rule are not just positive and substantial, but sufficiently large to overcome the quantified costs of the action, so that the action will result in positive net social benefit. Any such qualitative premises of the analysis will be premises that can be targeted by attackers to undermine the goal realization premise: that the policy would realize the goal of increasing aggregate welfare.

C. Mandatory Arrangement Proposals, and Private Ordering Attacks

A common type of policy proposal is what I refer to as a *mandatory arrangement proposal*. Mandatory arrangement proposals apply to organizations that have their own internal arrangements for conducting the activities of the organization.[181] The mandatory arrangement claim is that the policymaker should require all of those organizations or contracting parties in the relevant group to adopt a particular arrangement. An obvious

[180] Following judicial decisions requiring the SEC to quantify costs and benefits, several authors pointed out the challenges of doing so. *See, e.g.*, Coates, *supra* note 176, at 886 ("[C]ritiqu[ing] efforts to impose judicially reviewed, quantified [cost-benefit analysis] on independent financial agencies, while also attempting both to explore how conceptual [cost-benefit analysis of financial regulation] could lead to better policy and to advance the substantive project of [cost-benefit analysis of financial regulation] itself.").

[181] In this Section, I describe claims that particular *organizational arrangements* should be mandatory. A similar analysis could be applied to claims that arrangements in bilateral or multilateral contracts should be mandatory, though this may expand the scope of the supporting premises beyond those that I argue are necessary to support claims regarding mandatory organizational arrangements.

example is the claim that the SEC should require all companies to disclose climate-related risks,[182] including the SEC's own justification for its final rule doing just that.[183]

This Section separately considers two different types of mandatory arrangement proposals, according to their goal. One set of mandatory arrangement proposals consists of those that have a goal of benefiting organizations or individuals who are the subjects of the requirement. The second set consists of those proposals that have a goal of benefitting others that are not the subject of the requirement.[184] These two different goals correspond to two different goal premises (and corresponding goal realization premises), either or both of which could support the policy proposal itself. Figure 15 shows the structure of both of these sets of premises.

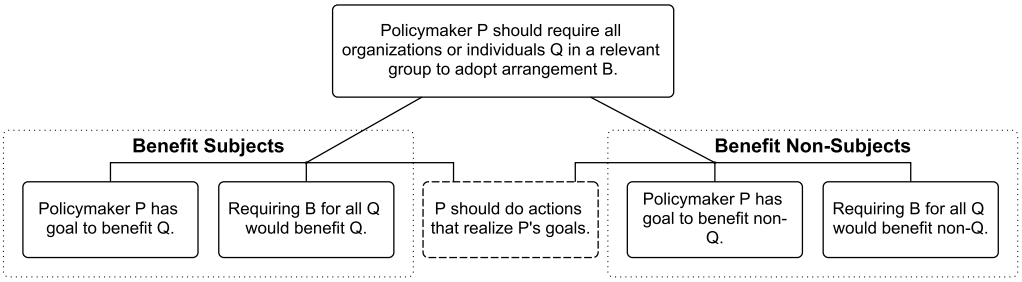

Figure 15. Mandatory Arrangement Proposals

1. Mandatory Arrangement Proposals Benefiting Subjects

The premises of the mandatory arrangement proposal for the benefit of the subjects of the rule are shown in Figure 16.

[182] For three of many articles calling for mandatory disclosure of climate risk, see Letter from Cynthia A. Williams, Osler Chair in Bus. L., Osgoode Hall L. Sch., & Jill E. Fisch, Professor of Bus. L., Univ. of Penn., to Brent J. Fields, Sec'y, SEC 16 (Oct. 1, 2018), https://www.sec.gov/files/rules/petitions/2018/petn4-730.pdf [https://perma.cc/K4FL-2PSH] (requesting the SEC to "initiate rulemaking to develop mandatory rules for public companies to disclose . . . environmental, social, and governance information"); Madison Condon et al., *Mandating Disclosure of Climate-Related Financial Risk*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 745, 748 (2022) ("The SEC . . . should mandate that publicly traded companies disclose their climate risk . . . ."); and Madison Condon, *Market Myopia's Climate Bubble*, 1 UTAH L. REV. 63, 126 (2022) ("An updated mandatory climate risk disclosure regime, designed in consultation with climate scientists and auditing professionals, is a necessary first step toward preparing the economy for climate change.").

[183] *See* Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668, 21671 (Mar. 28, 2024) (codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, 249) (discussing the purpose of the SEC's mandatory climate disclosure rule).

[184] These two goals are non-exclusive—it could be that the policymaker is motivated by a goal to benefit *both* the subjects of the rule and non-subjects.

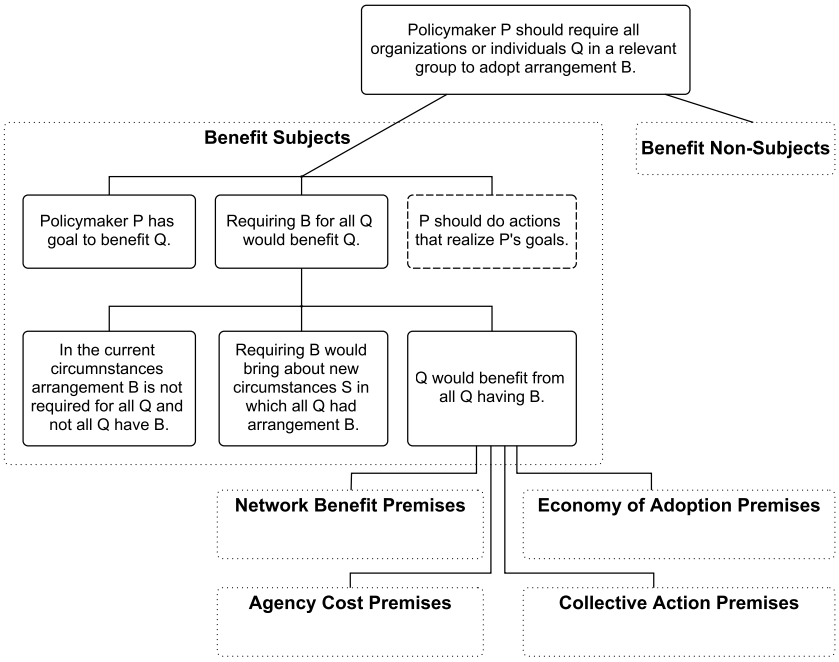

Figure 16. Mandatory Arrangement Benefit Premises (Benefit Subjects)

The main work of the proposal is part of the goal realization premise. There are three sub-premises, two of which are straightforward. Any mandatory arrangement claim obviously assumes that the particular arrangement is not already mandatory for all of the organizations or contracting parties in the relevant group. Another straightforward premise is that requiring the arrangement would bring about new circumstances in which all organizations in the relevant group would have the particular arrangement. The crux of the argument is the third premise, which I refer to as the *subject benefit premise*: that the organizations or contracting parties in the group that are subject to the rule would benefit from all of them having the particular arrangement. As Figure 16 shows, I argue that there are four ways, and only four, that the subject benefit premise can be supported.

a. Network Benefit Premises

The first way that the subject benefit premise can be supported is by *network benefit premises*. These are shown in Figure 17.

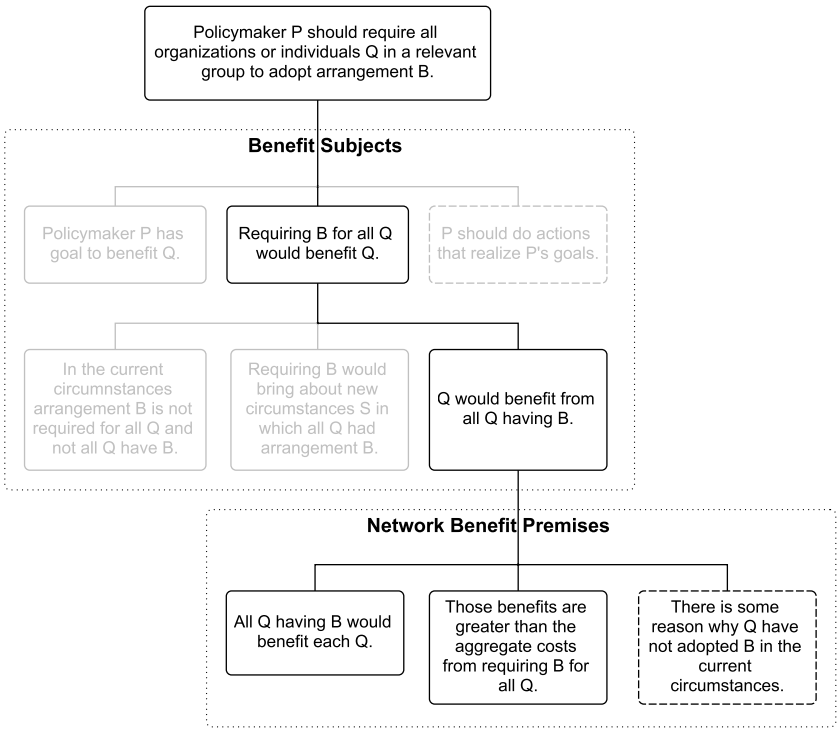

Figure 17. Network Benefit Premises

These premises argue that each of the members of the group subject to the regulation would benefit from all of the members of that group having the particular arrangement, and that they would not all have the same arrangement without the mandatory rule. For the argument to succeed, the benefits to those members must be greater than the aggregate costs of requiring the arrangement for all members of the group. But an additional premise is needed to avoid the dollar in the street attack: if the members of the group would benefit from all of them having the arrangement, why have they not already adopted the arrangement? The required premise is that there is some reason that the organizations or contracting parties have not adopted the arrangement in the current circumstances. This premise, by definition, suggests some kind of collective action problem. Most obviously, it could be a free-rider problem. For instance, if adopting the arrangement is costly and does not directly benefit the adopting organization, but instead benefits other group members, that organization will want others to adopt the arrangement, but will decline to do so themselves, thereby hoping to free-ride on the decision of others to adopt the arrangement. A different version could be a first-adopter problem, whereby the costs are greater (or benefits lower) for those that adopt first, so none of the group members have an incentive to do so.

b. Agency Cost Premises

A second type of mandatory arrangement argument relies on *agency cost premises*. These are shown in Figure 18.[185]

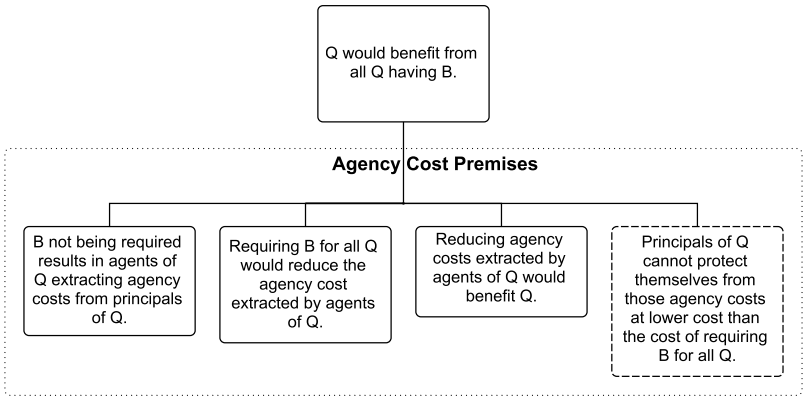

Figure 18. Agency Costs Premises

In this argument, the absence of the arrangement currently results in *agents* of group members extracting value from group members, commonly referred to as agency costs.[186] As a result, requiring the arrangement for all group members would reduce the agency costs extracted by agents of group members. And reducing those agency costs would obviously benefit the group members. As with the network benefit argument, this argument only works because of an implicit premise. In this case, the premise is that the organizations or contracting parties cannot protect themselves from the agency costs at a lower cost than the cost of requiring the arrangement for all group members. If this premise were not true then there would be an alternative for benefiting group members that would be better for them than the mandatory arrangement.

c. Collective Action Premises

The third type of mandatory arrangement argument relies on *collective action premises*. These are shown in Figure 19.

[185] For parsimony, Figure 18 omits the policy proposal itself and focuses on the premises supporting the claim that subjects of the rule would benefit from all subjects having the arrangement, as do subsequent figures in Subsection I.A.1.

[186] Agency costs also include the contracting costs incurred by the principal and the agent to reduce their misalignment, as well as the residual costs from that misalignment that are not eliminated. *See* Jensen & Meckling, *supra* note 88, at 308 ("We define *agency costs* as the sum of: (1) the monitoring expenditures by the principal, (2) the bonding expenditures by the agent, (3) the residual loss." (footnote omitted)).

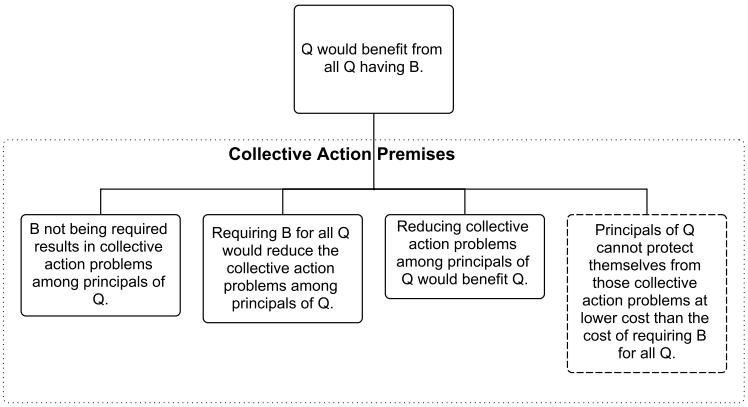

Figure 19. Collective Action Premises

The main idea in this set of premises is that there is some collective action problem[187] that would arise among the subjects of the requirement that would lead them to choose arrangements that are sub-optimal for them, and that this could be averted if all the subjects were required to adopt the (optimal) arrangement. This relies on an implicit premise that the subjects cannot protect themselves from the collective action problems at lower cost than the proposed requirement.

d. Economy of Adoption Premises

The fourth type of mandatory arrangement argument relies on what I refer to as *economy of adoption premises*. These premises are shown in Figure 20.

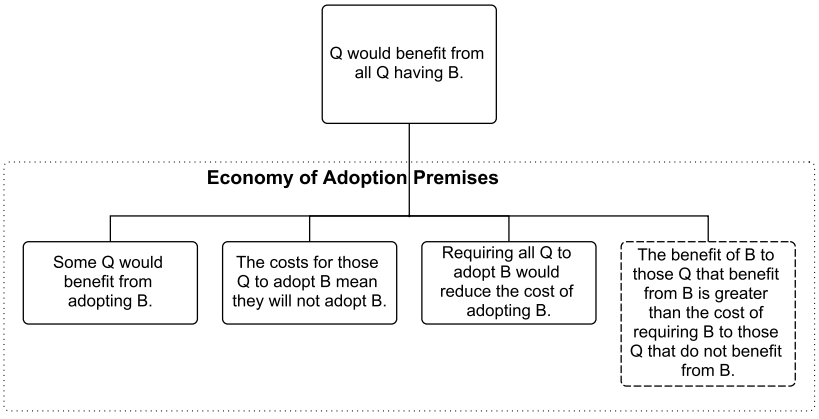

Figure 20. Economy of Adoption Premises

In this argument, the central rationale for a mandatory arrangement is that it would reduce costs to those in the subject group to adopt the arrangement. In this argument, some

[187] For the canonical discussion of public goods and collective action problems, see, generally, Olson, *supra* note 92.

group members would benefit from adopting the arrangement. But the costs for them to adopt the arrangement are high enough that they will not adopt the arrangement. Requiring the arrangement would reduce the cost of adopting the arrangement. An implicit premise necessary for this argument to work is that the benefit of the arrangement to those group members who benefit from it, but do not otherwise adopt it, is greater than the cost of requiring the arrangement for those group members who do not benefit from it.

2. Mandatory Arrangement Proposals Benefiting Non-Subjects

The second way of supporting mandatory arrangement proposals is to argue that the policymaker's goal is to benefit some set of organizations or individuals that are *not* in the group being regulated, and that requiring the arrangement for all organizations or individuals in the subject group would benefit non-subject group organizations or individuals. This argument is illustrated in Figure 21.

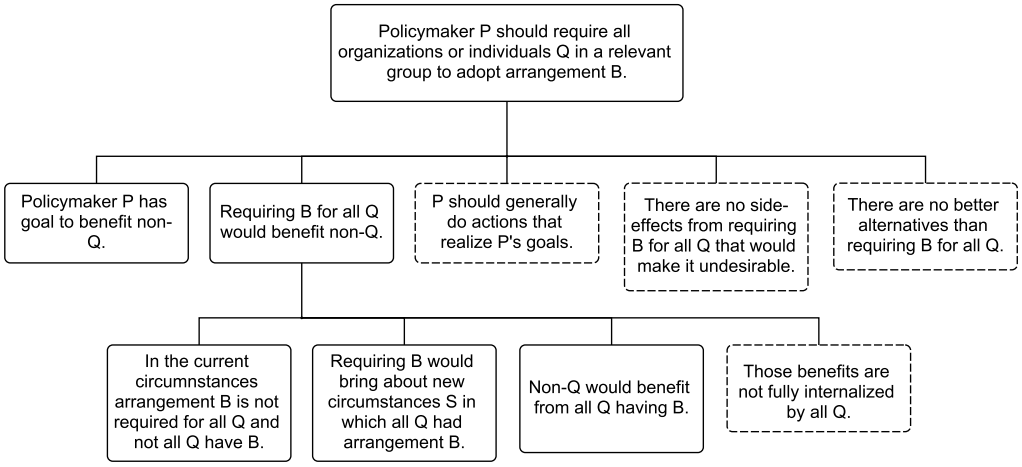

Figure 21. Mandatory Arrangement Claims (Benefit Non-Subjects)

The argument that mandatory arrangements should be imposed to benefit organizations or individuals that are not subject to the requirement relies on the premise that the organizations outside of the subject group would benefit from all organizations or individuals in the subject group having the particular arrangement. Several implicit premises are necessary for this argument to succeed, which I refer to as *externality premises*. First, in order for the mandatory arrangement to have a benefit over the status quo, the benefits to external organizations and individuals (those *outside* the group subject to the requirement) must not be fully internalized by those organizations *within* the subject group. If they were fully internalized, the subject organizations would choose to adopt the arrangement, obviating the need for a mandatory arrangement.[188] Second, the same implicit

[188] This could be the case because of transfer payments between, on the one hand, the external individuals and organizations and, on the other hand, the organizations that would be subject to the requirement. This is simply an application of the Coase theorem. *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 8 (1960) ("[T]he ultimate result (which maximises the value of production) is independent of the legal position if the pricing system is assumed to work without cost.").

premises as in the general policy proposal will apply and, thus, so will the same general attacks. Most relevant here is the side effects attack: that there may be side effects that would make requiring the arrangement undesirable. If the goal premise is focused on the benefit to organizations or individuals other than the ones being regulated, an obvious side effect is the potential harm to those organizations that are being regulated. If the value underlying the goal of benefiting the non-regulated organizations is welfare maximization, then this might be defeated if the regulated organizations suffer costs that exceed the benefits to the target group. Third, the best alternative premise means that the claim can be attacked by showing there is a better alternative, such as one that has equal benefits for the group not subject to the regulation and lower costs for those that are subject to the regulation.

3. Private Ordering Proposals

What I refer as a *private ordering proposal* argues that a policymaker should allow organizations to choose their own arrangements, because that would be better for those organizations than if the policymaker required them to adopt a particular arrangement. While a private ordering proposal could propose a change to a mandatory status quo, it could also function as an attack on a mandatory arrangement proposal with the goal of benefiting the subjects of the mandatory rule.[189] Figure 22 shows how a private ordering

[189] And vice versa—a mandatory arrangement claim that requiring the same arrangement for subjects would benefit those subjects is an attack on a private ordering claim.

Although a private ordering attack would not apply to a mandatory arrangement claim that had the goal of benefiting non-subjects of the regulation, it could be reformulated as a side effects attack on that claim, arguing that realizing the goal of benefiting non-subjects would have side effects for subjects that would make the policy undesirable. Similarly, it could also be used to attack a claim that supported a mandatory arrangement by reference to *both* subjects of the rule and non-subjects.

proposal attacks a mandatory arrangements proposal, and also shows three different ways that a private ordering proposal can be supported.

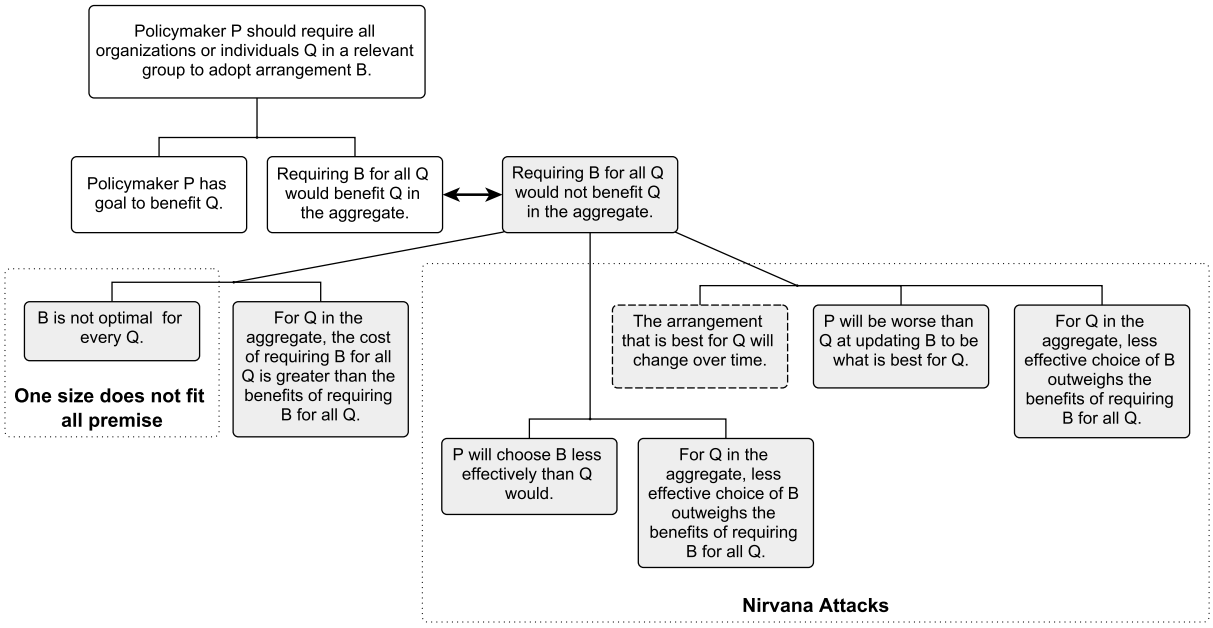

Figure 22. Private Ordering Proposals

The first way that a private ordering proposal can be supported is based on a *one size does not fit all premise*: that, when it comes to the particular arrangement, one size does not fit all of the subjects, and that the arrangement is not optimal for every subject. Part of this attack is also that the costs to the subjects for which the arrangement is not optimal of adopting the arrangement are greater than the benefits of requiring the same arrangement for all subjects. As a result, requiring the arrangement for all subjects would not benefit the subjects in the aggregate.

The second and third ways to support a private ordering proposal are what I refer to as *nirvana attacks*. These are formulations of what have previously been called "nirvana fallacies."[190] The typical version of a nirvana attack relies on the premise that the policymaker will be less effective than the subject companies at choosing the arrangement that is best for the subject companies. The cost of this less effective choice will outweigh the benefits of requiring all subjects to have the same arrangement, causing the mandatory arrangement to be worse for the subjects (in the aggregate) than allowing private ordering.

The third way to support a private ordering proposal is a type of nirvana attack that focuses not on the *initial* choice of arrangement by the policymaker, but the *updating* of

[190] *See* Melvin Aron Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1524–25 (1989) ("It is sometimes said that arguments for mandatory rules reflect the Nirvana Fallacy, which consists of believing that just because markets are not perfect, mandatory rules would be better."); *see also* Melvin Aron Eisenberg, *Bad Arguments in Corporate Law*, 78 GEO. L.J. 1551, 1551–52 (1990) (describing and analyzing the "Nirvana Fallacy"). Harold Demsetz previously referred to this as the "nirvana approach." *See* Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1 (1969) ("The view that now pervades much public policy economics implicitly presents the relevant choice as between an ideal norm and an existing 'imperfect' institutional arrangement. This *nirvana* approach differs considerably from a *comparative institution* approach . . . .").

that choice. It is premised on the assumption that the arrangement that is best for the subject organizations will change over time, and it argues that the policymaker will be worse at updating the arrangements to be what is best for the subjects, with the same result as above—that this deficit will outweigh the benefits of the mandatory arrangement.

IV. IMPROVING POLICY ARGUMENTS

As with arguments in general, policy arguments can mean two different things.[191] One is an argument among multiple participants, debating the desirability of one or more potential policies. The other is the argument that each participant makes in such a debate, proposing or attacking a policy. I argue that adopting and developing the analysis and approach proposed in this Article would improve both individual arguments about policies, and also (and as a result), the quality of arguments qua debates regarding policies.

A. Improving Policy Arguments

In this Section I make the claim that applying the models of policy proposals and attacks set out in this Article would improve individual policy arguments—for both policy proponents and also their opponents—and would thus also improve policy debates as a whole. The first part of this claim is that the argument models outlined in this Article offer significant benefits for those reading or hearing policy proposals. Policy proposals in the wild are often opaque and obscure, rarely presenting themselves with the clarity and structure that systematic analysis would demand.[192] This opacity arises because policy arguments are typically made in natural language, often in verbose prose,[193] where premises are generally not labeled, and some may be left unarticulated—either inadvertently, for brevity or prose elegance, or possibly to avoid highlighting the weaker parts of a claim.[194] As a result, the core structure of the argument, including its key premises and inferential steps, can be difficult to discern without a systematic approach to parsing and analysis.

Applying the approach outlined in this Article helps overcome this problem, in three ways. First, it aids with the recognition of the underlying arguments from dense and possibly opaque prose. The argument models provide a framework that serves as both a template and a checklist. It allows readers to parse the author's natural language into particular premises and determine whether all core premises have been articulated or if some remain implicit. This process makes the structure of the author's argument more transparent and amenable to critical analysis. This is important because we may otherwise respond to arguments intuitively, resulting in potential gaps in our analysis, rather than

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[191] *See, e.g.,* TRUDY GOVIER, A PRACTICAL STUDY OF ARGUMENT 1 (7th ed. 2010,) (recognizing that the word argument can mean "a set of claims in which one or more of them … are put forward so as to offer reasons for another claim" or a "dispute or fight").

[192] *See supra* Part III.

[193] *See supra* Part III.

[194] That is, these arguments are enthymematic. For discussions of enthymemes see *supra* note 9 and note 131 and accompanying text.

systematically and comprehensively.[195] Even for those with well-developed argumentative intuitions, a pre-reasoned list of attacks and defenses may be more comprehensive than their intuitive responses. Much like cognitive schemas that we internalize to navigate familiar situations, having a mental catalog of common policy proposal structures enables readers to more rapidly identify and grasp the thrust of arguments encountered in policy discussions.[196] This schema-like function allows for faster processing of complex policy arguments, as readers can quickly map new arguments onto familiar structures, and can thus focus their attention on the unique aspects of each argument rather than spending time deciphering its basic form.

Second, argument models help in the parsing and evaluation of actual arguments. The models provide a clear framework for breaking down policy proposals into their constituent parts—claims, premises (explicit and implicit), and the inferential steps between them. This structured analysis allows readers to more effectively evaluate the logical flow and coherence of an argument. By identifying each component, readers can assess the strength of individual premises, the validity of the inferential steps, and the overall soundness of the argument. This parsing process is particularly valuable when dealing with complex or multifaceted policy proposals, where the relationships between different aspects of the argument may not be immediately apparent. It also helps in uncovering hidden assumptions or unstated premises that might be crucial to the argument's validity. By making these elements explicit, the models enable a more thorough and critical examination of policy proposals, ensuring that no essential aspect of the argument is overlooked or misunderstood.

Third, it helps in responding to arguments. The argument models in Part I provide ready-made attacks that apply generically to most policy proposals, such as the ain't broke attack or the partial framing attack, which allow readers to quickly instantiate the attacks for the content of the claim being attacked. The argument models in Part III serve a similar purpose, but for particular classes of claims—Goldilocks claims, cost-benefit claims, or mandatory arrangement claims. The models in Part II present a general theory of policy proposals, the premises that support them, and how those premises can be attacked to effectively undermine any policy proposal. For any policy proposal, one or more of these models can be used as a checklist of potential attacks that can be made against the proposal.

So far I have focused on the benefits of the argument modeling approach for those reading or hearing opaque and complex policy proposals. But they are equally applicable to allow authors of policy proposals to make their own policy proposals stronger, or clearer, or both. Applying argument models allows authors to clearly identify the core premises for

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[195] *See* Brun & Betz, *supra* note 8, at 39–40 ("Intuitive practical reasoning risks to suffer from various shortcomings and fallacies as soon as a decision problem becomes a bit more complex . . . [h]ence we need to analyse policy arguments and to make explicit which scientific findings and normative assumptions they presume, how the various arguments are related to each other and which standpoints the opponents in a debate may reasonably hold."). In this respect, analysis of policy claims can be said to use an analytic or reasoning process, as opposed to a heuristic or intuitive process—that is, a "system 2" process rather than a "system 1" process, in the terms used in the dual-process theory of cognition and reasoning. For a review of that field, see, generally, Jonathan St. B.T. Evans, *Dual-Processing Accounts of Reasoning, Judgment, and Social Cognition*, 59 ANN. REV. PSYCH. 255 (2008).

[196] A well-developed branch of cognitive science suggests that schemas allow individuals to recognize and respond to phenomena. For a discussion on the history and background of schema theory, see Mary B. McVee et al., *Schema Theory Revisited*, 75 REV. EDUC. RSCH. 531, 535–40 (2005).

their claim, and the potential attacks that could be directed at their claim. This is particularly important because we may have potential blind spots for weaknesses in our own arguments.[197] Identifying the core premises means that the author can ensure that they articulate all of those premises. And it might also suggest to the author ways that their articulation of the premise can be refined to be more precise or clearer for potential readers. Identifying potential attacks allows the author to consider those attacks and, if necessary, to revise their claims and premises to defend against the potential attacks. Authors may do this by changing their claims and premises so that they are not susceptible to those attacks. Or authors may make a proleptic defense of the claim or premises—articulating the potential attack, and defending against it by explaining why it does not apply (that is, counter–attacking the potential attack, in anticipation). By allowing authors to more clearly understand their own arguments, and to think more deeply about them, applying argument models may provide additional insights into the nature of the move being made, or the debate that it is part of.

Astute readers will recognize that the arguments I have made in this Section are parts of two policy proposals. I have made the arguments that (1) using the argument models in this Article would help readers analyze, evaluate, and attack policy proposals, and (2) they would help authors make their own policy proposals stronger, clearer, or both. These are essentially the goal realization premises of policy proposals that (1) readers should use the methods of analysis proposed in this Article if they wish to analyze, evaluate, and attack policy proposals more effectively, and (2) authors should use those methods if they wish to make their own policy proposals stronger, or clearer, or both. I phrase these policy proposals conditionally, because I do not feel confident generalizing about the goals of readers or authors of policy proposals. It is likely that not all readers of policy proposals wish to analyze, evaluate, and attack policy proposals more effectively, and that not all authors wish to make their policy proposals stronger, clearer, or both. But, I argue, those that do should use the analysis in this Article to do so.

Applying the same approach I have advocated in this Article, I wish to consider two potential attacks on these policy proposals, and to provide proleptic defenses. One potential attack is that using argument models is unnecessary, because readers could analyze policy proposals just as effectively simply by using their intuition. A stronger version of this attack would be that even if my proposed approach does marginally improve analysis of policy proposals compared to an intuitive approach, it is not worth the effort required to do so.[198]

I readily concede that this might be the case for simple policy proposals, or those that are already clear. But my claims are contingent on the policy proposals being unclear (for readers) or complex (for authors). My claim is that intuitive analysis of complex or convoluted arguments will not be as effective as doing so systematically. I am not aware of formal empirical evidence that can be adduced either in support of this defense or against

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[197] In the cognitive science literature, this has been referred to as "myside bias." For an overview of myside bias, see Keith E. Stanovich et al., *Myside Bias, Rational Thinking, and Intelligence*, 22 CURRENT DIRECTIONS PSYCH. SCI. 259 (2013). For a discussion of myside bias in argumentation, see Christopher R. Wolfe & M. Anne Britt, *The Locus of the Myside Bias in Written Argumentation*, 14 THINKING & REASONING 1 (2008).

[198] These can be understood as undercutting attacks, attacking the better means premises, and positing the (less costly) alternative of *not* using such tools.

it, in support of the potential attack. Instead, this is a matter for individuals to assess for themselves. I also believe that the "cost" of applying argument models is likely to be limited, especially for anyone that has read this far into the Article. The ideas are understandable and straightforward to apply, and the schemes I have proposed are now readily available for application and extension.

A second potential attack is that applying the approach I have proposed to one's own policy proposals would make them longer, more tendentious, or less elegant.[199] One defense is simply that it will not, because the use of the analysis in this Article need not be revealed in the resulting claim. The claim can be made stronger without explicitly pointing out the analysis that the author has undertaken that motivated them to do so. Even if the author does choose to explicitly refer to the models and their labeling, at the cost of additional prose, a second defense is that that length, tendentiousness, and inelegance may not be real costs, especially if the author's claims are made clearer as a result. This depends also on the question of how readers are likely to evaluate policy proposals. My suggestion is that readers of policy proposals are more likely to evaluate those claims on the strength of their reasoning, rather than their concision or prose elegance, grounds on which many policy proposals may already be found wanting.

Policy debates are composed of arguments from each side. To the extent that those arguments are improved, the debates will also therefore be improved. Especially, more incisive attacks more effectively show the weaknesses in policy proposals, which might serve to eliminate some bad policies. Proponents recognizing potential attacks may respond to them by changing their proposed policies to avoid the attacks, or by better supporting their claims for why their policies would nonetheless be most effective.

But applying the analysis in this Article could also improve the dialectic of policy debates. Responding proleptically preempts a request for the author to respond. It therefore reduces the number of steps necessary for all the arguments in the debate to be revealed. Having a common vocabulary for claim structures, and different types of attacks, also reduces the exposition necessary from each side at each stage of the dialectic process.

B. The Benefits of Modeling of Policy Proposals and Attacks

The previous Section argued for the benefits of *applying* models of policy proposals. In this Section I argue for the benefits of *developing* these models. I argue that the benefits of developing and refining models can be understood in three ways. First, the benefits of better models can be understood in terms of the benefits of applying those models, which I have discussed in the previous Section. Better models allow us to *better* analyze particular policy proposals and attacks and thus improve our own arguments, and our responses to others' arguments. Since debates are made up of arguments, better arguments also mean better debates.

Second, the approach of modeling policy arguments, abstracted from their particular contexts, offers distinct advantages over studying policy arguments solely in

[199] This attack can most clearly be understood as an attack on the "no side effects" implicit premise. If "prose elegance" were considered a competing goal of the author, it could be equally well characterized as an attack on the "no alternative goals" implicit premise. *See supra* Subsection I.A.3.

their specific contexts. When analyzing policy proposals within particular debates, the underlying structure of the argument is often obscured by subject-matter complexity. And the depth with which the structure of a policy proposal in any single context can be analyzed is necessarily limited. In the usual course of scholarship or policy analysis, a policy proposal being analyzed is but one of many in a paper, and delving too deeply into the workings of a particular claim or attack would seem out of place or disproportionate. Even if scholars were to engage in deep analysis of individual arguments, the reach of that analysis would be limited by the narrow context. Any debate on that particular topic will only attract a small subset of the scholars who could use a variation of the same claim or attack, since scholars who are not familiar with the subject matter of the debate are unlikely to engage in dialogue regarding the nature of the claims.

Studying these claims and premises at a broader level of generality avoids these problems. Studying these arguments in the abstract is, in many ways, easier and more effective. It does not require particular subject-matter knowledge specific to the context. Therefore, it allows for concerted focus on the premises and claims, and for discussion across a group of scholars that extends beyond those who are familiar with and interested in the details of a particular subject matter area. Ultimately, we are able to think more deeply about the structure of the argument by abstracting it from its subject-matter context.

Another benefit of considering models of policy arguments is that the payoffs from the analysis are amplified by network effects. An analysis of a claim embedded in a subject area will only have benefits for those interested in that area. Scholars who do not follow the literature in that area will not benefit from it. Abstracting from particular policy domains enables us to identify common patterns and principles that may be obscured by the details of individual cases. When scholars across different fields engage with the same underlying argument structures, each contribution to understanding these structures redounds to the benefit of all others in fields where it could be applied. Unlike analyses embedded in specific subject areas, which primarily benefit scholars of those subjects, improvements to argumentation models can be applied across multiple domains. This commonality allows insights developed in one policy domain to be more readily applied and adapted in others, fostering cross-pollination of ideas and approaches.

This is further facilitated by the development of shared analytical frameworks and vocabularies for describing the same policy proposals across those domains. This ultimately leads to economies of scale in the development of our understanding of policy arguments.[200] And these are network benefits—the more scholars that focus on and improve the scheme, the greater the benefits for all of those scholars.[201] Collective work on these models thus offers the possibility of elevating the quality and rigor of all the policy debates

[200] The analysis of arguments in the form of argumentation schemes is similar to the development by social scientists of general models that have applications in many different areas.

[201] For the influential early article defining network externalities, see Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424, 424 (1985) (setting out cases in which "the utility that a given user derives from the good depends upon the number of other users who are in the same 'network' as is he or she"). For a critical analysis of network externalities, see, generally, S.J. Liebowitz & Stephen E. Margolis, *Network Externality: An Uncommon Tragedy*, 8 J. ECON. PERSPS. 133 (1994). For a discussion of network benefits in legal scholarship, see Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 763 (1995).

to which the analysis can be applied, resulting in more robust and well-reasoned policy proposals and critiques.

C. Towards Better Models of Policy Proposals and Attacks

I have framed the analytical claims in this Article to argue that my models of policy proposals and attacks accurately describe the way policy proposals are made, and how they can be attacked, and defended. By taking this approach, I do not mean to suggest that these are definitive or complete answers. Rather, I hope that they may be a starting point for thoroughgoing analysis of the structure of policy arguments. My hope is that presenting these models will allow others to respond with improvements and extensions, thereby extending this set of models, leading to a deeper and more sophisticated understanding of policy arguments.

One benefit of setting out policy arguments in the diagrammatic form used in this Article is that the claims that I am making about policy proposals are definitive. Describing arguments in prose can result in ambiguity about the claim that is actually being made. Premises can be elided or omitted. My hope is that this will make it easier for others to disagree with my arguments about the nature of policy proposals and attacks, thereby helping to foster a richer dialogue about policy proposals.

CONCLUSION

This Article has presented a playbook of policy attacks and defenses, based on a structured analysis of the arguments underlying particular categories of policy proposals, and policy proposals in general. This approach is unusual: the natural inclination of scholars and others engaged in policy debates is to focus on their own specific context, rather than abstracting from them to consider the general nature of the claim being made. But by doing so, we miss an opportunity to think more deeply about what we are actually arguing.

This Article is itself a set of meta-claims, that the structure of the arguments described are as I've analyzed them, and that they can be attacked and defended in the ways I've suggested. This applies not only to the generic attacks described in Part I, but also to the structure and attacks on the specific types of claims analyzed in Part III. For the general form of policy proposals described in Part II, my claim is even stronger: that all policy arguments are structured as I have described, and therefore, that the attacks of the kind specified in this Article apply to all policy proposals. I have articulated the claims in this manner to make them clearly falsifiable. Likely, further analysis will reveal some ways in which the claims that I have made could be attacked, and improved. I hope that they will be, and that this Article will serve as the starting point in a dialog that results in a more thorough understanding of how we argue about policy.

APPENDIX
A Playbook of Policy Proposals, Attacks, and Defenses

This Appendix consolidates and compiles the analyses of each of the policy proposals and attacks in the Article for ease of reference, and so that the lists and structures of premises may serve as a more effective checklist for application.[202] To condense the space needed to display these structures, it reorients the presentation of each set of claims and attacks from the horizontal, "tree root" style presentation used in the body of the Article, to a vertical, "outline" style.

The visual vocabulary is otherwise the same as in the body of the Article, and follows the "standard" approach, and is illustrated in the key below Figure 23.[203] Main claims are shown at the top and left of the diagram, with supporting premises below them. The premises that are part of the main claim generally have a white background, and those that are part of the attack have a light grey background. Where premises are usually implicit, rather than articulated, they are shown with a dashed border. Support relationships are shown with black line segments. Linked premises are shown with the line from the supported premise splitting into two or more lines. Where convergent premises appear, they are shown by separate lines to the supported proposition. Bold line segments show attack relationships between two propositions, with arrows pointing at the premises attacked. Where a segment ends in two arrows, both premises attack each other. Defenses of a claim are modeled as an attack on an attack on that claim, and premises that are part of defenses are generally shown with white backgrounds.

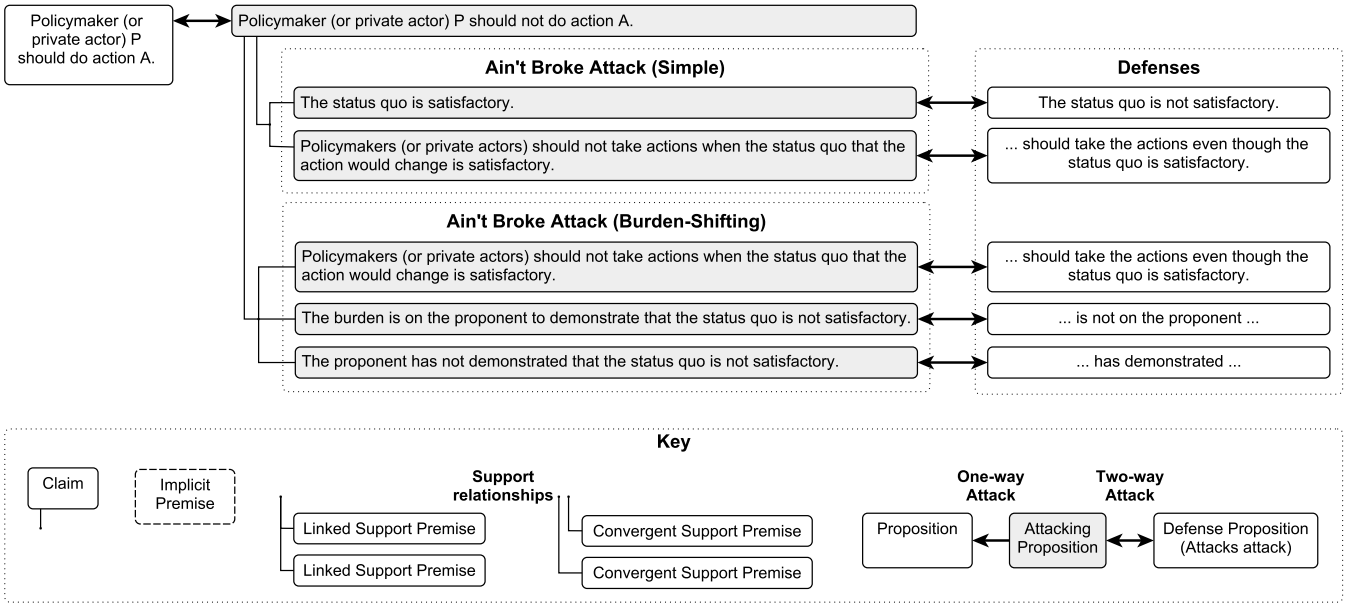

Figure 23. Ain't Broke Attacks and Defenses

[202] In this way, the Appendix follows Karl Lewellyn's approach in setting out "thrusts and parries" dialogically in the appendix to his article. *See* Llewellyn, *supra* note 3, at 401–06.

[203] *See supra* notes **Error! Bookmark not defined.**–50 and accompanying text.

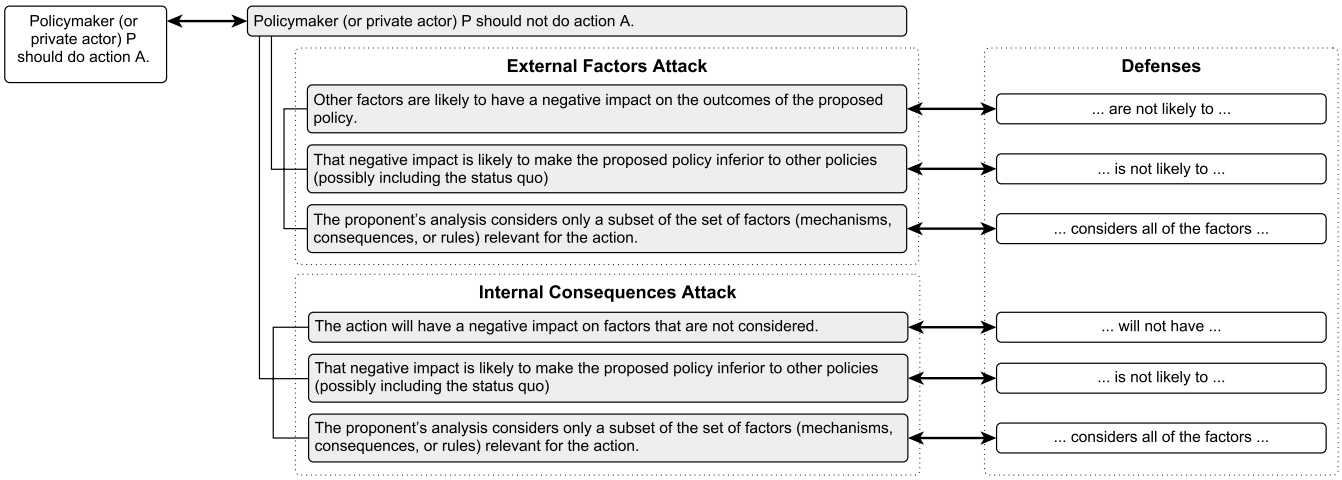

Figure 24. Partial Framing Attacks

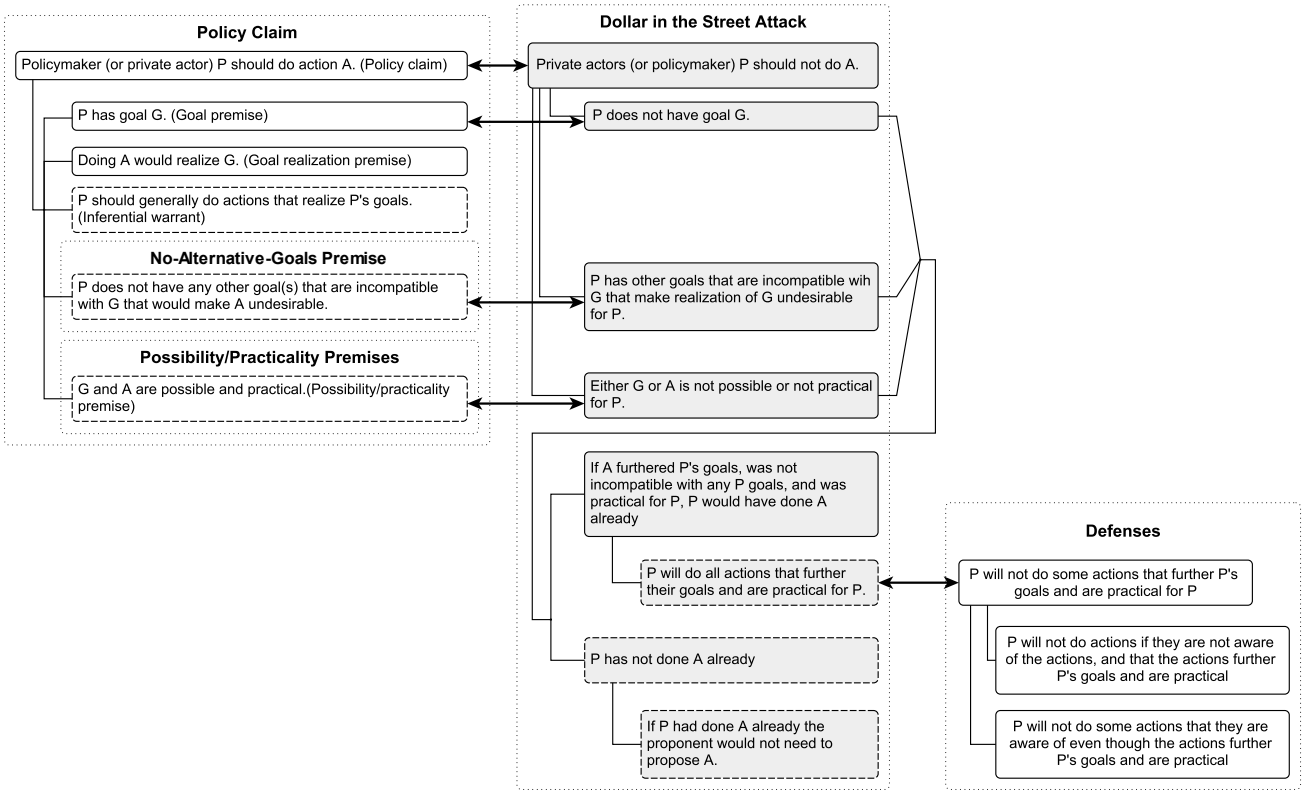

Figure 25. Dollar in the Street Attacks and Defenses

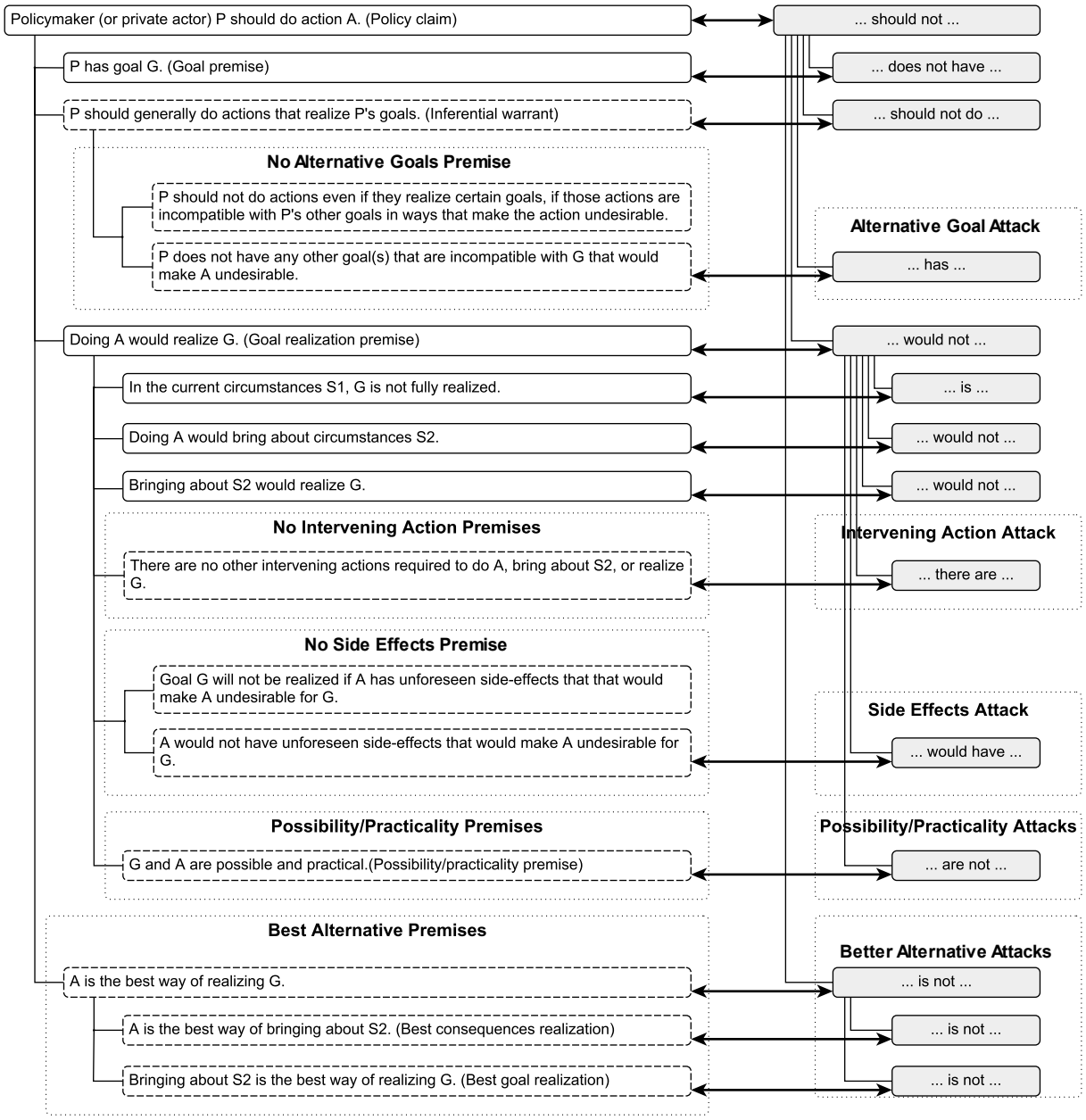

Figure 26. General Model of Policy Proposals and Attacks

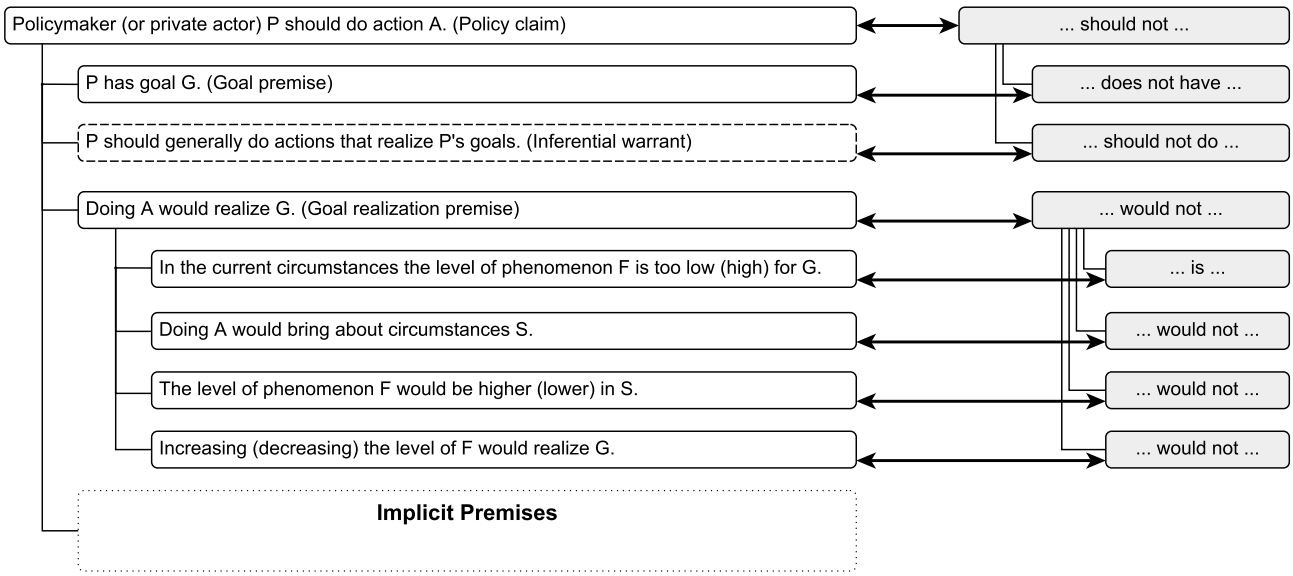

Figure 27. Goldilocks Claims and Attacks

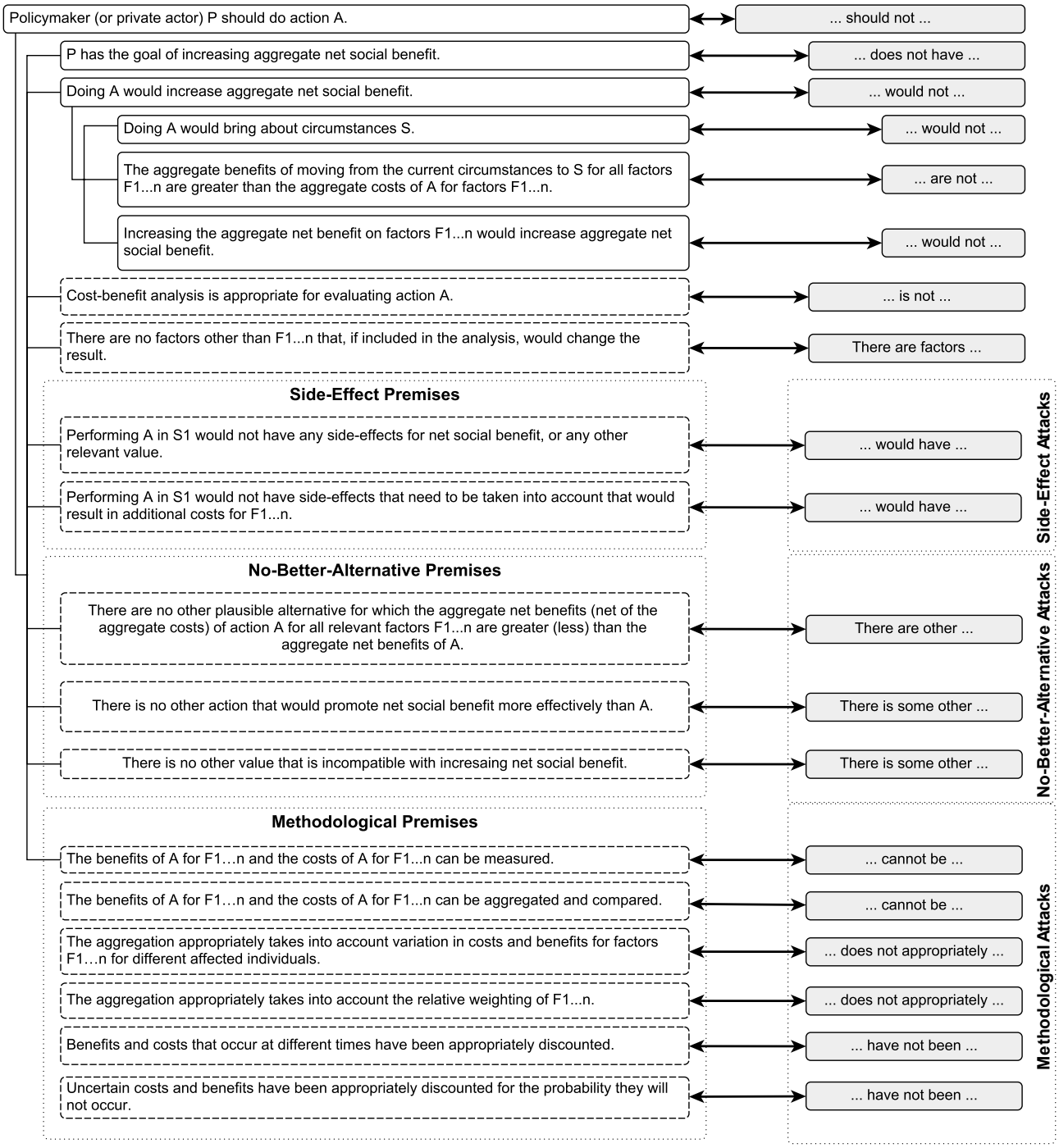

Figure 28. Cost-Benefit Claims and Attacks

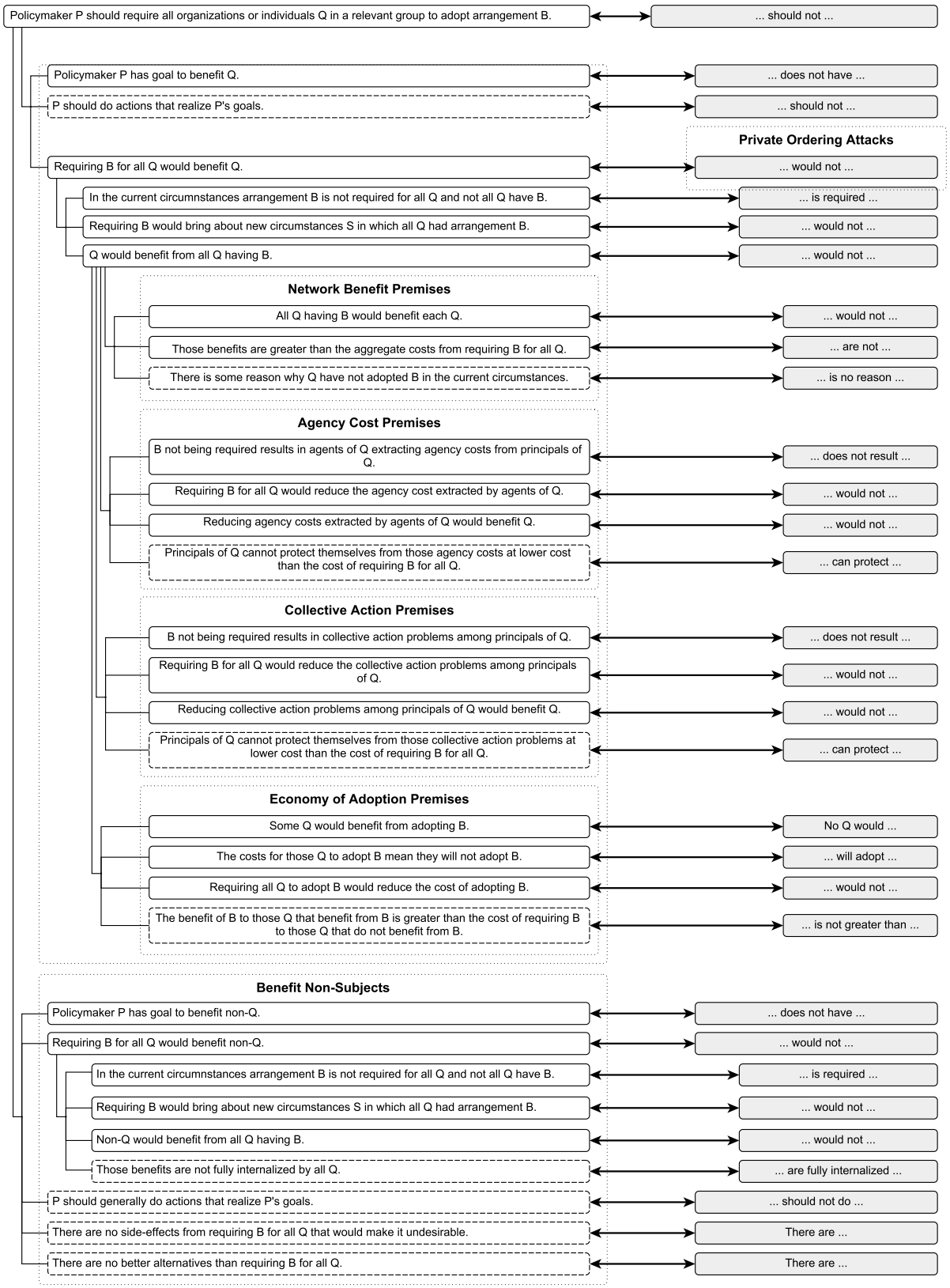
Policymaker P should require all organizations or individuals Q in a relevant group to adopt arrangement B.
... should not ...
Policymaker P has goal to benefit Q.
... does not have ...
P should do actions that realize P's goals.
... should not ...
Private Ordering Attacks
Requiring B for all Q would benefit Q.
... would not ...
In the current circumnstances arrangement B is not required for all Q and not all Q have B.
... is required ...
Requiring B would bring about new circumstances S in which all Q had arrangement B.
... would not ...
Q would benefit from all Q having B.
... would not ...
Network Benefit Premises
All Q having B would benefit each Q.
... would not ...
Those benefits are greater than the aggregate costs from requiring B for all Q.
... are not ...
There is some reason why Q have not adopted B in the current circumstances.
... is no reason ...
Agency Cost Premises
B not being required results in agents of Q extracting agency costs from principals of Q.
... does not result ...
Requiring B for all Q would reduce the agency cost extracted by agents of Q.
... would not ...
Reducing agency costs extracted by agents of Q would benefit Q.
... would not ...
Principals of Q cannot protect themselves from those agency costs at lower cost than the cost of requiring B for all Q.
... can protect ...
Collective Action Premises
B not being required results in collective action problems among principals of Q.
... does not result ...
Requiring B for all Q would reduce the collective action problems among principals of Q.
... would not ...
Reducing collective action problems among principals of Q would benefit Q.
... would not ...
Principals of Q cannot protect themselves from those collective action problems at lower cost than the cost of requiring B for all Q.
... can protect ...
Economy of Adoption Premises
Some Q would benefit from adopting B.
No Q would ...
The costs for those Q to adopt B mean they will not adopt B.
... will adopt ...
Requiring all Q to adopt B would reduce the cost of adopting B.
... would not ...
The benefit of B to those Q that benefit from B is greater than the cost of requiring B to those Q that do not benefit from B.
... is not greater than ...
Benefit Non-Subjects
Policymaker P has goal to benefit non-Q.
... does not have ...
Requiring B for all Q would benefit non-Q.
... would not ...
In the current circumnstances arrangement B is not required for all Q and not all Q have B.
... is required ...
Requiring B would bring about new circumstances S in which all Q had arrangement B.
... would not ...
Non-Q would benefit from all Q having B.
... would not ...
Those benefits are not fully internalized by all Q.
... are fully internalized ...
P should generally do actions that realize P's goals.
... should not do ...
There are no side-effects from requiring B for all Q that would make it undesirable.
There are ...
There are no better alternatives than requiring B for all Q.
There are ...

Figure 29. Mandatory Arrangement Claims and Attacks

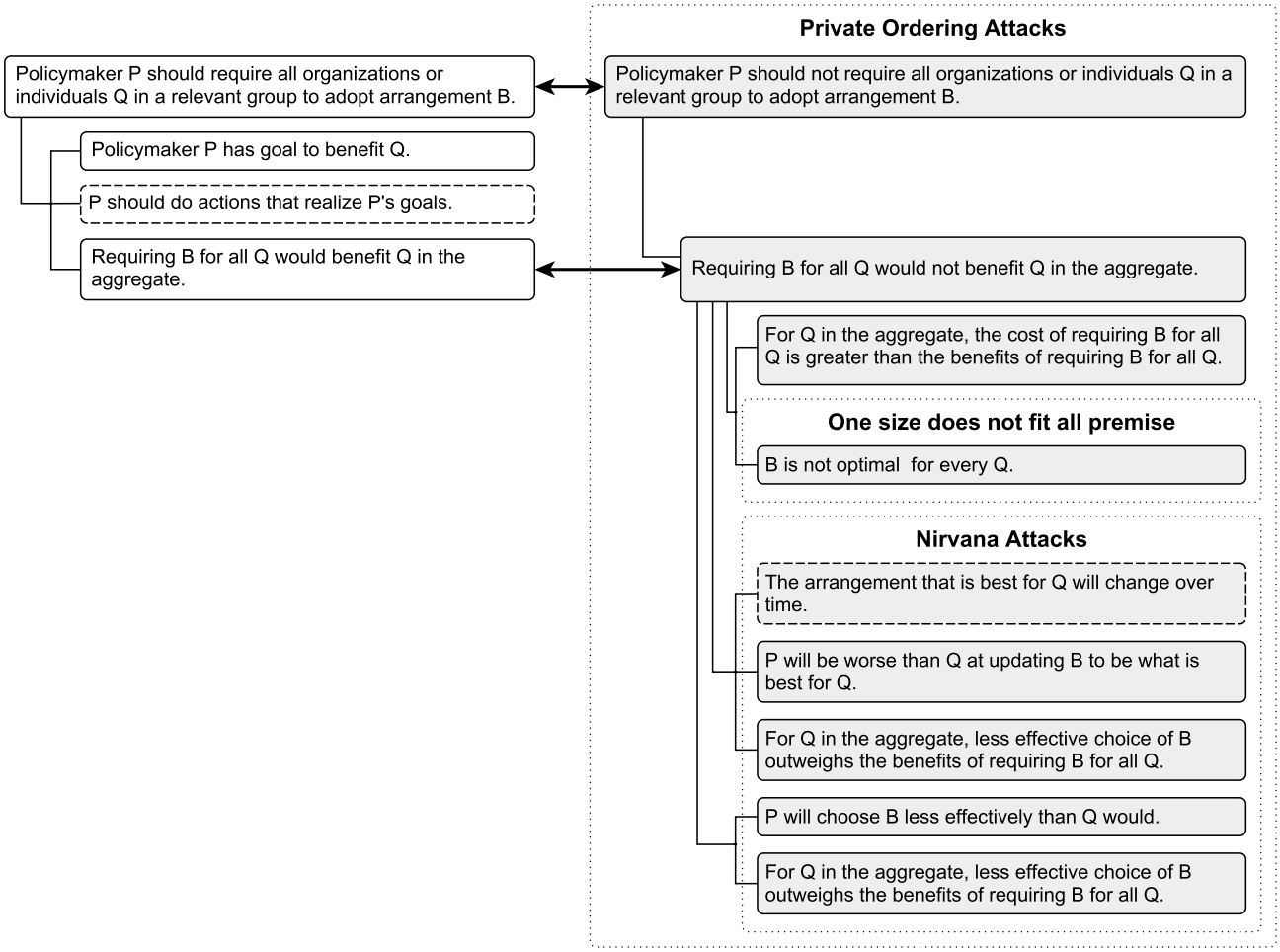

Figure 30. Private Ordering Attacks

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