

The Rule of Law Unplugged

Abstract:

The “Rule of Law” is a venerable concept, but, on closer inspection, is a complex admixture of positive assumptions, occasionally wishful thinking, and inchoate political and legal theory. While enormous investment has been made in rule of law reformism throughout the world, advocates of transplanting American-style legal and political institutions to developed and developing countries in the world are often unclear about what they are transplanting and why they are ambitiously doing so. The concept of rule of law has become unplugged from theories of law. Scholars clearly have more work to do in understanding the rule of law and designing institutions to realize the objectives for which this grand project is intended.

In this paper, we revisit the concept of the rule of law in order to help unpack the theoretical and operational assumptions underlying scholarship and reform efforts. We do so from the perspective of legal and positive political theory; and we interrogate various institutional devices (such as constitutionalism and the independent judiciary) in order to shed light on how the construct of the rule of law is being put into service on behalf of cross-national reform initiatives.

The Rule of Law Unplugged

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I. Introduction

The rule of law maintains enormous appeal among scholars and reformers.⁴ Influential non-governmental organizations, supported generously by public and private benefactors, have

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⁴ “The degree of apparent international consensus,” writes Thomas Carrothers,” on the value and importance of the rule of law is striking.” Thomas Carrothers,” *The Rule of Law Revival*,” in Promoting the Rule of Law Abroad: In Search of Knowledge 4 (“[t]he concept is suddenly everywhere – a venerable part of Western political philosophy enjoying a new run as a rising imperative of the era of globalization”). See also Jeremy Waldron, “The Concept and the Rule

urged upon various nations institutional and legal reforms in order to implement the rule of law.⁵ These myriad reformers hope to create, maintain, and improve legal and political institutions around the world.⁶ While their advocacy is resolutely normative, reformers maintain that their prescriptions are supported by scholarly research that demonstrates that the establishment and maintenance of appropriate legal and political institutions improves aggregate well-being.

Reformers, and many scholars, insist that the rule of law (which we will, on occasion, refer to simply as “RL”) is an unalloyed good, promoting and safeguarding values that are intrinsically desirable, such as, promoting economic development and social progress.⁷ Political

of Law,” 43 Georgia L. Rev. 1 (2009) (describing the rule of law as “one of the most important political ideals of our time”).

⁵ See text accompanying notes – infra.

⁶ In addition to the various efforts by non-governmental organizations described in Part II infra, two initiatives are especially noteworthy for their diligence in bringing together a vast number of internationally recognized scholars with governmental officials and private sector leaders to discuss the rule of law (henceforth often referred to as RL) and RL initiatives. See Carnegie Endowment’s Democracy and Rule of Law Project: <http://www.carnegieendowment.org/programs/global/index.cfm?fa=proj&id=101>; and the Rule of law Program of the Hague Institute for the Internationalisation of Law: <http://www.hiil.org/research/main-themes/rule-of-law/>

⁷ See, for example, these two oft-quoted statements “At its most basic, the rule of law has been held to mean simply that the government is required to act in accordance with valid law. While this is undoubtedly desirable, it is not an exhaustive description of the characteristics of a system that meets the criteria of the rule of law. Various other wider definitions have been proposed. These have included the requirement of procedural justice; something which is now generally recognized as part of the rule of law.” Nelson Mandela, cited in “The Rule of Law and Human Rights,” Report on the First HiiL Law of the Future Conference (Hague Institute for the Internationalisation of Law, 2007), p.17. And from the U.N.’s Universal Declaration of Human Rights: “[I]t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.” See id.

and legal theorists identify the rule of law as essential to a justice-seeking polity. This connection is frequently seen as grounded in democracy,⁹ human freedom,¹⁰ equality,¹¹ justice,¹² economic well-being,¹³ national identity,¹⁴ or, as with Lon Fuller, in the “inner morality” of law.¹⁵ In the oft-stated dichotomy, a polity must be ruled by law or else by men.¹⁶ Where the

⁹ See, e.g., Jean Hampton, “Democracy and the Rule of Law,” in Nomos XXXVI: The Rule of Law 13 (Ian Shapiro ed. 1994). See also Roberto Gargarella, “The Majoritarian Reading of the Rule of Law,” in Democracy and the Rule of Law 149 (Jose Maria Maravall & Adam Przeworski eds. 2003); Geoffrey de Q. Walker, The Rule of Law: Foundation of Constitutional Democracy (1988).

¹⁰ See, e.g., Todd J. Zywicki, “The Rule of Law, Freedom, and Prosperity,” Supreme Court Econ. Rev. 1, 4-11 (2003) (“[t]he rule of law is therefore inherently a classical liberal concept that presupposes the need and desirability to constrain governmental actors and maximize the sphere of liberty of liberty for private ordering . . .”). See also Friedrich A. Hayek, The Constitution of Liberty (1960); The Political Ideal of the Rule of Law (1955); The Road to Serfdom (1944).

¹¹ See, e.g., John Rawls, A Theory of Justice 235-43 (1971). Stephen Holmes describes equality before the law in the sense conceived by Jean-Jacques Rousseau in “The Social Contract” as one of the “lineages” of the rule of law. See Stephen Holmes, “Lineages of the Rule of Law,” in Democracy and the Rule of Law, supra, at 19, 22, 47-53.

¹² See, e.g., Amartya Sen, “Global Justice,” 14-15 (preliminary draft prepared for World Justice forum, July 2008). See also his The Idea of Justice (2009).

¹³ See, e.g., Stephen Haggard, Andrew MacIntyre, & Lydia Tiede, “The Rule of Law and Economic Development,” 11 Ann. Rev. Polit. Sci. 205 (2009); Stephen Knack, “Governance and Growth” (World Bank Working Paper, 10/06); Philip Keefer, “A Review of the Political Economy of Governance: From Property Rights to Voice” (World Bank Policy Research Working Paper 3315, 5/04).

¹⁴ See Frank Michelman, “Law’s Republic,” 97 Yale L.J. 1493, 1499-1503 (1988). See also Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) (“The rule of law . . . is the great mucilage that holds society together”).

¹⁵ See Lon Fuller, The Morality of Law (rev. ed. 1969). See text accompanying notes -- infra.

¹⁶ For famous statements of this dichotomy, see, e.g., Constitution of Massachusetts: Declaration of Rights, Art. 30 (1780); David Hume, Essays: Moral, Political, and Literary (94) Eugene Miller ed. 1985) (1742); James Harrington, Commonwealth of Oceana (Cambridge ed. 1992; orig. pub. 1656) (contracting “an empire of laws not of men”). The best surmise is that the

rule of law is absent, it is said that we cannot govern the governors, and are thus subject to official prerogative, which may be arbitrary, capricious, and brutal.¹⁷

Yet the deeper we dig into the concept of the rule of law, the more vexing is the question of what precisely it entails and how it should be operationalized. The rule of law is, as one commentator puts it, “a much celebrated, historic ideal, the precise meaning of which may be less clear today than ever before.”¹⁸ Rule of law is an attractive ideal, but its attractiveness may stem mainly from its imprecision, which allows each of us to project our own sense of the ideal government onto the phrase “rule of law.” In the name of the rule of law, we export American-style institutions across the globe, without sufficient evidence that these institutions are ideal for

phrase originates with Aristotle in *The Politics*. See generally W. Burnett Harvey, “The Rule of Law in Historical Perspective,” 59 Mich. L. Rev. 487 (1961). In Professor Hampton’s essay, cited in n. – supra, she discusses this famous dichotomy in the context of Thomas Hobbes and his perspective on the incompatibility between government and the rule of law. See Hampton, “Democracy,” supra.

¹⁷ For an interesting discussion of the political theory underlying this anxiety, see, e.g., Michael P. Zuckert, “Hobbes, Locke, and the Problem of the Rule of Law,” in *Nomos*, supra, at 63-78, and Hampton, “Democracy,” in this same volume. and Cf. Administrative Procedure Act Sec. 706(2), providing that reviewing courts shall “hold unlawful and set aside agency action . . . found to be . . . arbitrary [or] capricious. . . .”

¹⁸ Richard H. Fallon, Jr., “‘The Rule of Law’ as a Concept in Constitutional Discourse,” 97 Colum. L. Rev. 1, 1 (1997). See also George Fletcher, *Basic Concepts of Legal Thought* (1996) (“legality and the ‘rule of law’ are ideas that present themselves as opaque even to legal philosophers”) (quoted in Cass at 1); Frank Lovett, “A Positivist Account of the Rule of Law,” L. & Soc. Inquiry 41 (2002) (“descriptive accounts of the Rule of Law remain strikingly vague and imprecise”); Margaret J. Radin, “Reconsidering the Rule of Law,” 69 Boston U. L. Rev. 781, 781 (1989) (noting that the RL ideal “is deeply contested” and we lack a “canonical formulation of its meaning. . . .”).

the U.S., let alone for the rest of the world.¹⁹ Myriad incomplete and unsupported assumptions underlie claims on behalf of the institutions associated with the rule of law. Articulating a clearer conception of the rule of law and devising a strategy for its implementation requires careful attention to these assumptions.

Our principal claims in this article are four-fold: First, any sound definition of the rule of law must explicitly incorporate substantive values. While it may be framed in procedural terms (for instance, “laws should be transparent and prospective”) any theory of the rule of law must connect procedural rules with the values that the legal system aims to subserve. Second, we must be able to assess and measure the rule of law. Such measurement must go beyond simply pointing to a series of institutions and assessing or indexing a system’s fidelity to the rule of law by reference to these institutions. Rather, we must have in mind a connection between the structure and performance of these institutions and the realization of “the rule of law.” Third, rule of law reform must have clearly in mind the relationship between means and ends. A satisfactory understanding of this relationship requires positive theory and empirical support, not merely normative leaps of faith or *ipse dixit*. Finally, rule of law reformism must take adequate account of tradeoffs, that is, conflicts among institutions aiming to promote the rule of law.

Our aims in this article are both critical and constructive. They are *critical* in that we methodically unpack the assumptions of the scholarly literature to reveal the shortcomings

¹⁹ See, e.g., Frank Upham, “Mythmaking in the Rule of Law Orthodoxy,” in Promoting the Rule of Law, supra, at 75; Stephen Golub, “A House Without a Foundation,” in Promoting the Rule Abroad, supra, at 105.

described above. We do not see the rule of law as inevitably flawed, as a vacuous Rorschach test upon which legal scholars and reformers simply project their own views about the content and purpose of law. Rather, we see the rule of law as expressing a worthy aspiration that rightly finds voice in the hard work of good-intentioned activists. The essential predicament in the current practice of rule-of-law reformism is that the concept of the rule of law rests on unstated and under-explicated assumptions. Our aims are *constructive* in that we identify perilous assumptions and find a way to define the rule of law without them. Specifically, a clearly-defined concept of the rule of law requires three innovations: (1) it must more conspicuously incorporate substantive values and theories; (2) it must incorporate, or at least be plugged into, a coherent theory of law; and (3) it must make more cogent connections between means and ends. This last innovation will help guide those engaged in reform to evaluate tradeoffs where the cherished values from the Anglo-American legal framework come into conflict.

This article proceeds as follows: In the next Part, we consider how and why RL reformers value the rule of law, first focusing on the developing effort to export American-style RL abroad and, next, on how legal theorists conceive of, and attempt to operationalize, RL. In Part III, we offer some general observations about how best to think about the imperative of “measuring” RL. In Part IV, we turn to the specifics of RL institutions, looking at the essential institutions and key governance structures which are viewed in the literature as configuring RL. With the contours of RL in mind, we turn in Part V to the daunting task of “implementing” RL. It is from this close analysis of implementation that we arrive at our ultimately skeptical conclusion that RL is misunderstood in fundamental ways.

II. Valuing the Rule of Law

A. Rule of Law Reformism: Ambitions, Strategies and Assumptions

RL has an active fan club. The enormous appeal of RL reform efforts is reflected in the myriad activities and statements of key United States and international public and private agencies, including The World Bank, the United States Agency for International Development (USAID), the Carnegie Endowment for International Peace, and the American Bar Association. These organizations have spent enormous amounts of money on legal reform efforts;²⁰ and their efforts show little signs of slowing. The Global Governance Group of the World Bank connects rule of law to its comprehensive effort to improve worldwide governance.²¹ While policy analysts urge attention to “outcome measures,”²² many of what

²⁰ See Frank Upham, “Mythmaking in the Rule of Law Orthodoxy,” in Promoting the Rule of Law, supra, at -- (noting that from the 1980s to the early 1990s, the World Bank and USAID spent over \$1 billion on legal-reform efforts); General Accounting Office, “Foreign Assistance Rule of Law Funding Worldwide for FY 1993 to 1998” (GAO/NSIAD 99-158, June 1999) (noting that U.S. government spent \$970 million on rule of law assistance). In 2005 in Afghanistan and Iraq alone, the U.S. dedicated nearly \$500 million for RL assistance. Lydia Tiede, “The Rule of Law: What is It? Can we Measure it? Do we have it?” 7 n.8 (Working paper, 2007).

²¹ See <http://web.worldbank.org/WBSITE/EXTERNAL/WBI/EXTWBIGOVANTCOR/0,,menuPK:1740542~pagePK:64168427~piPK:64168435~theSitePK:1740530,00.html>. See also Upham, “Mythmaking,” in Promoting the Rule of Law, supra, at 77-79 (describing World Bank model of RL); Rick Messick, “Judicial Reform and Economic Development: A Survey of Issues,” 14 *The World Bank Research Observer* 117 (1999)

²² See World Bank, Governance Matters Indicators, compiled and explained on World Governance Indicators (WGI) website: http://info.worldbank.org/governance/wgi/sc_country.asp. See also Daniel Kaufman, Aart Kray,

are conventionally described as output measures are in fact institutions that, in the judgment of World Bank analysts reflect and implement the rule of law.²³

Likewise, USAID maintains that the rule of law is a principle of universal appeal, noting that “[t]he term ‘rule of law’ is used frequently in reference to a wide variety of desired end states. . . . However, the term usually refers to a state in which citizens, corporations and the state itself obey the law, and the laws are derived from a democratic consensus.”²⁴ The USAID document references two notable descriptions of the rule of law. The first is on the U.S. State Department’s website and describes rule of law as “protecting fundamental political, social, and economic rights”²⁵ The second, from the United Nations’ definition, provides that: “The rule of law . . . refers to a principle of governance in which all persons, institutions and entities . . . are accountable to laws that are publicly promulgated, equally

and Massimo Mastruzzi, “Governance Matters III: Governance Indicators for 1996-2002 (World Bank working paper, June 2003).

²³ See, e.g., John Hewko, “Foreign Direct Investment: Does the Rule of La Matter?” Carnegie Endowment Working Paper No. 26 (Washington, D.C.: Carnegie Endowment for International Peace, April 2002); Rick Messick, “Judicial Reform and Economic Development: A Survey of Issues,” *The World Bank Research Observer* Vol. 14, No. 1 (Feb. 1999), p. 117–36. A recent paper summarizes this line of scholarship, “In the past two decades, a number of scholars have turned to non-economic factors to explain variations in wealth across countries. Economic theory suggests institutions impact decisions about labor supply, saving, investment, and exchange. According to the institutionalist view, laws and regulations that enforce contracts, guarantee property rights and promote well-developed financial markets can foster economic growth by encouraging investment in human and physical capital, as well as the development of technological innovations,” Sebastian M. Saiegh “Political Institutions and Sovereign Borrowing: Evidence from Nineteenth-Century Argentina (Paper presented at the USC Gould School of Law – University of Texas School of Law, Rule of Law Symposium, March 26th-27th, 2009).

²⁴ USAID, *Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework 5* (August 2008).

²⁵ U.S. Department of State: <http://usinfo.state.gov/products/pubs/principles/law.html>

enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”²⁶

The World Justice Project, according to its website, seeks to “(1) advance the understanding of the processes that lead to and impede the development of the rule of law in different national contexts, and (2) advance the understanding of the contributions that the rule of law can make to reducing poverty, violence, and corruption and increasing education and health.”²⁷

One of the most far-reaching RL programs is the Rule of Law Initiative of the American Bar Association (ABA).²⁸ The ABA largely elides the question of what RL is and instead has developed a multi-pronged, multi-national set of programs to improve the well-being of underperforming countries.²⁹ They concentrate their efforts around the following imperatives:

²⁶ See *id.*

²⁷ Robert L. Nelson & Lee Cabatingan, “Introductory Essay: New Research on the Rule of Law” (working paper 2008).

²⁸ See <http://www.abanet.org/rol/about.shtml>. In a similar vein, the International Bar Association has adopted a Rule of Law Resolution declaring the following: “An independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law; these are all fundamental principles of the Rule of Law.” See Hague Institute Report, *supra*, at 17 n.7.

²⁹ On its Rule of Law Initiative home page, The ABA claims that “over half of the world’s population lives in countries that lack the rule of law, consigning billions of people to lives characterized by a lack of economic opportunity, basic justice and even physical security.” <http://www.abanet.org/rol/about.shtml>.

judicial reform, legal profession reform, prosecutorial reform, legal education reform, combating human trafficking, the development of an index based on the United Nations International Covenant on Civil and Political Rights, and the development of an assessment tool based on the Convention on the Elimination of All Forms of Discrimination Against Women.³⁰

What the World Justice Project and the ABA do is, in essence, commission scholarship, craft “white papers” of various sorts, send staff and consultants around the country and around the world to make presentations and, in various ways, engage with public officials and private citizens in many countries to fashion institutions and governance structures that ostensibly promote RL. Much of the back office work involves the development of assessment tools and outcome measures. These measures describe in a fair amount of detail the criteria of good governance,³¹ including not only institutional architecture but also basic governmental

³⁰ See *id.* For a comprehensive collection of publications concerning the ABA’s Rule of Law Initiative, see <http://www.abanet.org/rol/publications.shtml>.

³¹ See, e.g., For a good comprehensive review, see Stephan Haggard, Andrew MacIntyre, & Lydia Tiede, “Rule of Law and Economic Development,” 11 *Ann. Rev. of Polit.Sci.* 205 (2008). See also Stephen Knack, “Governance and Growth,” (World Bank working paper, October 2006); Darion Acemoglu, Simon Johnson, & James A. Robinson, “The Global Origins of Comparative Development: An Empirical Investigation,” 91 *Amer. Econ. Rev.* 1369 (2001); Philip Kiefer & Stephen Knack, “Why Don’t Poor Countries Catch Up? A Cross-Country Test on an Institutional Explanation,” 35 *Econ. Inquiry* 590 (1997); Stephen Knack & Philip Kiefer, “Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures,” 7 *Econ. & Politics* 207 (1995); Adam Przeworski & Fernando Limongi, “Political Regimes and Economic Growth,” 7 *J. Econ. Persps.* 51 (1993).

structure (for instance, “is the system democratic”)³² and the content of legal rules (for instance, “are there secure property rights?”).³³ Each of these organizations, and especially the World Bank and USAID,³⁴ have collected an ample supply of serious scholarly analyses that purport to measure the state and scope of RL and “governance” in individual countries and worldwide and, as well, to measure the progress of RL reform efforts.³⁵

Four key assumptions underlay this RL reformism: First, RL reformers believe that RL captures something of universal applicability.³⁶ The rule of law is of cross-national, cross-cultural value; each political system, whatever its cultural underpinnings and objectives, ought

³² On democracy and governance, see, Robert Barro, “Democracy and Growth,” 1 J. of Econ. Growth 1 (1996); John F. Helliwell, “Empirical Linkages between Democracy and Economic Growth,” 24 British J. Pol. Sci. 225 (1994).

³³ On property rights and governance in particular, see Philip Keefer, “A Review of the Political Economy of Governance: From Property Rights to Voice” (World Bank working paper, May 2004). The classic analysis in this regard is Hernando de Soto, The Other Path (1989). See also his The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else (2000).

³⁴ The websites for both organizations contain helpful links to publications and working papers on various aspects of their respective projects.

³⁵ For sophisticated critiques of these governance measures, see See, e.g., Florencio López de Silanes, Simeon Djankov, Rafael La Porta, and Andrei Shleifer, “Courts,” 118.2 Q. J. Econ. 453 (2003); Rafael La Porta, Rafael, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert W. Vishny (1999) “The Quality of Government,” 15 J. L., Econ. & Org., 222 (1999); La Porta, Rafael, Lopez-de-Silanes, Florencio, Pop-Eccles, Christian, and Shleifer, Andrei, “Judicial Checks and Balances,” *Journal of Political Economy* 112 (2004): 445-470.

³⁶ “Universal theories,” writes Professor Upham, “of the interdependence of legal form and economic activity lurk behind the rhetoric of the rule of law without a great deal of intellectual agonizing over exactly what this form of law entails, how it relates to economic activity, or how it fits in different political, social, and institutional contexts.” Upham, “Mythmaking,” in Promoting the Rule of Law Abroad, supra, at 76.

to incorporate RL values and institutions into its legal system.³⁷ The claim, reduced to its basics, is that a political system can only achieve economic self-sufficiency and a good quality of life if it constructs and maintains legal institutions. Societies lacking these institutions may be described as having *law*, but we cannot sensibly describe them as having *the rule of law*, at least in any sense that would keep RL coherent as a concept. Second, RL reformism insists that the structure of RL is made up of not merely a commitment to legal obedience and the cluster of values that define the concept of RL, but is made up of a distinctive series of institutions and governance arrangements. Reformers assume that a legal system's commitment to RL by resort to these institutions and arrangements. Third, RL is associated with *democracy* and is thus viewed to be in tension with authoritarianism or any kind of top-down legal system in which the people do not ultimately rule.³⁸ Whether or not an

³⁷ See Hague Institute Report, *supra*, at 23-30 (describing objective as creating a “rule of law marketplace”); But see Carothers, “Revival,” at 5 (contrasting American view with RL as understood in “Asian-style democracy”). For another contrary view, see Matthew Stephenson, “A Trojan Horse in China?,” in Promoting the Rule of Law Abroad 191, 197 (Thomas Carothers ed. 2006) (“It is generally agreed . . . that the U.S. and Chinese governments have different things in mind when they talk about the rule of law”).

³⁸ As Thomas Carothers, the impresario of the Carnegie Endowment's rule of law project, puts it

The relationship between the rule of law and liberal democracy is profound. The rule of law makes possible individual rights, which are at the core of democracy. A government's respect for the sovereign authority of the people and a constitution depends on its acceptance of law. Democracy includes institutions and processes that, although beyond the immediate domain of the legal system, are rooted in it. Basic elements of a modern market economy such as property rights and contracts are founded on the law and require competent third-party enforcement. Without the rule of law, major economic institutions such as corporations, banks, and labor unions would not function, and the government's many involvements in the economy – regulatory mechanisms, tax systems, customs structures, monetary policy, and the like – would be unfair, inefficient, and opaque.³⁸

Carothers, “The Rule-of-Law Revival,” in Promoting the Rule of Law Abroad, *supra*, at 4-5. See also Hampton; et al.

authoritarian legal system is properly deemed a legal system, this system does not and cannot, in the eyes of RL reformers, embody RL. Lastly, RL reformers insist that RL can be measured. The assumption here, though generally unstated, is that RL is a single-dimensional concept, much the same as a Likert scale,³⁹ and thus one that can be measured with reasonable precision and without attention to tradeoffs and other considerations that are characteristic of multidimensional concepts.

B. Rule of Law and Legal Theory

What theorists since Aristotle are primarily interested in is in fashioning a coherent description of RL that can withstand analytic scrutiny.⁴⁰ There are those who believe this to be a fool's errand, that the rule of law is an "essentially contested concept."⁴¹ We might wonder, then, before setting off to change the world, whether and to what extent we have made an progress in

³⁹ The Likert scale refers to a psychometric scale used in survey research to aggregate respondent opinions by specifying their level of agreement to one or another statement, the levels generally ranking from "strongly agree" to "strongly disagree." See Rensis Likert, "A Technique for the Measurement of Attitudes," 140 *Archives of Psychology* 1 (1932). For a thorough analysis of the Likert scale and other mechanisms of social scientific measurement, see Lawrence S. Meyers, Anthony Guarino, and Glenn Gamst, Applied Multivariate Research: Design and Interpretation (2005).

⁴⁰ Aristotle, The Politics, Book III, Ch. Xvi, 1287a ("He who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men") (Stephen Everson ed. 1988). For an interesting exploration of the different strands, though not necessarily contradictions, in Aristotle's thoughts on RL, see Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?," 21 *L. & Phil.* 137, 141-42 (2002).

⁴¹ See, e.g., Radin, "Reconsidering Rule of Law," supra n.- at 791 ("the Rule of Law is . . . a contestable concept"). See also Waldron, "Florida," supra, at 148-53 (unpacking "essentially contestable concepts").

defining rule of law. Constitutional theorist Richard Fallon notes that, “[t]he Rule of Law might appear, at best, to be no more than an honorific title for an amalgam of the values, and the preferred means for promoting those values, reflected in the competing Rule-of-Law ideal types.”⁴² Thomas Hobbes concluded that nothing like RL was really possible,⁴³ that the government is typically disinclined to tie itself to the mast of legal rules and therefore ensure that that the *rule* of law was applicable to governed and governor alike. On one reading, therefore, the RL is not a useful analytical concept at all.⁴⁴

More commonly, scholars argue that RL encapsulates the heady notion that law should govern human affairs with quality and attention to the virtues and values that make up a good legal system; and, moreover, the governors should be governed by law.⁴⁵ Political and legal theorists typically frame the concept of the rule of law around a series of qualities of good law. These basic qualities might be very broad and even opaque (as in Aristotle’s declaration that “the law is reason unaffected by desire”);⁴⁶ or they may drill deeper into the structure of the legal system in

⁴² Fallon, “Constitutional Discourse,” *supra*, at 41.

⁴³ See Thomas Hobbes, The Leviathan 176-77 J. Gerkin ed. 1996) (“he that is bound to himself only, is not bound”). See generally Hampton, “Democracy,” in Nomos, *supra* (discussing Thomas Hobbes’ views on rule of law). See also Michael P. Zuckert, “The Problem of the Rule of Law,” in Nomos, *supra*, at 63-67.

⁴⁴ See, e.g., Allan C. Hutchinson & Patrick Monahan, “Democracy and the Rule of Law,” in The Rule of Law: Ideal or Ideology? 97 (Hutchinson & Monahan eds. 1987); Morton Horowitz, “The Rule of Law: An Unqualified Human Good?,” 86 Yale L.J. 561 (1977).

⁴⁵ See, e.g., Ronald Cass, The Rule of Law in America 1-4 (2001); John Finnis, Natural Law and Natural Rights 270 (1980); John Rawls, A Theory of Justice 236-39); Andrei Marmor, “The Ideal of the Rule of Law,” in The Blackwell Companion to the Philosophy of Law and Legal Theory (USC Legal Studies Research Paper No. 08-6) at 2 (“The ideal of the rule of law is basically the moral-political ideal that it is *good to be ruled by law*”) (emphasis in original).

⁴⁶ Aristotle, The Politics, Bk. III, Ch. Xvi, 1287a.

promulgating particular rules of the road (as in the insistence on prospective, rather than retrospective legal rules).⁴⁷ But the framework as it has been revisited and refined over the centuries highlights the fundamental normative point that a good legal system is effective only insofar as individuals and officials are ruled by law, not men, and, moreover, they are carry out their responsibilities and duties in accordance with agreeable principles, principles that make up the contours of RL. “In a fundamentally justice society,” writes Ronald Cass, “the rule of law serves to channel decisionmaking in attractive ways, to make decisions more predictable, and to increase the prospects for fair administration of public power.”⁴⁸

RL scholars have attempted to draw a coherent connection between the qualities of good law and the objectives that certain lawmaking principles and legal institutions are intended to achieve. For A.V. Dicey, the Oxford scholar who is credited with coining the phrase, the principal objective of RL is to discipline and regulate official power.⁴⁹ Dicey described RL as entailing three basic requirements:⁵⁰ First, the supremacy of law over arbitrary power – the rule of law, not men is the slogan generally associated with this influential concept; second, equality

⁴⁷ See text accompanying notes *infra* (discussing prospectivity and RL).

⁴⁸ Cass, Rule of Law, *supra*, at xi.

⁴⁹ See generally A.V. Dicey, Introduction to the Study of the Law of the Constitution 181-2005 (2d ed. 1959). For an interesting take on Professor Dicey in his historical context, see Morton Horwitz, The Transformation of American Law, 1870-1960 225-27 (1992).

⁵⁰ See generally A.V. Dicey, Introduction to the Study of the Law of the Constitution 181-205 (2d ed. 1959).

before the law of all, including government officials, and, third, constitutional law as fundamental law.⁵¹

The focus in the literature on official infidelity raises the puzzle of *why* exactly we value RL.⁵² The most famous answer in modern jurisprudence is provided by Lon Fuller. His list of RL virtues captures well the overall objective of RL as a matter of legal theory and, as well, delineates qualities of good law that command widespread agreement.⁵³ Fuller views RL as

⁵¹ Friedrich Hayek was even more insistent that RL was fundamentally concerned with restricting governmental power. “[F]ormal equality before the law,” writes Hayek, “is in conflict . . . with any activity of the government deliberately aiming at material or substantive equality of different people, and that any policy aiming directly at a substantive ideal of distributive justice must lead to the destruction of the Rule of Law.” Friedrich Hayek, The Road to Serfdom 79 (1944). Political theorist Michael Oakeshott also drew a connection between the RL ideal and individual liberty. See generally Michael Oakeshott, “The Rule of Law,” in On History: And Other Essays (1983). As one recent commentator summarizes his views, Oakeshott sees the rule of law as “an inherent part of a free, peaceful, and prosperous society” and, therefore, “[a] society organized under the rule of law is a ‘liberal’ order of private ordering and constitutional limits on government; corollatively, the rule of law can exist only in such an order.” Zywicki, “Rule of Law, supra n.--, at 6.

⁵² Judith Shklar, having in mind presumably these political theory efforts to explain why RL is essential, was quite skeptical of the connection, writing that “[c]ontemporary theories [of the Rule of Law] fail because they have lost a sense of what the political objectives of the ideal of the Rule of Law originally were and have come up with no plausible restatement.” Judith N. Shklar, “Political Theory and the Rule of Law,” in The Rule of Law: Ideal or Ideology? 1 (A. Hutchinson & P. Monahan eds. 1987). Hence, the phrase “has become meaningless thanks to ideological abuse and general over-use.” Id. See also Upham, “Mythmaking,” in Promoting the Rule of Law Abroad, supra at 75.

⁵³ Because it is not relevant to this analysis, we elide the question of whether Fuller was or was not a legal positivist and therefore saw the rule of law is a prerequisite to fidelity and obedience to ascriptive law. The classic texts here are Lon L. Fuller, “Positivism and Fidelity to Law – A Reply to Professor Hart,” 71 Harv. L. Rev. 630 (1958); H.L.A. Hart, “Positivism and the Separation of Law and Morals,” 71 Harv. L. Rev. 593 (1958). See also Frederick Schauer, “Is Defeasibility an Essential Property of Law?” (ms. October 2008); Gerald Postema, “Positivism and the Separation of Realists from Their Skepticism: Normative Guidance, the Rule of Law, and Legal Reasoning” (ms. 2009).

entailing a series of moral qualities that are characteristic of good law.⁵⁴ These include the requirements of

- **Generality**, so that expectations of conduct are stated in rules widely applicable and impartially applied;⁵⁵
- **Publicity**, so that legal decisionmakers make available to the public the rules to be observed;⁵⁶
- **Prospectivity**, so that no one will be subject to the “threat of retrospective change;”⁵⁷
- **Understandability**, or what has also been called clarity;⁵⁸
- **Consistency**, so that no one is subject to contradictory rules;⁵⁹
- **Possibility**, that is, the prohibition of “rules that require conduct beyond the powers of the affected party”;⁶⁰

⁵⁴ See, e.g., Colleen Murphy, “Lon Fuller and the Moral Value of the Rule of Law,” 24 L.& Phil. 239, 240-43 (2005) (“[These criteria] specify necessary conditions for the activities of lawmakers to count as *lawmaking*”) (emphasis in original).

⁵⁵ These and the other requirements are taken from Chapter 2 of Fuller’s The Morality of Law (rev. ed. 1969).

Id. at 46-49. Fuller associates this requirement with the need for neutrality in legal decisionmaking and he notes as an instance of the failure of generality the presence and prevalence of special laws. See id. at 47 n. 4. See also text accompanying notes infra (discussing generality and neutrality).

⁵⁶ The somewhat clumsy label Fuller gives to this requirement is “promulgation.” See id. at 49-51.

⁵⁷ Id. at 51-62.

⁵⁸ Id. at 63-65. See also Hayek, Serfdom, at 78 (referenced by Fuller as making an equivalent objection to unclear laws).

⁵⁹ Fuller, Morality, at 65-70.

- **Stability**, so that rules do not change so frequently that parties cannot adequately gauge their actions and inactions;⁶¹ and
- **Congruence** between the stated rules and their actual administration⁶²

Joseph Raz's depiction of RL is broadly congruent with Fuller's famous list.⁶³ Raz emphasizes prospectivity, transparency, clarity, stability, all of which are on Fuller's list. He adds generality, expressed as the imperative of "general rules," going on to say that "the requirement of generality is of the essence of the rule of law."⁶⁴ Raz adds to the Fullerian RL criteria by addressing specific institutional dimensions of RL. He adds to the list the requirement of an independent judiciary and judicial review,⁶⁵ and he further urges that "the discretion of the crime-preventing agencies should not be allowed to prevent the law."⁶⁶ Raz acknowledges that this latter category of RL principles addresses different dimensions of RL. The first set of principles, largely congruent with Fuller's, reflect the requirement "that the law should conform to standards designed to enable it effectively to guide action," while the second, institutionally

⁶⁰ Id. at 70-79.

⁶¹ Id. at 79-81.

⁶² Id. at 81-91.

⁶³ Joseph Raz, The Authority of Law 214-15 (1979). And, indeed, so are the other influential theoretical treatments of RL's characteristics. See Waldron, "Florida," at 155 (noting that "Fuller, [John] Rawls, Raz, [Margaret] Radin, and [John] Finnis do not present themselves as advocating rival conceptions. Their approaches seem quite congenial to each other; they are filling in the details of what is more or less the same conception in slightly different ways").

⁶⁴ Id. at 215.

⁶⁵ Id. at 216-17.

⁶⁶ Id. at 218.

salient set of principles “are designed to ensure that the legal machinery of enforcing the law . . . shall be capable of supervising conformity to the rule of law and provide effective remedies in cases of deviation from it.”⁶⁷ In the main, contemporary commentary on RL has worked through themes that are quite copasetic with this normative template. As Andrei Marmor recently notes, there is “[a] remarkable consensus” about what RL basically entails;⁶⁸ and the theoretical scholarship on RL is broadly consistent with both Dicey’s preoccupation with narrowing of official discretion and with the Fuller-Raz focus on the qualities of a good legal system.

Other contemporary legal theorists have emphasized the point that RL qualities are very important, and perhaps even essential, to realize the myriad objectives of good governance.⁶⁹ The important sense in which we can still describe the issue of RL’s values as unsettled, however, is because disagreement remains about which of these RL characteristics are “essential,” which just facilitate law’s purposes and objectives, and which ought to be reconsidered as perhaps only valued contingently. Fuller provides us with a famous list; yet it does not purport to describe a

⁶⁷ *Id.* at 218.

⁶⁸ Andrei Marmor, “The Ideal of the Rule of Law,” in Blackwell Companion to the Philosophy of Law and Legal Theory 1 (ms. 2008).

⁶⁹ See e.g., Lovett, “Positivist Account,” at 60 (“*if* a political community has something recognizable as a legal system, *then* it must be the case that Rule of Law principles are at least to some extent being observed”). On one rendering, this is a variation on Ronald Dworkin’s theme that proper legal rules that have substantive objectives, objectives of good law.⁶⁹ See Ronald Dworkin, Law’s Empire (1991). On another plausible account, framed most famously by H.L.A. Hart, RL values are consistent with alternative legal regimes; however, a legal systems’ efficacy is bound up in important ways with the RL institutions and qualities. See H.L.A. Hart, “Postscript” in The Concept of Law 250-54 (rev. 1994). Similarly, Joseph Raz sees RL as “essentially a negative value . . . designed to minimize the danger created by the law itself.” See Raz, “Authority,” at 224.

hierarchy of values or a way to make tradeoffs when, as we discuss later, these qualities conflict. Raz 's depiction of RL values comes somewhat closer to making a comparative assessment among RL qualities, but he understandably stops short of doing so. Nor does he concern himself with the practical task of assembling RL values into an institutional matrix.⁷⁰ To the extent that we are after practical advice to reformers about how precisely to implement RL values and how to construct and maintain legal institutions, the lack of clarity about how to assess and rank these RL values is problematic. Moreover, to the extent that scholars are in fact thinking hard about legal institutions, they are generally thinking about legal institutions – or, even more opaquely, characteristics of decision-making within the judiciary. With such a focus, they invariably ignore the problem that to create the long-term stability of the law required by RL requires not only the right legal institutions, but embedding the legal system in the right way within the larger political system so that the latter can sustain the former.⁷¹ After all, a serious inquiry into RL must confront the basic fact that legal institutions more often fail than succeeds in countries in which legal and political institutions are established through ambitious reform efforts.⁷² We will return to the political context of RL in a later section. For now, we merely point out that the theoretical strand of RL thinking, a body of work represented by the leading political and legal scholars of our time, seldom draw the connection among the characteristics of RL, the structure

⁷⁰ In his participation in the conference dialogue in from which this paper's ideas grew, Professor Raz made it clear that he is rather agnostic as to the particular relationship between his theory of RL and the institutional arrangements that may promote or undermine RL as he sees it. However, he does discuss some of the institutional implications of RL in "The Politics of the Rule of Law," in his Ethics in the Public Domain 354 (1994).

⁷¹ See generally Barry R. Weingast, "Why Developing Countries Prove So Resistant to the Rule of Law" (Hoover Working Paper 2008); "The Political Foundations of Democracy and the Rule of Law," 91 *Amer. Pol. Sci. Rev.* 245 (1997).

⁷² See *id.* and sources cited therein.

of legal institutions, and the political context in which RL is nested. A further disagreement, one that also threatens to imperil RL as a construct useful to real political reform efforts, concerns whether RL values are essentially *proceduralist* or whether they entail concrete *substantive* commitments. Hayek's famous formulation of RL helped sow confusion on this matter. While he depicted RL as articulated constraints on the government's coercive power, he saw RL as promoting, in its design and implementation, individual freedom.⁷³ Raz objected to this second implication, noting that Hayek's view of RL and human freedom "leads to exaggerated expectations" of RL.⁷⁴ RL should be understood, argues Raz, as a more modest enterprise; it is truly "just one of the virtues the law should possess" and "it possesses no more than prima facie force."⁷⁵ . And, although Fuller saw RL as intrinsic to the morality of law, his list of RL qualities were essentially proceduralist; they were congruent with many substantive commitments and, indeed, many different types of legal systems.⁷⁶ This proceduralist conception is hard to square with the discussion of RL in the work of two other prominent modern theorists: John Rawls and Ronald Dworkin. Rawls, although less engaged with the project of sketching the political and legal architecture of RL, certainly had in mind the ideal of RL as vouchsafing substantive equality and justice.⁷⁷ RL's overarching value, then, would stand or fall on its ability to implement these aims; by contrast, a purely proceduralist template

⁷³ Hayek.

⁷⁴ Raz, "Authority," at 226.

⁷⁵ Id. at 228.

⁷⁶ See Fuller, *Morality*, at 153 (law's morality "is indifferent toward the substantive aims of law and is ready to serve a variety of such aims with equal efficacy").

⁷⁷ See John Rawls, *A Theory of Justice* 235-43 (1971).

would be unlikely to realize these objectives. Ronald Dworkin was even more insistent that RL embody substantive equality commitments.⁷⁸ “The connection,” says Dworkin, “is sometimes expressed in the rubric that under the rule of law no man is above the law; but the force of that claim . . . is not exhausted by the idea that each law should be enforced against everyone according to its minds.” *Id.* RL’s philosophers, he concludes, “have in mind substantial and not merely formal equality before the law.” *Id.* In an earlier iteration of his RL analysis, Dworkin contrasted the “rule-book” conception of RL with a second conception in which RL “is the ideal of rule by an accurate public conception of individual rights.”⁷⁹ In this view, RL is irretrievably substantive. “It does not distinguish,” writes Dworkin, “as the rule-book conception does, between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the rule book capture and enforce rights.”⁸⁰

This proceduralist-substantive dichotomy might not be a rigid one, however, as Jeremy Waldron has recently pointed out.⁸¹ “A procedural understanding of the Rule of Law,” writes Waldron, “does not just require that officials apply the rules as they are set out; it requires that they apply them with . . . care and attention to fairness”⁸² Waldron shifts the focus from RL as merely, or especially, a reformulation of the bromide that individuals and officials alike

⁷⁸ See Ronald Dworkin, Justice in Robes 177 (2006).

⁷⁹ Ronald Dworkin, A Matter of Principle 11 (1985).

⁸⁰ *Id.* at 12.

⁸¹ See Waldron, “Concept of Law,” at 7.

⁸² *Id.* at 7.

must obey the law to a focus on the substantive values of RL – at the very least, the value of fairness and equitable administration of justice.⁸³ For Waldron, the procedural qualities are deeply connected to the objectives of legal decisionmaking. The conventional RL lists of these qualities, then, reiterate the notion that fair procedure is a talisman for good law. Waldron is well aware of the other values that good legal systems aim to promote; but he reshapes the RL inquiry by pressing the point that RL can avoid the pitfall of becoming an “essentially contested concept” by being understood as a congeries of qualities that are fundamentally proceduralist, but no less utilitarian and purposive.

We thus circle back to Dicey and Hayek to make the point that the view of RL as a mechanism for restraining governmental power that can also be understood in substantive terms.⁸⁴ To be sure, framing RL as limits on official discretion leaves on the table many opportunities for noxious legal content.⁸⁵ A rulebook community may, after all, be a community of horrific laws. However, the restraints on government power that RL in the Dicey-Hayek sense (a sense that, as you will recall, Hobbes thought quite unlikely to materialize) curtail one key threat to substantive values, that threat being that a community would in fact create a substantively attractive legal system only to discover that the implementation of this system is gutted by official mendacity and abuses of discretion. The juxtaposition of rule of law and rule

⁸³ Id. at --.

⁸⁴ See, e.g., Stephen Holmes, “Lineages of the Rule of Law,” in Democracy and the Rule of Law 19, 22 (Jose Maria Maravall & Adam Przeworski eds. 2003) (discussing Rousseau).

⁸⁵ See Richard Flathman, “Liberalism and the Suspect Enterprise of Political Institutionalization: The Case of the Rule of Law,” in Nomos, supra, at 297, 301 (“the idea of the rule of law speaks primarily to the question of fidelity to law and leaves largely unresolved the issue of the proper scope and content of legal regulation”).

of men is meant to capture, at the very least, the notion that society should have decent confidence that their expressed desires should be accommodated and respected by their representatives.

III. Measuring the Rule of Law

RL reformers must not only try their best to develop and implement legal institutions across the globe; they must also have in place mechanisms of assessment and measurement. We need to know how and why RL fails and how it succeeds. We need a comprehensive series of measurement tools that will help reformers address in a clear-headed way whether and to what extent certain RL initiatives are having their intended effect. At the very least, we need to know this in order to determine whether the effort is worth the considerable investment. More fundamentally, we need to measure RL to make educated judgments about how best to refine our objectives in order to serve the large and important cause of improving governance and enhancing societal well-being throughout the world.

There are serious questions about whether suitable measurement is possible.⁸⁶ Most importantly, we face the ubiquitous dilemma of determining how best to make tradeoffs where RL values come into conflict. In the contemporary RL literature, the qualities of RL are seen as linear and as basically pointing in the same direction. All good things, this literature suggests, go together. Each institution and governance structure is viewed as a complement for the other. We should, for instance, have an independent judiciary and a separation of powers; we should maintain a unitary executive scheme and also have clearly prescribed limits on executive discretion. Our analysis above reveals a point that should be, if not obvious, than fairly clear: These schemes will frequently come into conflict with one another. That there are conflicting values at stake in public policymaking is not, in and of itself, an arresting insight. But what makes this especially problematic in the context of RL reformism is that we have no neat mechanism available for measuring the performance of RL qua RL given these tradeoffs.

We could conceivably measure some legal institutions (for instance, asking whether we have more or less of a system of constitutionalism), but how are we to measure RL more globally where some governance structures push in one direction and others point in the other. To make the point more concrete: Suppose we can say that a country in the developing world has an independent judiciary with a strong system of judicial review and, for those reasons, is high on

⁸⁶ “Measures of the [RL] concept have proliferated over the past decade, yet scholars commonly question their validity. We argue that measurement validity concerns are largely a function of the concept being targeted. We suggest that the broad, multidimensional concept of the rule of law should not guide empirical research, even if the individual concepts from which it is constituted should.” Julio Rios-Figueroa & Jeffrey K. Staton, “Unpacking the Rule of Law: A Review of Judicial Independence Measures” (July 16, 2009) (<http://ssrn.com/abstract=1434234>).

the RL “scale,” but it also has a strong, unitary executive branch that, as best we can discern, does not reliably respect decisions of the judiciary. How do we measure and promote RL in that country?

We need a sensible strategy for assessing tradeoffs. And this requires more than technical proficiency and sophisticated; it requires clarity about the concept of RL and a consensus about *how and why* we value RL.

Moving from critique to constructive engagement with the RL enterprise, we end by asking “what sort of steps ought we to follow to make measurement possible?” Building on the list of difficulties and dilemmas described at the beginning of this Part, we would suggest, first, that efforts to measure RL embed within them a similarly complex assessment of the political circumstances of the system to which the measuring tool is being directed. Such efforts have been made in important work touching upon RL and related considerations; second, the way to incorporate tradeoffs into measurement efforts begins with a specification of how different RL values are to be ranked. There are some governance analyses that triage RL structures in certain ways; but we still lack the sort of comprehensive, ordinal or cardinal ranking systems that would make measurement more fine-grained and truer to the overall normative objectives of RL reformism; third, greater progress needs to be made in yoking RL structures to issues of capacity and compliance. In short, we need to know how officials and branches of government follow the rules and principles laid down by legal institutions. This issue of compliance measurement is, of course, an analytically complex one, and we simply note its importance in RL reform efforts.

Lastly, and most grandly perhaps, we call for greater engagement among social scientists, legal scholars, and the RL reform community to refine the concept of RL, drawing upon the different perspectives available from these other disciplines and directions and, also, to generate a clearer strategy for assessment and measurement.

IV. Constructing the Rule of Law

There is broad consistency across the range of RL thinkers and activists on what a legal system needs to have in place to implement RL. In addition to basic agreement about what RL means and what qualities it entails, RL requires a series of essential institutions; and, likewise, it requires key governance structures, structures that, while perhaps different in architecture, are elements in the basic RL edifice. Such investigation will help us frame our discussion in Part V about how we can (or cannot) implement RL, given certain assumptions about the structures of government within the U.S. and abroad.

One key RL institution is the presence of a constitution – or, more accurately, a scheme of **constitutionalism**.⁸⁷ The idea here is a complex, yet familiar one: Only insofar as a polity has a

⁸⁷ See, e.g., Harvey C. Mansfield, Jr., “Constitutionalism and the Rule of Law,” 8 Harv. J. L. & Pub. Pol. 323 (1985)

body of (preferably written) fundamental law embedded in a constitution can we plausibly measure the government's fidelity to the rule of law.⁸⁸ The constitution's service to RL is two-fold: first, it provides the basic structure and rules of the system; it "stipulates institutions of government;"⁸⁹ and it tells the government, sometimes in broad terms, other times more specifically, how to undertake its responsibilities, that is, how to *govern*. Even more basically, it defines the architecture of government, for instance, by describing the structure of lawmaking and law executing.⁹⁰ Second, the constitution contains the substantive rules that authorize and limit government's regulatory power.⁹¹ When we say that the constitution describes the fundamental law, we mean to notice the rules explaining just how far the government can go. With the fundamental law, therefore, we can measure the metes and bounds of the government's regulatory authority. While most RL accounts are reticent to offer big judgments about the

⁸⁸ See, e.g., John Ferejohn, Constitutional Culture and Democratic Rule (2001); Cass Sunstein, Designing Democracy: What Constitutions Do (2001); Stephen Holmes, Passions and Constraints: On the Theory of Liberal Democracy (1995); Charles McIlwain, Constitutionalism Ancient and Modern, (2nd ed. 1958).

⁸⁹ Russell Hardin, "Constitutionalism," in Oxford Handbook of Political Economy 302 (Barry Weingast & Donald Wittman eds. 2006).

⁹⁰ For an interesting perspective on the role of constitutions "as expressive documents," see Geoffrey Brennan & Alan Hamlin, "Constitutions as Expressive Documents," in Oxford Handbook of Political Economy, supra at 329, 340 (noting the danger "in asking a written constitution to perform the function of fully defining the rules of the sociopolitical-economic game").

⁹¹ See, e.g., Donald Lutz, Principles of Constitutional Design 17 (2006) ("Power is also limited through specific prohibitions on decision outcomes reached by those in power"). This idea of constitutions as limiting government authority was especially prominent in the work of David Hume and, later, Montesquieu and Madison. See David Hume, A Treatise of Human Nature 1739-40 (L.A. Selby-Bigge & P.H. Nidditch 2nd eds. 1978). See generally Hardin, "Constitutionalism," supra at 306-07. See generally Barry R. Weingast, "Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century" (Hoover Working Paper 2008).

content of this fundamental law,⁹² they are considerably bolder in insisting that a constitution is a necessary condition for a polity to be governed by RL.

Though deemed necessary, a written constitution is hardly a sufficient condition for RL to flourish. Most constitutions have a rather short shelf-life, approximately seven years on average.⁹³ Moreover, the lion's share of new constitutions fail in the sense that political officials frequently disregard their constitution, no matter how ideally it is written. Hence there is an important mismatch between the establishment of a scheme of constitutionalism in a country that ostensibly aims to establish RL and the maintenance and performance of that constitution in the real world of law and politics. Therefore, the agenda of establishing constitutionalism as a linchpin of RL reform, an agenda reflected in much of the RL literature in both law and political science, does not adequately come to terms with the law-on-paper and law in society incongruity.⁹⁴

⁹² See text accompanying notes – *supra* (describing proceduralist versus substantive conceptions of RL).

⁹³ See Tom Ginsburg, Zachary Elkins, & James Melton, “The Lifespan of Written Constitutions” (working paper, July 2008).

⁹⁴ For important exceptions to this phenomenon, see Barry Weingast, “Self-Enforcing Constitutions,” *supra*; “Political Foundations of Democracy,” *supra*; Peter C. Ordeshook, “Constitutional Stability,” 3 *Constit. Polit. Economy* 137 (1992).

RL reformers and theorists typically insist that there be available in countries that aim to establish RL a system of **judicial review**.⁹⁵ This system enables a duly authorized institution – the judiciary – to make an assessment and a binding judgment about whether and to what extent a government’s actions comply with the procedural and substantive requirements embodied in the relevant constitution and other authoritative sources of law.⁹⁶ There are a wealth of perspectives on the purposes and functions of judicial review;⁹⁷ but, one of the consistent core ideas in the developed case for judicial review is that such an institutional arrangement is necessary (or at least extremely important) in providing a disinterested eye on the conduct and activities of government.⁹⁸ Judicial review helps in implementing the rules, and also the values, of the constitution; and therefore it helps implement the rule of law.

⁹⁵ See Hayek, “Political Ideal,” at 45; Rawls, “Justice,” at 238-39; Raz, “Authority,” at 216-17; Gerald F. Gaus, “Public Reason and the Rule of Law,” in *The Rule of Law*, supra n.—at 328-9. Fallon, “Constitutional Discourse,” at 9 (“In the American context . . . the association of the Rule of Law with judicial review is very strong”). Accord Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

⁹⁶ See, e.g., Raz, Authority, supra at 217 (requiring, as part of RL, that “[t]he courts should have review powers over the implementation of the other principles”). But see Fallon, “Constitutional Discourse,” supra, at 9 n.33 (“The necessary judicial role need not, at least on all theories, encompass review of legislative acts for consistency with a written constitution; the demand is only for the availability of courts to apply ordinary law.”).

⁹⁷ See, e.g., Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004); Mark Tushnet, Taking the Constitution Away from the Courts (1999) Richard H. Fallon, Jr., “The Core of an Uneasy Case for Judicial Review,” 121 Harv. L. Rev. 1693 (2008); Jeremy Waldron, “The Core of the Case Against Judicial Review,” 115 Yale L.J. 1346 (2006).

⁹⁸ See Fallon, “Uneasy Case,” supra, at 1699-1703.

Related to this idea in important ways is the concept of the **separation of powers**.⁹⁹

Influential political theorists, not the least of which have been the intellectual architects of the British and American constitutions,¹⁰⁰ have accounted for the division of powers and responsibilities among various institutions (in the conventional schema, the legislature, the executive, and the judiciary) on the grounds that such a division safeguards RL.¹⁰¹ It does so principally by managing the tactical aspects of multidimensional governance¹⁰² and, more to the point, making it more difficult for any one set of government officials to accumulate and aggrandize power.¹⁰³ The separation of powers shares in common with judicial review the idea that certain institutional arrangements help implement RL by making it more likely that the good governance qualities associated with the concept (recall here Fuller's criteria for successful law)

⁹⁹ See generally M.J.C. Vile, Constitutionalism and the Separation of Powers (1967); W.B. Gwyn, The Meaning of the Separation of Powers (1965). On the connection between separation of powers and the rule of law, see, e.g., John Manning, "Textualism and the Equity of the Statute," 101 *Colum. L. Rev.* 1, 58-70 (2001).

¹⁰⁰ See, e.g., Federalist #47-48, 51 (Madison); Baron de Montesquieu, The Spirit of Laws (Hafter ed. 1949) (Thomas Nugent transl.).

¹⁰¹ See, e.g., Richard Bellamy, The Rule of Law and the Separation of Powers (2006); Lovett, "Positivist Account," at 66 ("One idea behind the separation of powers system, for example, was precisely that since only power can effectively oppose power, we must cleverly design institutions such that the battle lines drawn between competing powers happen to coincide with boundaries set by the Rule of Law"); Manning, "Equity," supra, at 58 ("[T]he full historical context suggests that the separation of the legislative and judicial powers in the United States was designed, in part, to limit governmental discretion and promote rule of law values").

¹⁰² See, e.g., Gary W. Cox & Mathew D. McCubbins, "The Institutional Determinants of Economic Policy Outcomes," in Presidents, Parliaments, and Policy (Stephen Haggard & Mathew D. McCubbins eds. 2000; George Tsebelis, Veto Players: How Political Institutions Work (2002).

¹⁰³ See James Madison, "The Federalist No. 10," The Federalist Papers ("[t]he policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public.").

will emerge from the complicated interplay of forces, interests, expertise, and strategies.¹⁰⁴

Ambition, wrote Madison, must be counteracted by ambition, and the separation of powers represent the best example of the sort of “auxiliary precautions” that he eloquently insisted upon in the 51st Federalist.¹⁰⁵

A fourth institutional structure that is viewed in much of the literature as a critical component of a system that values and safeguards RL is an **independent judiciary**.¹⁰⁶ While there are many different ways to capture coherently the notion of judicial independence,¹⁰⁷ the usual requirement of an independent judiciary is a structural insulation from political pressure.¹⁰⁸ In a 2008 document entitled “Guide to Rule of Law Analysis,” the USAID defines judicial independence through the following two questions: “Do the constitution and laws of the country

¹⁰⁴ See, e.g., Barry R. Weingast, “A Postscript to ‘Political Foundations of Democracy and the Rule of Law,’” in Democracy and the Rule of Law, supra n.--, at 109; Adam Przeworski, “Why Do Political Parties Obey Results of Elections?” in id. at 114; Rafael La Porta, Florencio Lopez-de-Silanes, Christian Pop-Eccles, and Andrei Shleifer, “Judicial Checks and Balances,” 112 J. Pol. Econ. 445 (2004).

¹⁰⁵ James Madison, “The Federalist No. 10,” The Federalist Papers (“[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions”). See also Manning, “Equity,” at 61 (“[The] rule-of-law justification for the separation of powers owes a great deal to the Founders’ negative experiences with the ineffectively separated powers of colonial and state governments”).

¹⁰⁶ See, e.g., Brian Tamanaha, “A Concise Guide to the Rule of Law” (SSRN #1012051, 9/07) at 14-15; Manning, “Equity,” at 66 (“[A] recurring theme was that judicial independence furthered the related constitutional objectives of constraining official discretion and promoting the rule of law”).

¹⁰⁷ See, e.g., Joseph Raz, Authority, supra at 216-17.

¹⁰⁸ See, e.g., Charles Gardner Geyh, When Courts & Congress Collide: The Struggle for Control of America’s Judicial System (2006).

provide that the judiciary is an independent branch of government? Do the laws relating to the structure and operations of the judiciary place the principal control over most judicial operations in the hands of the judiciary itself?”¹⁰⁹ The first question tied the independent judiciary directly back to the separation of powers,¹¹⁰ while the second question looks at the degree of external political influence.

Why do we value judicial independence? Among the various values vouchsafed by judicial independence, two stand out: freedom from external influence and judicial impartiality. In addition, judicial independence may be a proxy for other values, for example, it may reflect “a concern about consistency across cases and, hence, across time.”¹¹¹ Both of these values are, of course, RL values as traditionally understood. A fuller consideration of the connection between judicial independence and RL must await the next Part,¹¹² but the central point here is that an independent judiciary is considered by many commentators, and most RL reformers, as a *sine qua non* for RL. Indeed, various indexes of RL in the USAID/World Bank reform efforts view the relationship between judicial independence and good governance as a linear one.¹¹³

¹⁰⁹ USAID, Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework 38 (August 2008).

¹¹⁰ See, e.g., Manning, “Equity,” *supra* at 58 (“[T]he U.S. Constitution takes pains to ensure judicial independence from the control and functions of the political branches”).

¹¹¹ Lewis Kornhauser, “Is Judicial Independence a Useful Concept?”, in Judicial Independence, *supra*, at 51.

¹¹² See text accompanying notes -- *infra*.

¹¹³ See generally Robert J. Barro, “Democracy and the Rule of Law,” in Governing for Prosperity 209 (B. Bueno de Mesquita & H. Root eds. 2000). But see Cameron, “Judicial

Each of these “essential” institutions is usually evaluated by reference to American criteria. That is, the literature looks at how the American system configures constitutionalism, judicial review, separation of powers, and judicial independence and then commends these structures to other countries. As we will explain in more detail below, there are at least two fundamental problems with such an approach: First, the understandings of what these institutions mean and how they are constructed are different in different countries. Constitutionalism means something different in New Zealand and Chile than it does in the U.S. and in the U.K. The same is certainly true for judicial review. And it is especially true of the last two institutions mentioned, separation of powers and the independent judiciary. It would be extraordinarily difficult, as has been pointed out frequently by social scientists investigating cross-national governance, to simply export an American system of separation of powers to a country whose political structure, history, and culture understands the relationship among institutions in government in a rather different way. Second, even supposing that we could transplant these essential institutions to developed and developing countries, the performance of these institutions in these countries will look quite different.

V. Implementing the Rule of Law

Independence,” *supra*, at 143 (discussing studies which find “no impact of judicial independence on rule of law values”).

Much of the discussion up to this point has involved RL as an abstract concept. In earlier sections, we interrogated the basic principles and values of RL and, further, considered how RL criteria map onto competing theories of law. We also sketched some of the institutional and structural apparatus of RL in the reform project, noting that the construction of RL is viewed as including certain essential institutions and key governance structures. We are ready to return to the central objective of this Article, that is to a consideration of how a deeper understanding of the nature and contents of RL will and should impact the implementation of RL on the ground. Our investigation of institutions and governance structures is necessarily preliminary. We are interested here in revealing some of the underappreciated difficulties faced by RL proponents in designing and maintaining various institutions. Some of these difficulties are fundamental, while others are surmountable. In any event, a closer look at the contingent and complex qualities of these legal institutions and structures and, as well, a closer look at tradeoffs, will help aid RL analysis and, more to the point, help improve the likelihood that RL efforts in the real world will accomplish their objectives.

A. Judicial Independence and Judicial Performance

The RL literature does not make clear in its description of judicial independence precisely from *what* judges are expected to be independent?¹¹⁴ Different conceptions of proper judging yield different answers. One modality of judicial independence stresses freedom from the reality

¹¹⁴ On the puzzling nature of judicial independence, see, e.g., McNollgast, “Conditions for Judicial Independence,” 13 J. Contemp. Legal Issues 105, 105-06 (2006) (“[T]here remains much disagreement as to the answers [to the question of what it means “for a judiciary to be ‘independent’”]. See also Lydia Brashear Tiede, “Judicial Independence: Often Cited, Rarely Understood,” 13 J. Contemp. Legal Issues 129 (2006).

or appearance of judicial corruption. Here the defining element of judicial independence is fidelity to law and legal principle, regardless of where this fidelity leads the judge. A judge betrays this fidelity, and thus the public trust, when he or she pursues other objectives, whether private-regarding or adherent to the objectives of other individuals or institutions with influence over the judge.¹¹⁵

However, corruption is only one concern undergirding the case for an independent judiciary. Another very different take on judicial independence stresses the value and virtue of judicial impartiality. The idea here is that judges are to come to legal disputes with an open mind; they are to be influenced in their judgments solely by the merits of the arguments, gleaned through (in the American context) the arguments of the disputants or (in the civil law tradition) by the judges' own methods of investigation and inquiry. Whatever threatens impartiality threatens sound adjudication. Judges, in this conception, should be kept independent from all realistic threats to this ideal of impartiality. Requirements, for example, that prosecutors be independent (a requirement that, separately, has been associated with RL)¹¹⁶ and prohibitions against judges

¹¹⁵ In the recent Caperton decision, 556 U.S. ___ (2009), for example, the Supreme Court decried the manner by which interest groups in the state of West Virginia were able to make substantial financial contributions to judges running for election in that state, thus raising questions about the judges' fidelity to legal principle.

¹¹⁶ See Raz, Authority, supra at 218; ABA Rule of Law Initiative, supra.

assessing evidence outside the purview of one of the parties, all contribute in small or large ways to the ideal of judicial impartiality.¹¹⁷

An important threat to judicial impartiality is political influence.¹¹⁸ Members of the executive or legislative branches frequently undertake to influence judges in the outcome of specific cases, directly threatening the judges' ability to render impartial judgment. Examples of external political threats to judicial impartiality are legion. King James's firing of Chief Justice Coke in early 17th century England,¹¹⁹ the effort by President Franklin Roosevelt to pack the Supreme Court in the 1930's,¹²⁰ the recent effort on the part of federal legislators to threaten judges who cited foreign law in their opinions with impeachment,¹²¹ and the outright ignoring by courts of a wide range of dictators across many continents, all reveal the ubiquitous threats to judicial impartiality.¹²² Judicial independence is regarded as a structural mechanism to insulate judges from external influence. And, more precisely, the influence that is fretful is the kind of

¹¹⁷ In the administrative adjudication context, this ideal of impartiality is embedded in various provisions of the Administrative Procedure Act and administrative law decisions that seek to shield administrative law judges from threats to their impartiality. [cites; ex parte contacts, etc.]

¹¹⁸ See text accompanying notes – supra and sources cited therein.

¹¹⁹ See generally John Ferejohn and Pasquale Pasuino, "Rule of Democracy and Rule of Law," in *Democracy and the Rule of Law* 243, 244-45 (Jose Maria Maravall & Adam Przeworski eds. 2003) (describing King James episode).

¹²⁰ See, e.g., William Leuchtenburg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt (1995).

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influence that would encourage a judge to decide an issue on the basis of non-objective criteria – in short, to rule on the basis of “men,” not “law.”

Another aspect of impartiality deserves mention. Until now, we focused on the concern of external influence. The underlying assumption is that, but for this external influence, judges would come to their disputes impartially and utterly open-minded. An entirely separate threat to impartiality, however, is the threat posed by the judge who is driven by internal influences, influences that bias his or her judgment, and which are wholly irrespective of external pressures. Judges may be ideological and, if so, the ideal of impartiality is deeply threatened.¹²³ Ideologically driven decisionmaking steers the judge away from the arguments of the parties and toward his or her ideology.¹²⁴ That the decision will be compelled by the latter rather than the former is a serious problem, if and insofar as we prize judicial impartiality above all else.

Notice here how judicial independence works in favor of the first conception of impartiality but not necessarily in favor of the second. With independence comes freedom from external influence. With no vulnerability to reprisal, the judge is free to decide on the merits of the case;

¹²³ Cf. Posner, “What do Judges Maximize?,” *supra*, (analyzing judges’ behavior through economic criteria, where the principle hypothesis is that judges have preferences not unlike other public officials and, indeed, other members of the general public).

¹²⁴ See, e.g., David W. Rohde and Harold J. Spaeth, Harold J. Supreme Court Decision Making, (1976); Jeffrey A. Segal, Jeffrey and Albert D. Cover, “Ideological Values and the Votes of U.S. Supreme Court Justices,” 83 *Amer. Poli. Sci. Rev.* 557 (1989); Jeffrey A. Segal and Harold J. Spaeth, Harold, The Supreme Court and the Attitudinal Model, (1993). For a survey see McNollgast, “The Political Economy of Law: Decision Making by Judiciary, Legislative, Executive and Administrative Agencies,” In The Handbook of Law and Economics (Mitchell Polinsky & Steven Shavell eds. 2007).

and s/he may adjudicate with no mind to the views of legislators, governors, presidents. S/he is, in essence, empowered to govern on the basis of law, not men. However, true judicial independence also gives license to the judge to decide on the basis of his or her own ideological predilections. No opportunities exist for external officials, be they legislators or chief executives, to check judicial freedom to pursue their own conceptions of justice, fair play, etc. If we suppose that judges typically act this way, then judicial independence works against RL. Such independence makes it more, rather than less, likely that judges will be governed by men, not law.¹²⁵

This stylized conception of judicial decisionmaking is not intended to take any position on how judges behave. This is a very complex question addressed within a large social science literature.¹²⁶ Rather, our central point here is that judicial independence standing alone tells us little about whether and to what extent RL is subserved unless we have a fuller idea of the risks associated with more or less judicial freedom. Under one conception of judicial behavior, RL would be greatly aided by carefully structured judicial independence, while, under another

¹²⁵ Judith Resnik and others note that this sense of partisanship may cut in the opposite direction; that is, we may view it as perfectly acceptable for citizens, through their elected officials, to seek to entrench their own governance philosophies and to do so by influence over the judicial process. Given the permanence of judicial tenure in an independence regime, the only credible way to do so is by careful attention to, and oversight of, the nomination and confirmation process. See Judith Resnik, "Interdependent Federal Judiciaries: Puzzling about Why & How to Value the Independence of which Judges," *Daedalus* 28, 32 (Fall 2008). See also Jack M. Balkin & Sanford Levinson, "The Processes of Constitutional Change: from Partisan Entrenchment to the National Surveillance State," 75 *Fordham L. Rev.* 489 (2006);

¹²⁶ See, e.g., Richard Posner, How Judges Decide (2007); David W. Rohde & Harold J. Spaeth, Supreme Court Decisionmaking (1993); Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model (1993).

conception, RL would be undermined by this very same structure.¹²⁷ Framing judicial independence in these two different ways illustrates the multidimensionality of this one RL element. If corruption is the principal worry, then RL demands especially rigorous ethical standards and, to boot, requirements of transparency.¹²⁸ We want to be crystal clear what interests may be implicated by one or another judicial ruling.¹²⁹ We want public-regarding, not private-regarding judicial decisions.¹³⁰ If, instead, we worry principally about judicial partiality, then we may or may not want judicial independence, depending upon from where the threats to impartiality arise.¹³¹

An additional wrinkle in the consideration of judicial independence as a scheme for implementing RL is the issue of judicial philosophy. In a contribution to a recent anthology on judicial independence, Lewis Kornhauser makes the wise point that judicial independence is

¹²⁷ Cf. F. Andrew Hanssen, “Is There a Politically Optimal Level of Judicial Independence?,” *Amer. Econ. Rev.* 712 (June 2004) (explaining, with the benefit of a model of strategic institutional choice, the tradeoffs between different levels of judicial independence).

¹²⁸ See generally ABA Materials on Rule of Law Initiative, text accompanying notes – *supra*.

¹²⁹ See, e.g., Gregory A. Caldeira & John R. Wright, “Organized Interests and Agenda Setting in the U.S. Supreme Court,” 82 *Am. Pol. Sci. Rev.* 1109 (1988); Marc Galanter, “Why the ‘Haves’ Come Out Ahead: Speculation on the Limits of Legal Change,” 9 *Law & Soc’y Rev.* 95 (1974).

¹³⁰ See, e.g., William Landes & Richard Posner, “The Independent Judiciary in an Interest Group Perspective,” 18 *J. L. & Econ.* 875 (1975).

¹³¹ That the assumptions and values concerning judicial performance are multifaceted explains in part why judicial independence is not monolithic within the American judicial system. Quite simply, judges at different levels will raise different sorts of risks and, correspondingly, will have applied to them different versions of independence regimes. See Burbank & Friedman, “Introduction,” in *Judicial Independence*, *supra* at 16-22. The same point can be made about judicial systems in other countries.

seldom valued for its own sake.¹³² What we really want to know, in assessing the connection between judicial performance and RL (and other values), is the judge's normative theory of adjudication.¹³³ Does the judge – or, if you prefer the bird's eye view, the judiciary – pay adequate fidelity to enacted law?¹³⁴ Does s/he follow precedent?¹³⁵ Does the judge act assiduously, and on his or her own initiative, to protect and promote the rule of law? If the answer to this is yes, then we might well consider judicial independence as less essential to RL. If, instead, judges aggrandize to themselves the lawmaking power, thereby replacing RL values of consistency and (to bring in one of Joseph Raz's requirements) the value of legislative lawmaking with judicial fiat,¹³⁶ then we might worry that judicial independence provides judges with an unacceptably wide domain of discretion. In such a system, we may prefer a non-independent judiciary, that is, a judiciary under the influence and even control of the legislative and executive branches – or, as in the case with the elected judiciary in the American states, the direct control of the voters. For it is only where these mechanisms are in place that judges will be obedient to RL.¹³⁷

¹³² Lewis A. Kornhauser, "Is Judicial Independence a Useful Concept?," in *Judicial Independence*, supra, at 45.

¹³³ *Id.* at 53-54.

¹³⁴ See, e.g., Cass, *Rule of Law*, supra, at 4-6.

¹³⁵ See, e.g., Mark Ramseyer & Eric Rasmussen, "Judicial Independence in a Civil Law Regime: The Evidence from Japan," 13 *J. L. Econ. & Org.* 259 (1997).

¹³⁶ See Raz, "Politics," supra at 357-58.

¹³⁷ The observations here are primarily normative, raising questions about how we ought to view the merits and demerits of judicial independence given what we know or think we know about judging. The positive political theory (PPT) analysis of judicial independence is nested more rigorously in the "new separation of powers literature" and emphasizes the ways in which judges, whether viewed as "independent" or not, are embedded in a strategic political process

In the end, we may be more interested in the central question of judicial fidelity to law than the question of how independent are judges from external influences. Consider here the enduring question of judicial lawmaking.¹³⁸ The prerogatives given to judges to decide issues without the fear of individual reprisal would appear to increase the incentives for judges to engage in more ambitious lawmaking. In his comparative analysis of adjudication and courts, Martin Shapiro makes the point that “[lawmaking and judicial independence are fundamentally incompatible.”¹³⁹ No political regime will permit on any sustained basis judges to engage in interpretations that are far apart from the will of the “governing coalition.”¹⁴⁰ That courts, even while exercising discretion, will perform their tasks within the broad strictures of an “interpretive regime” and will thus be limited in their opportunities for lawmaking is a common theme in the political science literature.¹⁴¹ This is a common theme and one that resonates across a realm of

that exerts influence and pressure over their decisionmaking. See generally Rui J.P. deFigueiredo, Jr., Tonja Jacobi, & Barry R. Weingast, “The New Separation-of-Powers Approach to American Politics,” in The Oxford Handbook of Political Economy 200 (Barry Weingast & Donald Wittman eds. 2006) (“[t]he new separation-of-powers analysis treats judicial decisions not as one-shot cases determined by their idiosyncratic characteristics, but as repeated iterations of interactions between the branches”). While the strategic model of court/legislative/executive decisionmaking is not front and center in the analysis here, we do note that, with the benefit of PPT, we can view more skeptically – perhaps we ought to say *realistically* – the claims that judges are in fact independent in their decisionmaking. See also John Ferejohn & Larry Kramer, *Independent Judges, Dependent Judiciary*, 77 NYU L. Rev. 962 (2002).

¹³⁸ See text accompanying notes – supra and sources cited therein.

¹³⁹ Martin Shapiro, Courts: A Comparative and Political Analysis 34 (1981).

¹⁴⁰ See *id.*

¹⁴¹ See William N. Eskridge, Jr. & John Ferejohn, “Politics, Interpretation, and the Rule of Law,” in Nomos, supra, at 265-67 (describing “interpretive regimes” as “systems of norms or conventions that regulate the interpretation of legal materials, including statutes”).

methodological approaches and positive analyses of judges and judicial/legislative/executive interactions.¹⁴² However, the normative proposition that judicial independence and judicial lawmaking are incompatible is not free from controversy. Kim Lane Scheppele, for example, insists that judges exercise wide discretion, and, indeed, seek substantive justice even in the face of positive law, precisely because judicial independence fosters these opportunities, these duties.¹⁴³ Scheppele writes: “If judges have to take a positivist attitude toward law and simply follow the rules laid down by the political branches, then they are not really independent of politics but . . . completely subservient to it.”¹⁴⁴ In this framework, judicial independence is not inconsistent with judicial lawmaking; rather, it is a necessary condition for judicial independence to properly function.¹⁴⁵

To summarize the insight of this section, the case for judicial independence rests on a series of incomplete and, in some ways, controversial premises and assumptions. The discussions of judicial independence with respect to indexes of RL are often unclear about precisely what it means by the independence of judges. Further, circumstances arise in which judicial independence may not, in fact, serve the objectives of RL reformers. We need not conclude,

¹⁴² See deFiguerido, “New Separation of Powers,” in Oxford Handbook, supra, at 200 et. seq.

¹⁴³ Kim Lane Scheppele, “Declarations of Independence: Judicial Reactions to Political Pressure,” in Judicial Independence, supra, at 227.

¹⁴⁴ Id. at 269. See also id.

¹⁴⁵ “At its highest reaches, then, the independence of judges requires some legal and institutional mechanisms through which the political branches can actually be challenged in their ability to dictate to judges the entirety of the law they are to apply.” Id. at 270.

cynically, that judicial independence is wholly chimerical and of little pertinence to RL reformism. Instead, we address some of the problems with judicial independence as an analytical construct and as a normative principle in order to improve future work on judicial performance, the judiciary as an institution, and on the relationship between certain theories of judging and RL values.

B. The Unitary Executive and Separation of Powers

A key tension arises between the virtue of the unitary executive as an institutional mechanism for promoting RL and the virtue of the separation of powers for that same purpose. We consider that tension here – not to resolve the dispute over the desirability of the unitary executive model, but in order to illustrate, once again, the point that the successful implementation of RL requires attention to these institutional complexities and to potential tradeoffs between competing structures and values.

Proponents of the unitary executive model in the U.S.,¹⁴⁶ perhaps channeling Alexander Hamilton and other intellectual architects of the strong executive,¹⁴⁷ emphasize that RL is best protected where the administration of policy is managed by a strong executive and in which there

¹⁴⁶ See, e.g., Steven G. Calabresi & Christopher Yoo, The Unitary Executive (2008); Saikrishna Prakash, “The Essential Meaning of Executive Power,” 2005 Ill. L. Rev. 701.

¹⁴⁷ See A. Hamilton, Federalist No. 70 (“Energy in the executive is a leading character in the definition of good government”). See generally Harvey C. Mansfield, Jr., Taming the Prince: The Ambivalence of Modern Executive Power (1989).

is a clear executive hierarchy.¹⁴⁸ But this presupposes that those higher up the chain of command are interested in following the law. Where, instead, they privilege their own interests above fidelity to law, the unitary executive empowers the chief executive and, to boot, enhances executive power vis-à-vis the other branches. Insofar as this is a risk, separation of powers is more important to the preservation of RL; such a scheme enables institutions and officials outside the executive branch to rein in executive authority.¹⁴⁹ However, if this risk is minimal, if, instead, the unitary executive better protects RL values, then separation of powers may impede, rather than facilitate, RL.

How are we best to evaluate these competing claims? We need, to begin with, a clear definition of the unitary executive. Such a definition remains somewhat elusive.¹⁵⁰ Formalistically, unitary executive refers to a structure in which all decisionmakers exercising executive power are located within the executive branch and are under the authority of the chief executive.¹⁵¹ However, there is less here than meets the eye. The Court has been bedeviled by the question of what constitutes executive functions. In Humphrey's Executor v. United States,¹⁵² for example, the Court assembled a vocabulary that distinguished executive from quasi-executive (and legislative from quasi-legislative) functions in order to preserve a sphere of

¹⁴⁸ See, e.g., Stephen Breyer, Breaking the Vicious Circle: Toward Effective Risk Regulation (1993) (making an extended argument for executive centralization in order to improve administrative performance).

¹⁴⁹ See, e.g., Mark Tushnet, "A Political Perspective on the Theory of the Unitary Executive," (SSRN #1397746, 6/09).

¹⁵⁰ See generally Edward S. Corwin, The President: Office and Powers (3d ed. rev. 1948).

¹⁵¹ See Prakash, "Essential Meaning," supra.

¹⁵² 295 U.S. 602 (1935).

Congressional influence over administrative agencies – in that case, the Federal Trade Commission – exercising a combination of powers and performing diverse functions.¹⁵³

Whatever its plausibility as a theoretical or structural matter, this distinction has survived the test of time.¹⁵⁴ Indeed, in the state constitutional context, the reference to “quasi” powers, by which we mean powers that are not cabined by the labels executive, legislative, and judicial, has enabled courts to embrace to a greater or lesser degree the exercise of multifaceted powers within the structure of a rigid, and typically textually grounded, scheme of separation of powers.¹⁵⁵

Suppose, instead, we take a more pragmatic route to the unitary executive matter and view this ideal as entailing strong presidential/gubernatorial control over the administration of the laws.¹⁵⁶ This is the view reflected in much of the administrative regulatory policymaking literature, one that looks past originalist depictions of executive performance and the separation of powers and instead explains how a workable, modern conception of regulatory policymaking in the post-New Deal administrative state requires the nesting of public administration in a hierarchical conception of accountability and control.¹⁵⁷ Such a model, one that we will consider as at least a cousin to the classic model of the unitary executive, can be grounded in a political

¹⁵³ See *id.* at 622-28.

¹⁵⁴ See, e.g., Morrison v. Olson, 487 U.S. 654 (1988); Bowsher v. Synar, 478 U.S. 714 (1986).

¹⁵⁵ See Rodriguez, State Constitutional Law, *supra*, at 161-63. See also Thomas R. Dye, “Executive Power and Public Policy in the States,” 22 *W. Polit. Q.* 926 (1969).

¹⁵⁶ See, e.g., Elena Kagan, “Presidential Administration,” 114 *Harv. L. Rev.* 2245 (2001).

¹⁵⁷ See, e.g., Peter Strauss, “The Place of Agencies in Government: Separation of Powers and the Fourth Branch,” 84 *Colum. L. Rev.* 573 (1984).

idea of the chief executive as principally responsive to public opinion;¹⁵⁸ or it can be grounded in a sort of “scientific management” perspective,¹⁵⁹ one that views the chief executive as a superior manager of regulatory decisionmaking. Either way, the unitary executive functions here in strongly practical terms. Definitionally, then, we can see the unitary executive as a structure in which the administration of policy is managed in mainly a top-down process, and with some shielding from influences and pressures of other branches in government.¹⁶⁰

With this definition in mind, let us consider how this unitary executive is connected to RL. From one perspective, the accountability of low-level and mid-level administrators to superiors within the executive branch line of authority helps to ensure that government decisions are consistent and stable.¹⁶¹ More generally, they can reassure us that the governors, in this case the bureaucrats, are governed by law, and that discretion is properly limited.¹⁶² Taken thusly, we can see the unitary executive as a facilitator of RL values – indeed, we want the executive functions organized in a more, rather than less, unitary way whenever possible. For it is through the device of top-down supervision, nested in the constitutional requirement that the president

¹⁵⁸ See, e.g., Jerry Mashaw, “Prodelegation,” *supra*. But see Matthew C. Stephenson, “Optimal Political Control of the Bureaucracy,” 107 Mich. L. Rev. 53 (2008) (opposing the position that centralized executive control responds adequately to voter preferences).

¹⁵⁹ The reference here to Frederick Winslow Taylor. See F.W. Taylor, The Principles of Scientific Management (1911).

¹⁶⁰ See Nicholas Bagley & Richard L. Revesz, “Centralized Oversight of the Regulatory State,” 106 Colum. L. Rev. 1260 (2006) (describing nuts-and-bolts of regulatory oversight in executive branch). See also Kagan, “Presidentialism,” *supra*.

¹⁶¹ See Mashaw, “Prodelegation,” *supra*; Calabresi & Yoo, “Unitary Executive,” *supra*.

¹⁶² See, e.g., Calabresi & Prakash, “Executive Power,” *supra*.

takes care that the laws be faithfully executed,¹⁶³ that we can assure the maintenance of RL against external pressures of infidelity.

Competing perspectives are possible, however.¹⁶⁴ For instance, congruence is, as Fuller noted, one of the values of RL.¹⁶⁵ This means that there should be a close connection between the stated rules and the implementation of those rules. We will consider congruence more fully when we discuss administrative lawmaking later in this Part.¹⁶⁶ The structure of the unitary executive can potentially cordon off administrative officials from the checks and balances of the legislative branch. Presumably, the legislative branch will be the institution that has the most at stake, that is, the most to gain and to lose, in ensuring that the rules promulgated by statute will be implemented by executive officials along the lines delineated by the legislature. Therefore, a focus on congruence as a key RL value may well entail a focus on the incentives of an autonomous executive branch to depart from promulgated rules and the capacity of the legislature to hold executive officials in check.¹⁶⁷

¹⁶³ U.S. Const., Article II.

¹⁶⁴ See, e.g., Christopher R. Berry & Jacob E. Gersen, “The Unbundled Executive,” 75 U. Chi. L. Rev. 1385 (2008); Abner Greene, “Checks and Balances in an Era of Presidential Lawmaking,” 61 U. Chi. L. Rev. 123 (1994).

¹⁶⁵ See Fuller, Morality, supra.

¹⁶⁶ See text accompanying notes -- infra.

¹⁶⁷ We may say much the same about the judiciary branch. The courts are interested, too, in ensuring that their judgments are carried out by executive officials. Lacking the power of the purse and the sword, see Federalist #78, they must not only rely on executive fidelity, but may also have the resources available through the constitutional doctrine of separation of powers to keep the executive honest in the appropriate cases.

An even more serious critique is possible. Thus far, we have been considering the unitary executive in primarily the American context. As we have explored earlier, the effort to transplant American style legal institutions is fraught with difficulties. In other countries in which official indiscretion is the norm, not the exception, a strict hierarchy of control will frequently undermine, rather than subserve, RL. What if control over the bureaucracy is in service of arbitrary ends, such as “erasing” perceived enemies in the middle of the night? Again, we cannot learn how legal institutions, such as the unitary executive, succeed or fail unless we have a better sense of how these institutions are deployed in systems with a very different political context. Insofar as we say that the unitary executive – or separation of powers more generally – “succeeds” in the American context, why precisely does it succeed? What about the American political and legal context contributes to this success? And what are the positive assumptions that must underlie any effort to translate this success to a very different context? Without satisfactory answers to these questions, progress on exporting legal institutions will be limited.

We can summarize the contingent value of the unitary executive thusly: The value of this schema depends, first, upon the relationship between the unitary executive and separation of powers more generally; next, it depends upon a positive political theory of government (not only in the U.S., but abroad) and, in particular, positive theories of executive officials; behavior and performance; and, lastly, it depends upon the objectives that the unitary executive system is

designed to achieve. RL, yes, but that is an unsatisfactory answer, for reasons we have already described. We need both a theory of law and also a clear sense of what we want our executive officials to facilitate and to achieve. This requires that we go beyond the RL shibboleth and consider more comprehensively what aims we have in mind for governing institutions in one or another political context.

C. Constitutionalism's Content

A further illustration of this very same point arises in connection with one of the sacred cows of RL discourse, constitutionalism.¹⁶⁸ The question whether and to what extent constitutionalism is essential for RL purposes arises precisely because the underlying purposes and functions of constitutionalism are contingent upon larger questions of the behavior of government and the political theory of the republic to which the constitution is attached. This answer will likely be different in, say, Brazil and India than it will in the U.S. and Canada. Constitutions articulate not only the appropriate procedures of governance,¹⁶⁹ but also the bedrock of legal principles from which governmental action, and the lines between public authority and private liberty are drawn.¹⁷⁰ Does it follow that constitutionalism by its very nature safeguards RL?

¹⁶⁸ See text accompanying notes, *supra*.

¹⁶⁹ See Hardin, "Constitutionalism," in Oxford Handbook on Political Economy, *supra*.

¹⁷⁰ See Keith Whittington, "Constitutionalism," in Oxford Handbook on Law & Politics, *supra*.

Clearly not. First, many constitutions around the world contain important “exceptions” clauses, that is, provisions that authorize certain governmental action notwithstanding express prohibitions within the document.¹⁷¹ Furthermore, government officials are typically authorized to make the decision whether and to what extent to act under these “exceptions.” Executive decisions which would be anathema in the American context, such as military coups or suspension of protections for criminal defendants, are common in, for example, Latin American contexts, even where written constitutions contain broad individual rights provisions.¹⁷² That there are frequent examples of conflicts between what the constitution forbids on the one hand and what it permits, through exceptions clauses on the other, indicates that there is nothing about the mere existence of a constitution that ensures that RL will be protected and preserved. Secondly, constitutions frequently authorize government to undertake action without an express grant of power, whether constitutional, statutory, or otherwise. The police power in the American state constitutional context,¹⁷³ the “necessary and proper” clause in the American federal context,¹⁷⁴ and general welfare clauses in many other constitutional contexts¹⁷⁵ are examples of just this phenomenon. Such broad authority granted to the government is justified largely on the grounds of exigency.¹⁷⁶ But notice how the presence of governmental prerogative

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¹⁷³ See Rodriguez, State Constitutional Law, supra.

¹⁷⁴ See Art. I, Section 8, cl. 18. See generally McCulloch v. Maryland, 17 U.S. 316 (1819).

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¹⁷⁶ A contemporary controversy with regard to this broad authority and its tension with RL is the The closest modern iteration of this idea in the American context is the controversial view of the President’s power to wage war and to carry out cognate wartime responsibilities in a domestic

and the corresponding absence of limit are inherently in tension with RL values. We might be quite willing to trade off these values in order to realize the values of governmental flexibility, but we should do so recognizing that RL has been sacrificed, or at least has been shuffled down the deck of values. Lastly, even where there is a constitution in operation, the problem remains (especially outside the U.S.) of how to get political officials – the executive leadership in particular – to adhere to the constitution. Given ubiquitous incentives to defect from the constitutional bargain, it is remarkable, if not extraordinarily so, to see government officials following constitutional rules where there are strongly pulled in other directions.¹⁷⁷ And where they do follow these rules, RL values are safeguarded not primarily because of the fact that there is a constitution in place, but because of the complex political structure and circumstances that yield compliance and reduce the risk of violence and defection from the social contract.¹⁷⁸

The RL literature dwells on the nature of constitutions as instruments of fundamental law. It sees constitutions as the inevitable source of limits on governmental power, as guidelines for

context, for example, detention, interrogation, and surveillance. See, e.g., John Yoo, The Powers of War and Peace (2005). Such an idea, so the argument goes, grows directly from the U.S. Constitution's authority vested in the President, per Article II, to act as commander-in-chief. Somewhat paradoxically, but not illogically, the argument rests squarely on the existence and authority of the Constitution, while resting on the notion that the Constitution in no serious way limits the implied powers of the President. This is not the place to debate the merits of this far-reaching argument; rather, this example illustrates the point that constitutionalism qua constitutionalism does not ensure that RL will be followed. Constitutions (and, indeed, constitutional interpretations) can be more or less facilitative of RL.

¹⁷⁷ See, e.g., Gonzalez de Lara, "Administrative Foundations," supra; Weingast, "Self-Enforcing Equilibrium," supra.

¹⁷⁸ See id. and sources cited therein.

governments to follow in pursuing authority.¹⁷⁹ Moreover, these guidelines ideally limit the scope of judicial initiative by guiding judges in resolving disputes. The special virtue of a written constitution is to make these guidelines transparent and tractable, thereby improving RL.¹⁸⁰ However, we cannot embrace this view without knowing more about the content of a constitution. The nexus between constitutionalism and RL depends upon the formal and practical expression of RL values in the constitution, in the document itself and, not unimportantly, in the way in which it is interpreted in real life. That a version of constitutionalism may work at cross-purposes with RL stands as a brute fact supporting the idea that this institutional mechanism has a contingent, rather than intrinsic, relationship with RL.

V. Conclusion

While there is enormous enthusiasm about the rule of law worldwide, we should be somewhat apprehensive about transplanting American style Legal institutions into other countries and systems of government until we, first, have a clearer sense of the concept and, second, how a much more informed understanding of how these institutions will work and how tradeoffs will be made when values, structures, and rules come into conflict.

¹⁷⁹ See Donald Lutz, Principles of Constitutional Design 22-24 (2006) (“Constitutional purposes are multiple, and liberty thus has several layers; among various related institutional implications are rule of law, republicanism, and limited government”).

¹⁸⁰ See Hardin, “Constitutionalism,” in Oxford Handbook on Political Economy, supra.

The problems with the current state of the literature and the reform projects are several-fold: First, we lack a consensus understanding of exactly why we value RL. While a rich literature has grown around this question, we still need to zero in on the normative reasons why particular elements of RL are valued (this is important for, among other reasons, helping us in making tradeoffs when values come into conflict). Second, too few satisfactory connections are made between RL and theories of legal decisionmaking. RL values must be grounded in a particular theory of law. For example, the implications for RL reform will be different if one is a Legal Realist or is, instead, a Legal Formalist. In order for the rule of law to be a meaningful construct that can be used prescriptively to build institutions in emerging democracies or to perform the more mundane task of defining RL, scholars and practitioners must be upfront about the theory of law that underpins their views and expectations.¹⁸¹ Unpacking the commonly used measures of RL should make us think critically about the construct of RL on which they are based. Rather than measuring RL, these instruments often serve to measure the level of democratic values in a society or the extent to which it has implemented Western democratic traditions and thought. Often, indices of RL capture both a classical view of the law as being derived from nature or written by God and the influence of the legal process school, which envisions RL as a system of processes based on neutral principles. These two theories of law often do not and cannot fit into the same construct of RL. Indeed, any instrument that measures RL will require analysts to make tradeoffs between, say, democracy, legal formalism, and the legal process view.

¹⁸¹ See, e.g., Posner, “What Do Judges and Justices Maximize?,” *supra*.

Third, we need to have more clearly in mind the connection between RL in theory and the implementation of RL in the real world. This connection requires not only a careful specification of RL qualities, but also a satisfactory positive analysis of governmental performance in order to support the claim that RL necessitates one or another institution. For example, our discussion of judicial independence suggests that the imprecision in this concept raises questions about whether and how RL is facilitated by judicial independence. Relatedly, we have to have a clearer way to evaluate tradeoffs when RL values come into conflict. Circumstances arise in which we are making incommensurable comparisons between values, interests, and objectives; and there are even circumstances in which, at least in theory, cycling among preferences for competing institutional arrangements is possible.

A separate, but equally fundamental difficulty concerns the lack of an adequate basis for evaluation and measurement. It is likely that no single definition of RL will ever achieve consensus among those who make RL promotion their central goal. Aggregating all of the existing measures into an ordinal scale or index, as is the most common approach, does little to overcome this definitional divide and only serves to violate every tenet of measurement theory.¹⁸²

Moreover, scholars and reformers too easily fall into the habit of equating American governmental institutions with good legal institutions. When we consider the relationship between separation of powers and RL we usually have in mind the American style separation of

¹⁸² For an overview of RL instruments and empirical uses, see Haggard, MacIntyre, & Tiede, “Economic Development,” *supra*.

powers. This is problematic, insofar as the underlying political structure of countries to which the RL reform project is directed may be – and frequently is – quite different than the American structure. In addition to raising the question whether American style RL is the best template for cross-national reform, the transplanting of American institutions to other contexts makes it very hard to evaluate progress. Where one or another RL institution fails, we do not know whether this failure is the result of a flawed view of RL generally or a mismatch between institution and country.

Given the many needs and beliefs of a society, RL may come in many flavors and include many dimensions. Citizens may prefer to have the theory of justice on which RL is based to be tailored to a specific policy context, and to change across different policies. While it may want a law and economics view to guide contract law, a society may prefer the legal process to define the governing concept behind administrative law. Such patchwork of RL theories and institutions cannot simply be stitched together and called *the* rule of law and exported to any country in any period of time.

