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Daniel B. Rodriguez

Mathew D. McCubbins

Barry R. Weingast

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THE RULE OF LAW UNPLUGGED[†]

*Daniel B. Rodriguez**
*Mathew D. McCubbins***
*Barry R. Weingast****

ABSTRACT

The “Rule of Law” is a venerable concept, but, on closer inspection, it is a complex admixture of positive assumptions, inchoate political and legal theory, and occasionally wishful thinking. Although enormous investments have been made in rule of law reformism throughout the world, advocates of transplanting American-style legal and political institutions to developed and developing countries are often unclear about what they are transplanting and why they are 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 Article, we revisit the concept of the rule of law in order to 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.

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* Minerva House Drysdale Regents Chair in Law, University of Texas School of Law; Research Fellow, James Baker III Institute for Public Policy, Rice University.

** Provost, Professor of Business, Law, and Political Economy, University of Southern California; Co-Director, USC–Caltech Center for the Study of Law & Politics.

*** Ward C. Krepes Professor, Stanford University, Department of Political Science; Senior Fellow, Hoover Institution on War, Revolution and Peace, Stanford University.

INTRODUCTION

The rule of law maintains enormous appeal among scholars and reformers.¹ Influential non-governmental organizations, supported generously by public and private benefactors, have urged various nations to undertake institutional and legal reforms in order to implement the rule of law.² These myriad reformers hope to create, maintain, and improve legal and political institutions around the world.³ While their advocacy is resolutely normative, reformers maintain that their prescriptions are supported by scholarly research demonstrating 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 economic development and social progress.⁴ Political and legal theorists identify the rule of law as essential to a justice-seeking polity. This connection is frequently

¹ “The degree of apparent international consensus,” writes Thomas Carothers, “on the value and importance of the rule of law is striking.” Thomas Carothers, *The Rule of Law Revival*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 4* (Thomas Carothers ed., 2006) (“The 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 of Law*, 43 GA. L. REV. 1, 3 (2008) (describing the rule of law as “one of the most important political ideals of our time”).

² See *infra* Part I.

³ In addition to the various efforts by non-governmental organizations described *infra* Part I, two initiatives—rule-of-law programs run by the Carnegie Endowment for International Peace and the Hague Institute for the Internationalisation of Law—are especially noteworthy for their diligence in bringing together a vast number of internationally recognized scholars, governmental officials, and private sector leaders to discuss the rule of law and rule-of-law initiatives. See *Democracy & the Rule of Law*, CARNEGIE ENDOWMENT FOR INT’L PEACE, <http://www.carnegieendowment.org/programs/global/index.cfm?fa=proj&id=101> (last visited June 4, 2010); *Rule of Law, Background and Overview*, HAGUE INST. FOR THE INTERNATIONALISATION OF LAW (HiIL), <http://www.hiil.org/research/main-themes/rule-of-law/> (last visited June 4, 2010).

⁴ See, for example, two oft-quoted statements, the first by Nelson Mandela:

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.

HAGUE INST. FOR THE INTERNATIONALISATION OF LAW, EXTENSIVE REPORT ON THE FIRST HIIL *LAW OF THE FUTURE* CONFERENCE 17 (2007) [hereinafter HAGUE INST.]. The second frequently quoted statement comes 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.” Universal Declaration of Human Rights, G.A. Res. 217 (III) A, pmbL., U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

seen as grounded in democracy,⁵ human freedom,⁶ equality,⁷ justice,⁸ economic well-being,⁹ national identity,¹⁰ or, as with Lon Fuller, in the “inner morality” of law.¹¹ In the oft-stated dichotomy, a polity must be ruled by law or else by men.¹² It is said that where the rule of law is absent, we cannot govern the governors, and thus we are subject to official prerogative, which may be arbitrary, capricious, and brutal.¹³

⁵ See, e.g., Jean Hampton, *Democracy and the Rule of Law*, in *THE RULE OF LAW: NOMOS XXXVI*, at 13 (Ian Shapiro ed., 1994) [hereinafter *THE RULE OF LAW*]; see also GEOFFREY DE Q. WALKER, *THE RULE OF LAW: FOUNDATION OF CONSTITUTIONAL DEMOCRACY* (1988); Roberto Gargarella, *The Majoritarian Reading of the Rule of Law*, in *DEMOCRACY AND THE RULE OF LAW* 149 (José María Maravall & Adam Przeworski eds., 2003).

⁶ See, e.g., Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 *SUP. CT. ECON. REV.* 1, 4–11 (2003) (“The 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 for private ordering”); see also F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960); F.A. HAYEK, *THE POLITICAL IDEAL OF THE RULE OF LAW* (1955); F.A. HAYEK, *THE ROAD TO SERFDOM* (1944).

⁷ 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* note 5, at 19, 22, 47–53.

⁸ See, e.g., Amartya Sen, *Global Justice* 14–15 (July 5, 2008) (unpublished manuscript) (on file with the Emory Law Journal), available at http://www.lexisnexis.com/documents/pdf/20080806034945_large.pdf; see also AMARTYA SEN, *THE IDEA OF JUSTICE* (2009).

⁹ See, e.g., Stephan Haggard et al., *The Rule of Law and Economic Development*, 11 *ANN. REV. POL. SCI.* 205 (2008); Philip Keefer, *A Review of the Political Economy of Governance: From Property Rights to Voice* (World Bank, Policy Research Working Paper No. 3315, 2004); Stephen Knack, *Governance and Growth* (World Bank Working Paper, 2006) (on file with author).

¹⁰ 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.”).

¹¹ See LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969); see also *infra* text accompanying notes 52–62.

¹² For famous statements of this dichotomy, see, for example, MASS. CONST. art. XXX (“[T]o the end it may be a government of laws and not of men.”); JAMES HARRINGTON, *THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS* 8 (J.G.A. Pocock ed., Cambridge Univ. Press 1992) (1656) (“[G]overnment . . . is the empire of laws and not of men.”); and DAVID HUME, *ESSAYS: MORAL, POLITICAL, AND LITERARY* 94 (Eugene F. Miller ed., Liberty Classics 1987) (1777) (“It may now be affirmed of civilized monarchies, what was formerly said in praise of republics alone, *that they are a government of Laws, not of Men.*”). The best surmise is that the phrase originates with Aristotle in *The Politics*. See *infra* notes 39, 45 and accompanying text; see also W. Burnett Harvey, *The Rule of Law in Historical Perspective*, 59 *MICH. L. REV.* 487 (1961). Professor Hampton has discussed this famous dichotomy in the context of Thomas Hobbes and his perspective on the incompatibility between government and the rule of law. See Hampton, *supra* note 5.

¹³ For an interesting discussion of the political theory underlying this anxiety, see Michael P. Zuckert, *Hobbes, Locke, and the Problem of the Rule of Law*, in *THE RULE OF LAW*, *supra* note 5, at 63–78. See also Hampton, *supra* note 5; cf. Administrative Procedure Act, 5 U.S.C. § 706(2) (2006) (providing that reviewing courts shall “hold unlawful and set aside agency action . . . found to be . . . arbitrary [or] capricious”).

Yet the deeper we dig into the concept of the rule of law, the more vexing the question becomes: What precisely does it entail, 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.”¹⁴ 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 the United States, let alone the rest of the world.¹⁵ Myriad incomplete and unsupported assumptions underlie the claims made by 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, the idea that 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. Relatedly, RL’s advocates must have a theory of law squarely in their minds; yoking rule of law to law’s ideals is incoherent without a framework for understanding law’s purposes and its nature. 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.¹⁶ Rather, we must have in mind a connection between the structure and performance of these institutions

¹⁴ Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 11, 11 (1997); see also GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 11 (1996) (“[L]egality and the ‘rule of law’ are ideals that present themselves as opaque even to legal philosophers.”); Frank Lovett, *A Positivist Account of the Rule of Law*, 27 LAW & SOC. INQUIRY 41, 41 (2002) (“[D]escriptive accounts of the Rule of Law remain strikingly vague and imprecise.”); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 781 (1989) (noting that the RL ideal “is deeply contested” and that we lack a “canonical formulation of its meaning”).

¹⁵ See, e.g., Stephen Golub, *A House Without a Foundation*, in PROMOTING THE RULE OF LAW, *supra* at 105; Frank Upham, *Mythmaking in the Rule-of-Law Orthodoxy*, in PROMOTING THE RULE OF LAW, *supra* at 75.

¹⁶ This protocol reminds us of the variegated ways in which colleges and universities manipulate their data to improve their *U.S. News & World Report* rankings. Much like this, countries will strive, unfortunately, to manipulate their own rule-of-law rankings without affecting their rule of law in constructive ways. For example, we see the oddity of late-night television commercials in the United States touting the Republic of Georgia’s Global Economic Scoreboard. For the web version of the Georgian National Investment Agency’s (GNIA) call for enhanced investment, see *Invest in Georgia*, GEORGIAN NAT’L INV. AGENCY, <http://www.investingorgia.org/> (last visited June 4, 2010).

and the realization of the rule of law, once effectively defined. Third, rule-of-law reform must contemplate 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 trade-offs, that is, conflicts among institutions aiming to promote the rule of law.¹⁷

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 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 trade-offs.

This Article proceeds as follows: In Part I, 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, then, on how legal theorists conceive of and attempt to operationalize RL. In Part II, we offer some general

¹⁷ Gary Cox and Mathew McCubbins write that democratic institutions:

establish two key tradeoffs with respect to democratic outcomes. The first is between a political system's *decisiveness* and its *resoluteness*. The tradeoff that any country makes on this dimension—between having the ability to change policy and having the ability to commit to policy—depends heavily on the effective number of vetoes in the political system. Polities that choose to locate at either extreme will be ungovernable. At one end, a polity that lacks decisiveness will encounter gridlock and stalemate. At the other end, a polity that lacks resoluteness will be threatened by a lack of stability. The second tradeoff . . . is between the *private-* and *public-regardedness* of policy produced.

Gary W. Cox & Mathew D. McCubbins, *The Institutional Determinants of Economic Policy Outcomes, in PRESIDENTS, PARLIAMENTS, AND POLICY* 21, 22–23 (Stephan Haggard & Mathew D. McCubbins eds., 2001) (footnote omitted).

observations about how best to think about the imperative of “measuring” RL. In Part III, we turn to the specifics of RL institutions, looking at the essential institutions and key governance structures that are viewed in the literature as configuring RL. With the contours of RL in mind, we turn in Part IV 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.

I. VALUING THE RULE OF LAW

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

The rule of law has an active fan club. The enormous appeal of RL reform efforts is reflected in the myriad activities and statements of key U.S. 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 (ABA). These organizations have spent enormous amounts of money on legal reform efforts,¹⁸ 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.¹⁹ While policy analysts urge attention to outcome measures and other indicators of governance,²⁰ many of what are conventionally described as outcome measures are in fact institutions that, in the judgment of World Bank analysts, reflect and implement the rule of law.²¹

¹⁸ See GEN. ACCOUNTING OFFICE, FOREIGN ASSISTANCE RULE OF LAW FUNDING WORLDWIDE FOR FISCAL YEARS 1993–98, at 3 (1999) (noting that the U.S. government spent \$970 million on rule of law assistance); Carothers, *supra* note 1, at 10 (“Assistance in [the RL] field has mushroomed in recent years, becoming a major category of international aid.”). In 2005, the United States dedicated nearly \$500 million for RL assistance to Afghanistan and Iraq alone. Lydia Brashear Tiede, *The Rule of Law: What Is It? Can We Measure It? Do We Have It?* 7 n.8 (Oct. 27, 2006) (unpublished manuscript) (on file with the Emory Law Journal), available at <http://ssrn.com/abstract=906157>.

¹⁹ See WBI GOVERNANCE & ANTI-CORRUPTION, <http://www.worldbank.org/wbi/governance/> (last visited Mar. 1, 2010); see also Richard E. Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, 14 WORLD BANK RES. OBSERVER 117 (1999); Upham, *supra* note 15, at 77–79 (describing the World Bank model of RL).

²⁰ See *Governance Matters 2009: Worldwide Governance Indicators 1996–2008*, WORLD BANK GROUP, <http://info.worldbank.org/governance/wgi/> (last visited June 4, 2010); see also Daniel Kaufmann et al., *Governance Matters III: Governance Indicators for 1996–2002* (World Bank, Policy Research Working Paper No. 3106, 2003).

²¹ See, e.g., Messick, *supra* note 19, at 117–36; John Hewko, *Foreign Direct Investment: Does the Rule of Law Matter?* (Carnegie Endowment for Int’l Peace, Working Paper No. 26, 2002). In a recent paper, Sebastian Saiegh summarizes this line of scholarship:

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.”²² USAID references two notable descriptions of the rule of law; one describes the rule of law as “protecting fundamental political, social, and economic rights,”²³ and the other, which comes from the United Nations, 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 enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”²⁴

The World Justice Project 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.”²⁵ One of the most far-reaching RL programs is the Rule of Law Initiative of the ABA,²⁶ but the ABA

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. Saleigh, *Political Institutions and Sovereign Borrowing: Evidence from Nineteenth-Century Argentina* 1 (Nov. 12, 2009) (unpublished manuscript) (on file with the Emory Law Journal), *available at* <http://ssrn.com/abstract=1434534>.

²² USAID, *GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK* 5 (2008).

²³ *Id.*

²⁴ U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, 4, U.N. Doc. S/2004/616 (Aug. 23, 2004).

²⁵ Robert L. Nelson & Lee Cabatingan, *Introductory Essay: New Research on the Rule of Law* 1 (Jul. 5, 2008) (unpublished manuscript) (on file with the Emory Law Journal), *available at* http://www.lexisnexis.com/documents/pdf/20080806010147_large.pdf.

²⁶ *See About the ABA Rule of Law Initiative*, AM. BAR ASS'N, <http://www.abanet.org/rol/about.shtml> (last visited Mar. 1, 2010). 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.” HAGUE INST., *supra* note 4, at 17 n.7.

largely elides the question of what RL is and instead has developed a multi-pronged, multinational set of programs to improve the well-being of underperforming countries.²⁷ They concentrate their efforts around the following imperatives: 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.²⁸

What the World Justice Project and the ABA do, in essence, is 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,²⁹ including not only institutional architecture but also basic governmental structure (for instance, “Is the system democratic?”),³⁰ and the content of legal rules (for instance, “Are there secure property rights?”).³¹ Each of these organizations, especially the World Bank and USAID,³² have collected an ample supply of serious scholarly analyses that

²⁷ On its Rule of Law Initiative home page, the American Bar Association (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.” *About the ABA Rule of Law Initiative*, *supra* note 26.

²⁸ *See id.* For a comprehensive collection of publications concerning the ABA’s Rule of Law Initiative, see *ABA Rule of Law Initiative: Publications and Assessments*, AM. BAR ASS’N, <http://www.abanet.org/rol/publications.shtml> (last visited June 5, 2010).

²⁹ For a comprehensive review, see Haggard et al., *supra* note 9. *See also* Daron Acemoglu et al., *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369 (2001); Philip Keefer & Stephen Knack, *Why Don’t Poor Countries Catch Up? A Cross-National Test of an Institutional Explanation*, 35 ECON. INQUIRY 590 (1997); Knack, *supra* note 9; Stephen Knack & Philip Keefer, *Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures*, 7 ECON. & POL. 207 (1995); Adam Przeworski & Fernando Limongi, *Political Regimes and Economic Growth*, 7 J. ECON. PERSP. 51 (1993).

³⁰ On democracy and governance, see Robert J. Barro, *Democracy and Growth*, 1 J. ECON. GROWTH 1 (1996) and John F. Helliwell, *Empirical Linkages Between Democracy and Economic Growth*, 24 BRIT. J. POL. SCI. 225 (1994).

³¹ On property rights and governance in particular, see Keefer, *supra* note 9. The classic analysis in this area is HERNANDO DE SOTO, *THE OTHER PATH* (1989). *See also* HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000).

³² The websites for both organizations contain helpful links to publications and working papers on various aspects of their respective projects. *See Democracy & Governance: Rule of Law*, USAID,

purport to measure the state and scope of RL and “governance” in individual countries and worldwide as well as the progress of RL reform efforts.³³

Four key assumptions underlie this RL reformism. First, RL reformers believe that RL captures something of universal applicability.³⁴ The rule of law is of cross-national, cross-cultural value; each political system, whatever its cultural underpinnings and objectives, ought to incorporate RL values and institutions into its legal system.³⁵ The claim, reduced to its basics, is that a political system can only achieve economic self-sufficiency and consistent quality 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 not merely made up of a commitment to legal obedience and the cluster of values that define the concept of RL, but is also composed of a distinctive series of institutions and governance arrangements. Reformers assume that a legal system’s commitment to RL is by resort to these institutions and arrangements. Third, RL is associated with *democracy* and is thus regarded as being in tension with authoritarianism or any kind of top-down legal system in which the people do not ultimately rule.³⁶ Whether or not an 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

http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/rule_of_law/ (last visited June 5, 2010); *Governance Matters 2009*, *supra* note 20.

³³ For sophisticated critiques of these governance measures, see Simeon Djankov et al., *Courts*, 118 Q.J. ECON. 453 (2003); Rafael La Porta et al., *Judicial Checks and Balances*, 112 J. POL. ECON. 445–70 (2004); and Rafael La Porta et al., *The Quality of Government*, 15 J.L. ECON. & ORG. 222 (1999).

³⁴ “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, *supra* note 15, at 76.

³⁵ See HAGUE INST., *supra* note 4, at 23–30 (2007) (describing the objective as creating a “rule of law marketplace”). *But see* Carothers, *supra* note 1, at 5 (contrasting the 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, *supra* at 191, 197 (“It is generally agreed . . . that the U.S. and Chinese governments have different things in mind when they talk about the rule of law.”).

³⁶ 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.

Carothers, PROMOTING THE RULE OF LAW, *supra* note 1, at 4–5; *see also* Hampton, *supra* note 5.

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,³⁷ 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*

Theorists since Aristotle³⁸ have been primarily interested in fashioning a coherent description of RL that can withstand analytic scrutiny.³⁹ Nonetheless, there are those who believe this to be a fool's errand—that the rule of law is an “essentially contested concept.”⁴⁰ We might wonder, then, before setting off to change the world, whether and to what extent we have made any progress in 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.”⁴¹ Thomas Hobbes concluded that nothing like RL was really possible⁴² because the government is typically disinclined to tie itself to the mast of legal rules, thereby ensuring that that the *rule* of law was applicable to governed and governor alike. On one reading, therefore, RL is not a useful analytical concept at all.⁴³

³⁷ The Likert scale refers to a psychometric scale used in survey research to aggregate respondent opinions by specifying their level of agreement to a particular statement. Responses are generally ranked from “strongly approve” to “strongly disapprove.” See Rensis Likert, *A Technique for the Measurement of Attitudes*, 22 ARCHIVES PSYCHOL. 1 (1932). For a thorough analysis of the Likert scale and other mechanisms of social scientific measurement, see LAWRENCE S. MEYERS ET AL., APPLIED MULTIVARIATE RESEARCH: DESIGN AND INTERPRETATION (2005).

³⁸ Aristotle, *The Politics*, reprinted in ARISTOTLE: *THE POLITICS AND THE CONSTITUTION OF ATHENS* 88 (Stephen Everson ed., Cambridge Univ. Press, rev. student ed. 1996) (“[H]e 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.”). 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 LAW & PHIL. 137, 141–42 (2002).

³⁹ See *infra* text accompanying notes 48–92.

⁴⁰ See, e.g., Radin, *supra* note 14, at 791 (describing the rule of law as a deeply contested concept); see also Waldron, *supra* note 38, at 148–53 (unpacking “[e]ssentially [c]ontested [c]oncepts”).

⁴¹ Fallon, *supra* note 14, at 41.

⁴² See THOMAS HOBBS, LEVIATHAN 176–77 (J.C.A. Gaskin ed., Oxford Univ. Press 1996) (1651) (“[H]e that is bound to himself only, is not bound.”). See generally Hampton, *supra* note 5 (discussing Hobbes's views on rule of law). See also Zuckert, *supra* note 13, at 63–67.

⁴³ See, e.g., Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561 (1977) (reviewing DOUGLAS HAY ET AL., ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND (1975) and E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT

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, that the governors should be governed by law.⁴⁴ 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 broad and even opaque (as in Aristotle’s declaration that “[t]he law is reason unaffected by desire”),⁴⁵ or they may drill deeper into the structure of the legal system in promulgating particular rules of the road (as in the insistence on prospective, rather than retrospective, legal rules).⁴⁶ But the framework as it has been revisited and refined over the centuries highlights the fundamental and normative point that a good legal system is effective only insofar as individuals and officials are ruled by law, not men. Under the RL framework, men carry out their responsibilities and duties in accordance with agreed-upon principles, principles that make up the contours of RL. “In a fundamentally just society,” writes Ronald Cass, “the rule of law serves to channel decision making in attractive ways, to make decisions more predictable, and to increase the prospects for fair administration of public power.”⁴⁷

Rule of law 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 credited with coining the phrase, the principal objective of RL is to discipline and regulate official power.⁴⁸ Dicey described RL as entailing three basic requirements⁴⁹: First, the supremacy of law over arbitrary power (the rule of law, not men, is the slogan generally associated with this influential

(1975)); Allan C. Hutchinson & Patrick Monahan, *Democracy and the Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY?* 97 (Allan C. Hutchinson & Patrick Monahan eds., 1987).

⁴⁴ See, e.g., RONALD A. CASS, *THE RULE OF LAW IN AMERICA* 1–4 (2001); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 270 (1980); RAWLS, *supra* note 7, at 236–39; Andrei Marmor, *The Ideal of the Rule of Law*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 666, 666 (Dennis Patterson ed., 2d ed. 2010) (“The ideal of the rule of law is basically the moral–political ideal that it is *good to be ruled by law*.”).

⁴⁵ Aristotle, *supra* note 38, at 88.

⁴⁶ See *infra* text accompanying note 57.

⁴⁷ CASS, *supra* note 44, at xi.

⁴⁸ See generally A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 183–205 (10th ed. 1959) (equating the rule of law with “the security given under the English constitution to the rights of individuals”). For an interesting take on Professor Dicey in his historical context, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 225–27 (1992).

⁴⁹ See generally DICEY, *supra* note 48, at 181–205.

concept); second, equality before the law of all, including government officials; and, third, constitutional law as fundamental law.⁵⁰

The focus in the literature on official infidelity raises the puzzle of *why* exactly we value RL.⁵¹ 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.⁵² Fuller views RL as entailing a series of moral qualities that are characteristic of good law.⁵³ These include the requirements of⁵⁴:

- **Generality**, so that expectations of conduct are stated in rules widely applicable and impartially applied;⁵⁵

⁵⁰ 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 . . . any policy aiming directly at a substantive ideal of distributive justice must lead to the destruction of the Rule of Law.” HAYEK, *THE ROAD TO SERFDOM*, *supra* note 6, at 82. Political theorist Michael Oakeshott also drew a connection between the RL ideal and individual liberty. See MICHAEL OAKESHOTT, *The Rule of Law, in ON HISTORY: AND OTHER ESSAYS* 119 (1983). As one recent commentator summarized, Oakeshott saw 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; [correlatively], the rule of law can exist only in such an order.” Zywicki, *supra* note 6, at 6.

⁵¹ Judith Shklar, presumably having in mind these political theory efforts to explain why RL is essential, was quite skeptical of the connection, writing that “contemporary 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?*, *supra* note 43, at 1, 1. Hence, the phrase “has become meaningless thanks to ideological abuse and general over-use.” *Id.*; see also Upham, *supra* note 15, at 75.

⁵² Because it is not relevant to this analysis, we elide the question of whether Fuller was or was not a legal positivist and, therefore, whether he saw the rule of law as a prerequisite to fidelity and obedience to ascriptive law. The classic texts on this issue are H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) and Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). See also Gerald J. Postema, *Positivism and the Separation of Realists from Their Skepticism: Normative Guidance, the Rule of Law, and Legal Reasoning, in THE HART-FULLER DEBATE IN THE 21ST CENTURY*, at 259, 281 (Peter Cane ed., 2010); Frederick Schauer, *Is Defeasibility an Essential Property of Law?*, in *ESSAYS ON DEFEASIBILITY* (Jordi Ferrer Beltrán & Giovanni B. Ratti eds., forthcoming 2010).

⁵³ See, e.g., Colleen Murphy, *Lon Fuller and the Moral Value of the Rule of Law*, 24 LAW & PHIL. 239, 241 (2005) (“[These criteria] specify necessary conditions for the activities of lawmakers to count as lawmaking.”).

⁵⁴ These requirements are taken from Chapter 2 of Fuller’s *The Morality of Law*. FULLER, *supra* note 11, at 46–91.

⁵⁵ *Id.* at 46–49. Fuller associates this requirement with the need for neutrality in legal decision making, and he notes as an instance of the failure of generality the presence and prevalence of special laws. See *id.* at 47 n.4.

- **Publicity**, so that legal decision makers 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
- **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 administration.⁶²

Joseph Raz’s depiction of RL is broadly congruent with Fuller’s famous list.⁶³ Raz emphasizes prospectivity, transparency, clarity, and stability, all of which are on Fuller’s list, but he adds generality, expressed as the imperative of “general rules.” He goes on to say that “the requirement of generality is of the essence of the rule of law.”⁶⁴ Raz supplements 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.”⁶⁷ The second institutionally salient set of principles is “designed to ensure that the

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

⁵⁷ *Id.* at 51–62.

⁵⁸ *Id.* at 63–65. Fuller also notes that Hayek made a substantially similar point in *The Road to Serfdom*. *Id.* at 64–65 (quoting HAYEK, *THE ROAD TO SERFDOM*, *supra* note 6, at 81).

⁵⁹ *Id.* at 65–70.

⁶⁰ *Id.* at 70–79.

⁶¹ *Id.* at 79–81.

⁶² *Id.* at 81–91.

⁶³ JOSEPH RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW* 210, 214–15 (1979). And, indeed, so are the other influential theoretical treatments of RL’s characteristics. *See* Waldron, *supra* note 38, at 155 (“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 Fuller, *supra* note 11, at 215.

⁶⁵ *Id.* at 216–17.

⁶⁶ *Id.* at 218.

⁶⁷ *Id.*

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.”⁶⁸ The contemporary commentary on RL has worked through themes that are quite copacetic with this normative template. As Andrei Marmor recently noted, there is a “remarkable consensus” about what RL basically entails.⁶⁹ The theoretical scholarship on RL is broadly consistent both with 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, perhaps even essential, to realize the myriad objectives of good governance.⁷⁰ However, we can still describe the issue of RL’s values as unsettled 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 he does not purport to describe a hierarchy of values or a way to make trade-offs 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.⁷¹ To the extent that we seek practical advice for 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.

⁶⁸ *Id.*

⁶⁹ Marmor, *supra* note 44.

⁷⁰ See, e.g., Lovett, *supra* note 14, at 60 (“[I]f 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.”). This is one variation on Ronald Dworkin’s theme that proper legal rules have substantive objectives—objectives of good law. See RONALD DWORIN, *LAW’S EMPIRE* 413 (1991) (“That is, anyway, what law is for us: for the people we want to be and the community we aim to have.”). In another plausible account, framed most famously by H.L.A. Hart, rule-of-law values are consistent with alternative legal regimes; however, a legal system’s efficacy is bound up in important ways with RL institutions and qualities. See H.L.A. HART, *Postscript*, in *THE CONCEPT OF LAW* 238, 250–54 (2d ed. 1994). Similarly, Joseph Raz sees RL as “essentially a negative value . . . designed to minimize the danger created by the law itself.” See RAZ, *supra* note 63, at 224.

⁷¹ In his participation in the conference dialogue 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 his conception of RL. However, he does discuss some of the institutional implications of RL in Joseph Raz, *The Politics of the Rule of Law*, 3 *RATIO JURIS* 331 (1990), reprinted in JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 354 (1994).

Moreover, to the extent that scholars are in fact thinking hard about institutions, they are generally thinking about *legal* institutions—or, even more opaquely, characteristics of decision making within the judiciary. By focusing on the judiciary as the key institution responsible for implementing the rule of law, scholars invariably ignore the reality that long-term stability of the law requires not only establishing the right legal institutions, but also embedding the legal system in the right way within the larger political system so that the latter can sustain the former.⁷² After all, a serious inquiry into RL must confront the basic fact that in countries in which legal and political institutions are established through ambitious reform efforts, legal institutions fail more often than they succeed.⁷³ 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 draws the connection among the characteristics of RL, the structure of legal institutions, and the political context in which RL is nested.

A further disagreement—one that also threatens to imperil RL as a useful construct for 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 a set of articulated constraints on the government’s coercive power, he saw RL as promoting, in its design and implementation, individual freedom.⁷⁴ Raz objected to this second implication, noting that Hayek’s view of RL and human freedom “leads to exaggerated expectations” of RL.⁷⁵ Rule of law should be understood, argues Raz, as a more modest enterprise; it is truly “just one of the virtues the law should possess” and “possesses no more than *prima facie* force.”⁷⁶ And, although Fuller saw RL as intrinsic to the morality of law, the RL qualities he listed are essentially proceduralist—they are congruent with many substantive

⁷² See generally Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997) [hereinafter Weingast, *Political Foundations*]; Barry R. Weingast, *Why Developing Countries Prove So Resistant to the Rule of Law* (Stanford Ctr. for Int’l Dev., Working Paper No. 382, 2009), available at <http://siepr.stanford.edu/?q=system/files/shared/pubs/SCID382.pdf>.

⁷³ See Weingast, *Political Foundations*, *supra* note 72, and sources cited therein.

⁷⁴ HAYEK, THE ROAD TO SERFDOM, *supra* note 6, at 88 (“[W]hatever form [the RL] takes, any such recognised limitations of the powers of legislation imply the recognition of the inalienable right of the individual, inviolable rights of man.”).

⁷⁵ RAZ, *supra* note 63, at 226.

⁷⁶ *Id.* at 228.

commitments and, indeed, many different types of legal systems.⁷⁷ 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 has been less engaged with the project of sketching the political and legal architecture of RL, but he certainly had in mind the ideal of RL as vouchsafing substantive equality and justice.⁷⁸ The overarching value of RL, then, would stand or fall on its ability to implement these aims; by contrast, a purely proceduralist template would be unlikely to realize these objectives. Ronald Dworkin is even more insistent that RL must embody substantive equality commitments.⁷⁹ “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 terms.”⁸⁰ Rule-of-law philosophers, he concludes, “have in mind substantial and not merely formal equality before the law.”⁸¹ In an earlier iteration of his RL analysis, Dworkin contrasted the “rule-book” conception of RL with a “rights” conception in which RL “is the ideal of rule by an accurate public conception of individual rights.”⁸² 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.”⁸³

As Jeremy Waldron has recently pointed out, however, this procedural–substantive dichotomy is not a rigid one.⁸⁴ “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 application of the rules with all the care and attention to fairness that is signaled by ideals such as ‘natural justice’ and ‘procedural due process.’”⁸⁵ Waldron shifts the focus from RL as merely, or especially, a reformulation of the bromide that individuals and officials alike must obey the law to focus on the substantive values of RL—at the very least,

⁷⁷ See FULLER, *supra* note 11, at 153 (“[L]aw’s internal morality . . . is indifferent toward the substantive aims of law and is ready to serve a variety of such aims with equal efficacy.”).

⁷⁸ See RAWLS, *supra* note 7, at 206–13.

⁷⁹ See RONALD DWORGIN, *JUSTICE IN ROBES* 177 (2006) (explaining that he “prefer[s] a conception of legality” that promotes “substantial and not merely formal equality before the law”).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² RONALD DWORGIN, *A MATTER OF PRINCIPLE* 11–12 (1985).

⁸³ *Id.* at 12.

⁸⁴ See Waldron, *supra* note 1, at 7–8.

⁸⁵ *Id.*

the value of fairness and equitable administration of justice.⁸⁶ For Waldron, the procedural qualities are deeply connected to the objectives of legal decision making.⁸⁷ 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” if it is understood as a congeries of qualities that are fundamentally proceduralist but no less utilitarian and purposive.⁸⁸

We thus circle back to Dicey and Hayek to make the point that the view of RL as a mechanism for restraining governmental power can also be understood in substantive terms.⁸⁹ To be sure, framing RL as limits on official discretion leaves many opportunities for noxious legal content on the table.⁹⁰ A rulebook community may, after all, be a community of horrific laws.⁹¹ However, the restraints on governmental power that RL in the Dicey–Hayek sense (a sense that Hobbes thought quite unlikely to materialize)⁹² limits the threat 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 of men is meant to capture, at the very least, the notion that society should have decent confidence that their expressed desires will be accommodated and respected by their representatives.

II. MEASURING THE RULE OF LAW

Rule-of-law 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 as well as how and why it succeeds. This requires a comprehensive

⁸⁶ *Id.* at 40–41.

⁸⁷ *Id.* at 55.

⁸⁸ See Waldron, *supra* note 1, at 28–38 (describing RL’s virtues).

⁸⁹ See, e.g., Holmes, *supra* note 7, at 19, 22 (discussing Rousseau’s view that a pluralistic society can exercise its political leverage to maximize—if not achieve—political equality).

⁹⁰ See Richard Flathman, *Liberalism and the Suspect Enterprise of Political Institutionalization: The Case of the Rule of Law*, in THE RULE OF LAW, *supra* note 5, at 297, 301 (“[T]he 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.”).

⁹¹ See HAYEK, THE ROAD TO SERFDOM, *supra* note 6, at 85 (“It may well be that Hitler has obtained his unlimited powers in a strictly constitutional manner . . . [b]ut who would suggest for that reason that the Rule of Law still prevails in [Nazi] Germany?”).

⁹² See *supra* text accompanying note 42.

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, these assessments help 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 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.⁹³ Most importantly, we face the ubiquitous dilemma of determining how best to make trade-offs 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.⁹⁴ Each institution and governance structure is viewed as

⁹³ “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 1* (April 26, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1434234>.

⁹⁴ According to the International Finance Corporation (IFC) of the World Bank, we can see how measures are presently created and used. The IFC states that its “Doing Business” project “publishes 8,967 indicators each year. To create these indicators, the team measures more than 52,000 data points, each of which is made available on the Doing Business website.” See *Doing Business: Measuring Business Regulations, Data Notes, Data Challenges and Revisions*, INT’L FIN. CORP., <http://www.doingbusiness.org/MethodologySurveys/MethodologyNote.aspx> (last visited June 6, 2010). How exactly is this to be used to explain outcomes in 185 countries, some of which change very little each year and others that change not at all year to year? However these indicators are scaled, amalgamated, indexed, added, subtracted or multiplied, we have many orders of magnitude greater numbers of explanatory variables than cases. We need only 184 explanatory variables, plus a few year dummies, to explain 100% of the times series on country-economic growth. They create all of these nearly nine thousand measures for only 185 cases. For most of the measures related to law, there are less than ten “contributors,” on average, contributing to the measures, and for many countries far less than ten. The World Bank is explicitly drawing from and contributing to the *current* academic literature in economics, as discussed on the methodology page of the Doing Business website. *Doing Business: Measuring Business Regulations*, INT’L FIN. CORP., <http://www.doingbusiness.org/MethodologySurveys/> (last visited June 6, 2010). Construction of these RL indexes goes far beyond a recitation of laws and their reform. Rather, Doing Business asks contributors to fill out a survey, evaluating the dynamics of a hypothetical scenario as follows:

Case Study Assumptions

Please read carefully the following assumptions to complete the rest of the survey.

Facts:

1. Buyer Co. (“Buyer”) is a food manufacturing company. It manufactures and distributes all of its products itself.
2. Mr. James is Buyer’s controlling shareholder and a member of Buyer’s board of directors. He owns 60% of Buyer and elected 2 directors to Buyer’s 5-member board of directors. If your

a complement for another. We should, for instance, have an independent judiciary and 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, fairly clear: These schemes will frequently come into conflict with one another. That there are

country requires a supervisory board that is appointed at least in part by shareholders, assume that Mr. James has elected 60% of the shareholder-elected members of the supervisory board. Assume also that the 5-member board of directors then consists of 3 directors, including Mr. James himself, who were designated or proposed by Mr. James' members on the supervisory board.

3. Mr. James also owns 90% of Seller Co. ("Seller"), which operates a chain of retail hardware stores. Seller is facing financial problems and recently shut a large number of its stores. As a result, many of its trucks are not being used.

4. Mr. James proposes to Buyer that Buyer purchase Seller's unused trucks to expand Buyer's distribution of its food products. Buyer agrees and enters into the transaction.

5. All required approvals are obtained and all mandatory disclosures are made. The final terms of the transaction require Buyer to pay to Seller in cash an amount equal to 10% of Buyer's assets in exchange for the trucks. If Mr. James can lawfully vote on the transaction at Buyer's board of directors and/or shareholder level, please assume he is the deciding vote in favor of the transaction.

6. The price of the trucks is above market value and the transaction causes damages to Buyer. Minority shareholders within Buyer sue Mr. James and the parties that approved the transaction.

7. Assume that Buyer is a large private firm (i.e., not state-owned) that has issued stock that is publicly traded and is listed on your country's most important stock exchange. If there is no stock exchange in your country, or if there are fewer than 10 firms actively traded on your country's exchange, please assume that Buyer is a large private company with a large number of shareholders.

8. Assume that the transaction is part of Buyer's ordinary course of business.

9. The transaction is not *ultra vires* (i.e., is not outside the power or authority of Buyer).

10. If you make any further assumptions, please explain them clearly in your responses.

WORLD BANK GROUP, INT'L FIN. CORP., DOING BUSINESS: PROTECTING INVESTORS SURVEY—ECONOMY 4 (2010), *available at* http://www.doingbusiness.org/Documents/Survey_Instruments/DB11_Protecting_Investors_survey_en.pdf. Contributors are then asked a series of questions, such as:

What is the standard of proof for a civil claim (e.g., beyond reasonable doubt, preponderance of the evidence, balance of probabilities)?

. . . .

What is the standard of proof for a criminal claim (e.g., beyond reasonable doubt, intimate conviction, preponderance of evidence)?

. . . .

In the suit described above, what is the minimum the plaintiff must prove to hold Mr. James liable?

. . . .

Please assume that the transaction was duly approved and all disclosure requirements were met. . . . If Buyer's shareholders are successful in the action(s) against Mr. James described above, describe what remedies are available.

Id. at 9–10. These are among the eighteen pages of questions that contributors are asked just about the topic of protecting investors. Which theory of law tells us that a balance-of-probabilities standard for civil claims and an intimate-conviction standard for criminal claims, plus the disposition of certain remedies trumps, or is trumped by, other constellations of answers?

conflicting values at stake in public policy making 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 trade-offs.

We could conceivably measure some legal institutions (for instance, asking whether a system of constitutionalism is more or less established),⁹⁵ but how are we to measure RL more globally when various governance structures push in different directions? To make the point more concrete: Suppose we can say that a developing country has an independent judiciary with a strong system of judicial review and, for those reasons, is high on 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 trade-offs. And this requires more than technical proficiency and sophistication; 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 should we to follow to make measurement possible?” Building on the list of difficulties and dilemmas described at the beginning of this Part, we first suggest that efforts to measure RL incorporate a similarly complex assessment of the political circumstances of the system that measuring tool is assessing. Second, the way to incorporate trade-offs into measurement efforts begins with a specification of how different RL values are to be ranked. Some governance analyses 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 perhaps most grandly, we call for greater engagement among social scientists, legal scholars, and the RL reform community to refine the concept of RL, with the goal of drawing upon the different perspectives available from these other

⁹⁵ See, e.g., ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 40–47 (2009) (describing constitutive elements of “constitutional order”).

disciplines and directions and generating a clearer strategy for assessment and measurement.

III. CONSTRUCTING THE RULE OF LAW

There is broad consistency across the range of RL thinkers and activists about 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 of series of essential institutions. Likewise, RL 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 IV about how we can (or cannot) implement RL given certain assumptions about the structures of government within the United States and abroad.

One key RL institution is the presence of a constitution—or, more accurately, a scheme of constitutionalism.⁹⁶ The idea here is a complex yet familiar one: Only insofar as a polity has a body of (preferably written) fundamental law embedded in a constitution can we plausibly measure the government's fidelity to the rule of law.⁹⁷ The constitution's service to RL is two-fold. First, it provides the basic structure and rules of the system, "stipulates institutions of government,"⁹⁸ and 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 by, for example, describing the structure of lawmaking and law executing.⁹⁹ Second, a constitution contains the substantive rules that authorize and limit government regulatory power.¹⁰⁰

⁹⁶ See, e.g., Harvey C. Mansfield, Jr., *Constitutionalism and the Rule of Law*, 8 HARV. J.L. & PUB. POL'Y 323 (1985).

⁹⁷ See, e.g., CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE (John Ferejohn et al. eds., 2001); STEPHEN HOLMES, PASSIONS & CONSTRAINTS: ON THE THEORY OF LIBERAL DEMOCRACY (1995); CHARLES H. MCILWAIN, CONSTITUTIONALISM ANCIENT AND MODERN (rev. ed. 1947); CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO (2001).

⁹⁸ Russell Hardin, *Constitutionalism*, in THE OXFORD HANDBOOK OF POLITICAL ECONOMY 289, 302 (Barry R. Weingast & Donald A. Wittman eds., 2006).

⁹⁹ For an interesting perspective on the role of constitutions "as expressive documents," see Geoffrey Brennan & Alan Hamlin, *Constitutions as Expressive Documents*, in THE OXFORD HANDBOOK, *supra* note 98, at 329, 340 ("But there is some danger . . . in asking a written constitution to perform the function of fully defining the rules of the sociopolitical-economic game.").

¹⁰⁰ See, e.g., DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 17 (2006) ("Power is also limited through specific prohibitions on decision outcomes reached by those in power."). This idea that constitutions can act as a limit on governmental authority was especially prominent in the work of David Hume and, later,

When we say that a constitution describes the fundamental law, we are referring to the rules explaining just how far the government can go. The fundamental law, therefore, can be used to measure the metes and bounds of the government's regulatory authority. While most RL accounts are reticent to offer big judgments about the content of this fundamental law, 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 seventeen years on average.¹⁰¹ 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.¹⁰²

Rule-of-law reformers and theorists typically insist that there be a system of judicial review available in countries that aim to establish RL.¹⁰³ This system enables a duly authorized institution—the judiciary—to assess and make a binding judgment about whether and to what extent a government action complies with the procedural and substantive requirements embodied in

Montesquieu and Madison. See DAVID HUME, A TREATISE OF HUMAN NATURE (Sir Lewis A. Selby-Bigge & Peter H. Nidditch eds., 2d ed. 1978) (1739–1740). See generally Hardin, *supra* note 98, at 306–07; Barry R. Weingast, Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century (June 30, 2008) (unpublished manuscript) (on file with author), available at <http://ssrn.com/abstract=1153527>.

¹⁰¹ See Tom Ginsburg et al., *The Lifespan of Written Constitutions*, RECORD ONLINE, Spring 2009, available at <http://www.law.uchicago.edu/alumni/magazine/lifespan> (“Constitutions, in general, do not last very long.”).

¹⁰² For important exceptions to this phenomenon, see Peter C. Ordeshook, *Constitutional Stability*, 3 CONST. POL. ECON. 137, 138–39 (1992); Weingast, *supra* note 100, at 2–5; Weingast, *The Political Foundations of Democracy*, *supra* note 72, at 245–46.

¹⁰³ See HAYEK, THE POLITICAL IDEAL OF THE RULE OF LAW, *supra* note 6, at 45; RAWLS, *supra* note 7, at 201; RAZ, *supra* note 63, at 216–17; Fallon, *supra* note 14, at 9 n.33 (“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); Gerald F. Gaus, *Public Reason and the Rule of Law*, in THE RULE OF LAW, *supra* note 5, at 328–29.

the relevant constitution and other authoritative sources of law.¹⁰⁴ 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) to maintaining a disinterested eye on the conduct and activities of government.¹⁰⁵ Judicial review helps implement the rules and values of the constitution; therefore, it helps implement the rule of law.

Related to this idea in important ways is the concept of the separation of powers.¹⁰⁶ Influential political theorists, not the least of whom include the intellectual architects of the British and American constitutions,¹⁰⁷ 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 ground that such a division safeguards RL.¹⁰⁸ It does so principally by managing the tactical aspects of multidimensional governance¹⁰⁹ and, more to the point, by making it more difficult for any one set of government officials to accumulate and aggrandize power.¹¹⁰ 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

¹⁰⁴ See, e.g., RAZ, *supra* note 63, at 217 (noting that, as part of RL, “[t]he courts should have review powers over the implementation of the other principles” (emphasis omitted)). But see Fallon, *supra* note 14, 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.”).

¹⁰⁵ See Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1699–1703 (2008).

¹⁰⁶ See generally W.B. Gwyn, *THE MEANING OF THE SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION* (1965); M.J.C. Vile, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (1967). On the connection between separation of powers and the rule of law, see, for example, John Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 58–70 (2001).

¹⁰⁷ See, e.g., THE FEDERALIST NOS. 47–48, 51 (James Madison); Montesquieu, *THE SPIRIT OF LAWS* (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748).

¹⁰⁸ See, e.g., Lovett, *supra* note 14, 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, *supra* note 106, 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.”).

¹⁰⁹ See, e.g., George Tsebelis, *VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK* (2002); Cox & McCubbins, *supra* note 17.

¹¹⁰ THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., 2009) (“This 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.”).

for successful law) will emerge from the complicated interplay of forces, interests, expertise, and strategies.¹¹¹ Ambition, wrote Madison, must be counteracted by ambition, and the separation of powers represents the best example of the sort of “auxiliary precautions” that he eloquently insisted upon in the *Federalist No. 51*.¹¹²

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.¹¹³ While there are many different ways to capture coherently the notion of judicial independence,¹¹⁴ structural insulation from political pressure is the usual requirement.¹¹⁵ A 2008 USAID document entitled *Guide to Rule of Law Country Analysis*, seeks to determine the level of judicial independence by asking two questions: “Do the constitution and laws of the country 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?”¹¹⁶ The first question ties the independent judiciary directly back to the separation of powers,¹¹⁷ while the second question looks at the degree of external political influence.

¹¹¹ See, e.g., La Porta et al., *Judicial Checks and Balances*, *supra* note 33, at 446; Adam Przeworski, *Why Do Political Parties Obey Results of Elections?*, in *DEMOCRACY AND THE RULE OF LAW*, *supra* note 5, at 114; Barry R. Weingast, *A Postscript to “Political Foundations of Democracy and the Rule of Law,”* in *DEMOCRACY AND THE RULE OF LAW*, *supra* note 5, at 109.

¹¹² See THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., 2009) (“In 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, *supra* note 106, 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.”).

¹¹³ See, e.g., Manning, *supra* note 106, at 66 (“[A] recurring theme was that judicial independence furthered the related constitutional objectives of constraining official discretion and promoting the rule of law.”); Brian Z. Tamanaha, *A Concise Guide to the Rule of Law*, in *RELOCATING THE RULE OF LAW* 3, 12–13 (Gianluggi Palombella & Neil Walker eds., 2009).

¹¹⁴ See, e.g., RAZ, *supra* note 63, at 216–17 (“Since the court’s judgment establishes conclusively what is the law in the case before it, the litigants can be guided by law only if the judges apply the law correctly.”).

¹¹⁵ See, e.g., Lewis A. Kornhauser, *Is Judicial Independence a Useful Concept?*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 45, 47 (Stephen B. Burbank & Barry Friedman eds., 2002) [hereinafter *JUDICIAL INDEPENDENCE*] (“[A]n independent judge is not subject to the ‘power’ of another individual or institution.”).

¹¹⁶ USAID, *GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK 38* (2008), available at http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/ROL_Strategic_Framework_Sept_08.pdf.

¹¹⁷ See, e.g., Manning, *supra* note 106, at 58 (“[T]he U.S. Constitution takes pains to ensure judicial independence from the control and functions of the political branches.”).

Why do we value judicial independence? Among the various values vouchsafed by judicial independence, two stand out: freedom from external influence and judicial impartiality. Judicial independence may also be a proxy for other values. For example, it may reflect “a concern about consistency across cases and, hence, across time.”¹¹⁸ 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,¹¹⁹ 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 found in USAID and World Bank reform efforts view the relationship between judicial independence and good governance as a linear one.¹²⁰

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 projects these structures onto 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 vary by country. Constitutionalism means something different in New Zealand and Chile than it does in the United States and the United Kingdom. The same is certainly true for judicial review. And it is especially true of the last two elements mentioned—separation of powers and the independent judiciary. Simply exporting an American system of separation of powers to a country whose political structure, history, and culture understands the relationship among government institutions in a different way would be extraordinarily difficult. Second, even supposing that we could transplant these essential institutions to developed and developing countries, the performance of these institutions will look quite different.

¹¹⁸ Kornhauser, *supra* note 115, at 51.

¹¹⁹ See *infra* text accompanying notes 120–181.

¹²⁰ See generally Robert J. Barro, *Democracy and the Rule of Law*, in GOVERNING FOR PROSPERITY 209 (Bruce Bueno de Mesquita & Hilton L. Root eds., 2000). But see Charles M. Cameron, *Judicial Independence: How Can You Tell It When You See It? And, Who Cares?*, in JUDICIAL INDEPENDENCE, *supra* note 115, at 143 (discussing studies that find “no impact of judicial independence on rule of law values”).

IV. IMPLEMENTING THE RULE OF LAW

Much of the discussion up to this point has involved RL as an abstract concept. In earlier Parts, 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 aspects 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 now ready to return to the central objective of this Article—a consideration of how a deeper understanding of the nature and contents of RL will or 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, as well as a closer look at trade-offs, 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.¹²¹ Different conceptions of proper judging yield different answers. One modality of judicial independence stresses freedom from the reality 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. These can be self-regarding or in service of the objectives of other individuals or institutions with influence over the judge.¹²²

¹²¹ On the puzzling nature of judicial independence, see, for example, McNollgast, *Conditions for Judicial Independence*, 13 J. CONTEMP. LEGAL ISSUES 105, 105–06 (2006) (explaining that there is much disagreement about 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).

¹²² In *Caperton v. Massey Coal Co.*, 129 S. Ct. 2252, 2266–67 (2009), for example, the Supreme Court decried the manner by which interest groups in 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 principles.

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 is that judges should come to legal disputes with an open mind; their judgments should be influenced 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 judge's own 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 has been separately associated with RL),¹²³ and prohibitions against judges assessing evidence outside the purview of one of the parties, all contribute in small or large ways to the ideal of judicial impartiality.¹²⁴

Political influence is a significant threat to judicial impartiality. Members of the executive or legislative branches frequently undertake to influence judges in the outcome of specific cases, directly threatening the ability of judges to render impartial judgment. Examples of external political threats to judicial impartiality are legion. King James's firing of Chief Justice Coke in early seventeenth-century England,¹²⁵ the effort by President Franklin Roosevelt to pack the Supreme Court in the 1930s,¹²⁶ and the recent effort on the part of federal legislators to threaten judges who cite foreign law in their opinions with impeachment¹²⁷ all reveal that the threats to judicial impartiality are ubiquitous. Judicial independence is regarded as a structural mechanism to

¹²³ See RAZ, *supra* note 63, at 218 (stating that the prosecution should not have the discretion to decide not to prosecute crimes committed by certain classes of offenders); *About the ABA Rule of Law Initiative*, *supra* note 26.

¹²⁴ In the administrative adjudication context, this ideal of impartiality is embedded in various provisions of the Administrative Procedure Act that seek to shield administrative law judges from threats to their impartiality. See, e.g., Administrative Procedure Act, 5 U.S.C. § 554(d)(1) (2006) (“[The agency adjudicator] . . . may not consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate”); *id.* § 554(d)(2) (“[An] employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not . . . participate or advise in the decision, recommended decision, or agency review”); *id.* § 557(d)(1)(A)–(C) (describing rules against ex parte contacts in administrative adjudications).

¹²⁵ See generally John Ferejohn & Pasquale Pasquino, *Rule of Democracy and Rule of Law*, in DEMOCRACY AND THE RULE OF LAW, *supra* note 5, at 244–45 (describing the King James episode).

¹²⁶ See, e.g., WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995).

¹²⁷ See, e.g., Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2007 U. ILL. L. REV. 637, 638–39 (“Congress has attempted to enact sweeping laws barring judges from using foreign sources, while some senators have suggested that citation to a foreign source should be an impeachable offense.”).

insulate judges from external influence. And the influence that is most worrisome is the kind of 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 have focused on concerns about external influence. The underlying assumption is that, but for this external influence, judges would come to 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 that bias his or her judgment and are wholly irrespective of external pressures. If judges are ideological, the ideal of impartiality is deeply threatened.¹²⁸ Ideologically driven decision making steers the judge away from the arguments of the parties and toward his or her ideology.¹²⁹ If the decision is be compelled by the latter rather than the former, it is a serious problem 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 the case on the merits, and he may adjudicate without regard to the views of legislators, governors, or presidents. Judges are, in essence, empowered to govern on the basis of law, not men. However, true judicial independence also gives judges license to decide on the basis of their own ideological predilections. No opportunities exist for external officials, be they legislators or chief executives, to check judicial freedom to impose 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.¹³⁰

¹²⁸ Cf. Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993) (analyzing judges' behavior using economic criteria and hypothesizing that judges have preferences not unlike other public officials and, indeed, other members of the general public).

¹²⁹ See, e.g., DAVID W. ROHDE & HAROLD J. SPAETH, *SUPREME COURT DECISION MAKING* (1976); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989). 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* 1651 (Mitchell Polinsky & Steven Shavell eds., 2007).

¹³⁰ 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

This stylized conception of judicial decision making is not intended to take any position on how judges behave. This is a very complex question addressed within a large social science literature.¹³¹ Rather, our central point 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 varying degrees of judicial freedom. Under one conception of judicial behavior, RL would be greatly aided by carefully structured judicial independence, while under another conception, RL would be undermined by this very same structure.¹³² 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 requirements of transparency to boot.¹³³ We want to be crystal clear about what interests may be implicated by one or another judicial structure.¹³⁴ We want public-regarding, not private-regarding judicial decisions.¹³⁵ If, instead, we worry principally about judicial partiality, then we may or may not want judicial independence, depending where the threats to impartiality arise.¹³⁶

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

own governance philosophies by influencing the judicial process. Given the permanence of judicial tenure, the only credible way to influence the judicial process in an independence regime 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, Fall 2008, at 28, 32; 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).

¹³¹ See, e.g., RICHARD A. POSNER, *HOW JUDGES THINK* (2008); ROHDE & SPAETH, *supra* note 129; SEGAL & SPAETH, *supra* note 129.

¹³² Cf. F. Andrew Hanssen, *Is There a Politically Optimal Level of Judicial Independence?*, 94 AM. ECON. REV. 712, 712–13 (2004) (explaining the trade-offs between different levels of judicial independence using a model of strategic institutional choice).

¹³³ See generally *supra* text accompanying notes 26–28 (discussion of the ABA Rule of Law Initiative).

¹³⁴ 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: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974).

¹³⁵ See, e.g., William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975).

¹³⁶ The assumptions and values concerning judicial performance are multifaceted, which 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 different versions of independence regimes applied to them. See Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, in JUDICIAL INDEPENDENCE, *supra* note 115, at 9, 16–22. The same point can be made about judicial systems in other countries.

makes the wise point that judicial independence is seldom valued for its own sake.¹³⁷ 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.¹³⁸ Does the judge—or, if you prefer the bird's eye view, the judiciary—pay adequate fidelity to enacted law?¹³⁹ Does the judge follow precedent?¹⁴⁰ Does the judge act assiduously, and on his 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,¹⁴¹ 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 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.¹⁴²

In the end, we may be more interested in the central question of judicial fidelity to law than how independent judges are from external influences. Consider here the enduring question of judicial lawmaking. 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

¹³⁷ Kornhauser, *supra* note 118, at 45.

¹³⁸ *Id.* at 53–54.

¹³⁹ *See, e.g.*, CASS, *supra* note 44, at 4–6.

¹⁴⁰ *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).

¹⁴¹ *See* Raz, *supra* note 71, at 357–58.

¹⁴² 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 that exerts influence and pressure over their decision making. *See* Rui J.P. de Figueiredo, Jr. et al., *The New Separation-of-Powers Approach to American Politics*, in THE OXFORD HANDBOOK, *supra* note 98, at 199, 208 (“The 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 judicial, legislative, and executive decision making is not front and center in the analysis here, we do note that, with the benefit of PPT, we can view more skeptically—or perhaps *realistically*—the claims that judges are in fact independent in their decision making. *See* John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962 (2002).

Shapiro makes the point that “lawmaking and judicial independence are fundamentally incompatible.”¹⁴³ 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.”¹⁴⁴ A common theme in the political science literature is 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.¹⁴⁵ This is a common theme and one that resonates across a realm of methodological approaches and positive analyses of judges and interactions among the judicial legislative and executive branches.¹⁴⁶ 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 and duties.¹⁴⁷ 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.”¹⁴⁸ In this framework, judicial independence is not inconsistent with judicial lawmaking; rather, judicial lawmaking is a necessary condition for judicial independence to properly function.¹⁴⁹

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 is meant by the term. Further, circumstances arise in which judicial independence may not, in fact, serve the objectives of RL reformers. We need not conclude, 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

¹⁴³ MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 34 (1981).

¹⁴⁴ *See id.*

¹⁴⁵ *See* William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, in *RULE OF LAW*, *supra* note 5, at 265, 265–67 (describing “interpretive regimes” as “systems of norms or conventions that regulate the interpretation of legal materials, including statutes” (emphasis omitted)).

¹⁴⁶ *See* de Figuerido, Jr. et al., *supra* note 142, at 199–201.

¹⁴⁷ Kim Lane Scheppele, *Declarations of Independence: Judicial Reactions to Political Pressure*, in *JUDICIAL INDEPENDENCE*, *supra* note 136, at 227, 269.

¹⁴⁸ *Id.* at 269.

¹⁴⁹ *See id.* at 270 (“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.”).

analytical construct and as a normative principle in order to improve future work on judicial performance, the judiciary as an institution, and 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 promoting 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 to once again illustrate the point that the successful implementation of RL requires attention to these institutional complexities and to potential trade-offs between competing structures and values.

Proponents of the unitary executive model in the United States,¹⁵⁰ perhaps channeling Alexander Hamilton and other intellectual architects of the strong executive,¹⁵¹ emphasize that RL is best protected where the administration of policy is managed by a strong executive in which there is a clear hierarchy.¹⁵² 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 while also enhancing 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 because such a scheme enables institutions and officials outside the executive branch to rein in executive authority. However, if this risk is minimal, and instead the unitary executive better protects RL values, then separation of powers may impede rather than facilitate RL.

How can we best evaluate these competing claims? To begin with, we need a clear definition of the unitary executive. Such a definition remains somewhat elusive.¹⁵³ Formalistically, the unitary executive refers to a structure in which all decision makers exercising executive power are located

¹⁵⁰ See, e.g., STEVEN G. CALABRESI & CHRISTOPHER YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 ILL. L. REV. 701.

¹⁵¹ See *THE FEDERALIST NO. 70*, at 354 (Alexander Hamilton) (Ian Shapiro ed., 2009) (“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).

¹⁵² See, e.g., STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993) (making an extended argument for centralization of the Executive in order to improve administrative performance).

¹⁵³ See generally EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* (4th ed. rev. 1957).

within the executive branch and are under the authority of the chief executive.¹⁵⁴ However, there is less here than meets the eye. The Supreme Court has been bedeviled by the question of what constitutes an executive function. In *Humphrey's Executor v. United States*,¹⁵⁵ 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 congressional influence over administrative agencies—in that case, the Federal Trade Commission—exercising a combination of powers and performing diverse functions.¹⁵⁶ Whatever its plausibility as a theoretical or structural matter, this distinction has survived the test of time.¹⁵⁷ 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, or 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.¹⁵⁸

Suppose, instead, we take a more pragmatic route to the unitary executive matter and view this ideal as entailing strong presidential or gubernatorial control over the administration of the laws.¹⁵⁹ This is the view reflected in much of the regulatory policy-making literature and is one that looks past originalist depictions of executive performance and the separation of powers; instead, it explains how a workable, modern conception of regulatory policy making in the post-New Deal administrative state requires the nesting of public administration in a hierarchical conception of accountability and control.¹⁶⁰ Such a model—one that we will consider at least a cousin to the classic model of the unitary executive—can be grounded in a political idea of the chief executive as principally responsive to public opinion¹⁶¹ or it can be grounded in a sort of “scientific management” perspective¹⁶² one that views the chief

¹⁵⁴ See Prakash, *supra* note 150, 772–74.

¹⁵⁵ 295 U.S. 602 (1935).

¹⁵⁶ *Id.* at 622–28.

¹⁵⁷ See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988); *Bowsher v. Synar*, 478 U.S. 714 (1986).

¹⁵⁸ See Thomas R. Dye, *Executive Power and Public Policy in the States*, 22 W. POL. Q. 926 (1969).

¹⁵⁹ See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

¹⁶⁰ See, e.g., Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

¹⁶¹ See, e.g., Jerry Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985). 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).

¹⁶² See F.W. TAYLOR, *THE PRINCIPLES OF SCIENTIFIC MANAGEMENT* (1911).

executive as a superior manager of regulatory decision making. 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 through a mainly top-down process, with some shielding from influences and pressures of other branches in government.¹⁶³

With this definition in mind, let us consider how this unitary executive is connected to RL. From one perspective, the accountability of low- and mid-level administrators to superiors within the executive branch line of authority helps to ensure that government decisions are consistent and stable.¹⁶⁴ More generally, they can reassure us that the governors, in this case the bureaucrats, are governed by law and that discretion is properly limited.¹⁶⁵ Taken thusly, we can see the unitary executive as a facilitator of RL values—indeed, we want 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 “[t]ake care that the [l]aws be faithfully executed,”¹⁶⁶ that we can assure the maintenance of RL against external pressures of infidelity.

Competing perspectives are possible, however.¹⁶⁷ For instance, congruence is, as Fuller noted, one of the values of RL.¹⁶⁸ This means that there should be a close connection between stated rules and implementation of those rules. The structure of the unitary executive can potentially cordon off administrative officials from checks by 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

¹⁶³ See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006) (describing the nuts and bolts of regulatory oversight in the Executive Branch); see also Kagan, *supra* note 159.

¹⁶⁴ See CALABRESI & YOO, *supra* note 150, at 311; Mashaw, *supra* note 161, 96.

¹⁶⁵ See, e.g., Stephen G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

¹⁶⁶ See U.S. CONST. art. II, § 3.

¹⁶⁷ 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).

¹⁶⁸ See FULLER, *supra* note 11, at 81–91.

from promulgated rules and the capacity of the legislature to hold executive officials in check.¹⁶⁹

An even more serious critique is possible. Thus far, we have been considering the unitary executive primarily in the American context. As we 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 until we have a better sense of how these institutions are deployed in systems with different political contexts. 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 different context? Without satisfactory answers to these questions, progress on exporting legal institutions will be limited.

C. Constitutionalism’s Content

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, upon a positive political theory of government (not only in the United States, but also abroad) and, in particular, positive theories of executive officials’ behavior and performance; and, lastly, upon the objectives that the unitary executive system is designed to achieve. The unitary executive also depends on RL, but for reasons we have already described, that is an unsatisfactory answer. 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.

¹⁶⁹ We may say much the same about the judicial branch. The courts are also interested in ensuring that their judgments are carried out by executive officials. However, lacking the power of the purse and the sword, 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. See THE FEDERALIST NO. 78, at 391–97 (Alexander Hamilton) (Ian Shapiro ed., 2009).

A further illustration of this very same point arises in connection with one of the sacred cows of RL discourse, constitutionalism.¹⁷⁰ 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 about 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 be in the United States and Canada. Constitutions articulate not only the appropriate procedures of governance,¹⁷¹ but also the bedrock of legal principles from which governmental action and the lines between public authority and private liberty are drawn.¹⁷² Does it follow that constitutionalism by its very nature safeguards RL?

Clearly not. First, many constitutions around the world contain important “exceptions” clauses—provisions that authorize certain governmental action notwithstanding express prohibitions within the document.¹⁷³ Furthermore, government officials are typically authorized under these “exceptions” to make the decision whether and to what extent to act. Executive decisions that would be anathema in the American context, such as military coups or suspensions of protections for criminal defendants, are common in, for example, Latin American contexts even where written constitutions contain broad individual rights provisions.¹⁷⁴ 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 governments to undertake action without an express grant of power, whether constitutional, statutory, or

¹⁷⁰ See *supra* notes 94–98 and accompanying text.

¹⁷¹ See Hardin, *Constitutionalism*, *supra* 98, at 301–02.

¹⁷² See Keith E. Whittington, *Constitutionalism*, in *THE OXFORD HANDBOOK ON LAW & POLITICS* (Keith E. Whittington et al. eds., 2008).

¹⁷³ See, e.g., Canadian Charter of Rights and Freedoms, § 33(1), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.) (commonly known as the “notwithstanding clause”); *Charter of Human Rights & Responsibilities Act 2006* (Vic) s 31(1) (Austl.) (“Parliament may expressly declare in an Act that that Act or a provision of that Act or another Act or a provision of another Act has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter.”).

¹⁷⁴ See Luis Kutner & Beverly May Carl, *An International Writ of Habeas Corpus: Protection of Personal Liberty in a World of Diverse Systems of Public Order*, 22 U. PITT. L. REV. 469, 554 (1961).

otherwise. The police power in the American state constitutional context,¹⁷⁵ the “necessary and proper” clause in the American federal context,¹⁷⁶ and general welfare clauses in many other constitutional contexts¹⁷⁷ are examples of just this phenomenon. Such broad authority granted to the government is justified largely on grounds of exigency.¹⁷⁸ But notice how the presence of governmental prerogative and the corresponding absence of limits 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 United States) of how to get political officials—executive leadership in particular—to adhere to the constitution. Given ubiquitous incentives to defect from the constitutional bargain, it is remarkable if not extraordinary to see government officials following constitutional rules where strong forces pull in other directions.¹⁷⁹ And where they do follow these rules, RL values are safeguarded not because there is a constitution in place, but rather because of the complex political structure and circumstances that yield compliance and reduce the risk of violence and defection from the social contract.¹⁸⁰

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 governments to follow in pursuing

¹⁷⁵ See generally ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* (1904).

¹⁷⁶ See U.S. CONST. art. I, § 8, cl. 18. See generally *McCulloch v. Maryland*, 17 U.S. 316 (1819).

¹⁷⁷ See, e.g., Art. 75, § 18, CONSTITUCIÓN NACIONAL (ARG.).

¹⁷⁸ A contemporary controversy with regard to this broad authority and its tension with RL in the American context is the controversial view that the President has the power to wage war and to carry out cognate wartime responsibilities in a domestic 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 constitutional 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 relying 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.

¹⁷⁹ See, e.g., Yadira Gonzalez de Lara et al., *Administrative Foundations of Self-Enforcing Constitutions*, 98 AM. ECON. REV. 105 (2008); Weingast, *supra* note 100.

¹⁸⁰ See Gonzalez de Lara, *supra* note 179, at 105–09; Weingast, *supra* note 100, at 10–15.

authority.¹⁸¹ Moreover, these guidelines ideally limit the scope of judicial initiative by guiding judges in resolving disputes. Written constitutions have a special virtue in that they make these guidelines transparent and tractable, thereby improving RL.¹⁸² 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 ways 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.

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 have a clearer sense of the concept and can demonstrate a much more informed understanding of how these institutions will work and how trade-offs will be made when values, structures, and rules come into conflict.

The problems with the current state of the literature and reform projects are several-fold. First, we lack a consensus regarding 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 make trade-offs when values come into conflict). Second, too few satisfactory connections are made between RL and theories of legal decision making. Rule-of-law values must be grounded in a particular theory of law. For example, the implications for RL reform will be different depending on whether one is a legal realist or a legal formalist. 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

¹⁸¹ See LUTZ, *supra* note 100, at 23–24 (“Constitutional purposes are multiple, and liberty thus has several layers; among various related institutional implications are rule of law, republicanism, and limited government.”).

¹⁸² See *id.*; see also Geoffrey Brennan & Alan Hamlin, *Constitutions as Expressive Documents*, in OXFORD HANDBOOK, *supra* note 98, at 329, 332 (“[A] written constitution can embody the constitutional rules, and indeed should do so. That is the conceived function of constitutional documents, and to the extent that such documents do not specify the rules of the game that is seen to represent a ‘future.’”).

upfront about the theory of law that underpins their views and expectations.¹⁸³ 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 trade-offs between, say, democracy, legal formalism, and the legal process view.

Third, we need to have more clarity in the connection between RL in theory and RL in implementation. This connection requires not only a careful specification of RL qualities, but also a satisfactory positive analysis of governmental performance 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 trade-offs when RL values come into conflict. Circumstances arise in which we are making incommensurable comparisons between values, interests, and objectives; 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, which is the most common approach, does little to overcome this definitional divide and only serves to violate every tenet of measurement theory.¹⁸⁴

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 powers. This is problematic,

¹⁸³ See, e.g., Posner, *supra* note 128.

¹⁸⁴ For an overview of RL instruments and empirical uses, see Haggard, *supra* note 9.

insofar as the underlying political structure of countries to which the RL reform project is directed may be—and frequently are—quite different than the American structure. In addition to asking whether American-style RL is the best template for reform in other nations, 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 that the theory of justice on which RL is based be tailored to a specific policy context and change across different policies. While a law and economics view may be preferable to some in the context of contract law, others may prefer to rely on legal process to define the governing concept behind administrative law. Such a 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.