The Rule of Law

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ABSTRACT. This Article offers a straightforward reconstruction of the rule of law and an overview of this notion as the ideal of subjecting political power to the discipline of law. Although the phrase "rule of law" saturates contemporary political discourse, we sometimes seem to lack a clear articulation of its content and value. Building and bringing together central strands of legal and political philosophy, I articulate a thin but normatively significant conception of legality. I show how this ideal connects to broader concerns about domination, public reason, and democracy. I also defend the rule of law's distinctive moral and political significance, while acknowledging its limits and its compatibility with injustice. In its final part, the Article argues that legality cannot sustain itself, and that its survival depends on the commitments of legal officials, the broader legal profession, and—crucially—an engaged citizenry that recognizes what is at stake when political power is not legally constrained. The aim of the Article is to offer a plain, accessible account of the rule of law.

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INTRODUCTION

The language of the rule of law is pervasive.[1] And this is true across most of the political spectrum.[2] At the same time, the prevalence of this language is combined with (and perhaps explained by) a widespread sense that we are living through a "global rule of law crisis."[3] On top of all this, it is not clear what exactly we mean when we talk about the rule of law—as Martin Loughlin recently noted, the rule of law is "regularly invoked but rarely defined."[4] We are thus dealing with an ambiguous ideal that seems, at the same time, ubiquitous in our discourse and severely weakened in our institutions. We should thus try to revisit the rule of law and to articulate, with as much clarity as possible, what it is and why it matters. This Article is an attempt to contribute to this project.

This attempt at clarification is not aimed at policing language and settling, once and for all, the precise meaning of the rule of law. Obviously, the rule of law designates a broad family of ideas in Western political thought (a point I return to below). As Joseph Raz notes, there is no point in a purely verbal dispute about which of those ideas *really* deserve to be called "the rule of law."[5] On the contrary, and very much in the spirit of Raz, this Article offers a clarification of "one common view"[6] that is usually alluded to when people talk about the rule of law. The project, then, is to offer a reconstruction of the rule of law that builds upon existing legal, political, and philosophical thought to articulate, in a way that is as clear as possible, a discernable ideal that—as I will argue—has great moral and political significance. To my mind, that ideal can be plausibly identified as the ideal of the rule of law.

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[1] Jedediah Britton-Purdy, *A Democratic Rule of Law*, 87 LAW AND CONTEMPORARY PROBLEMS 293, 293 (2025). *See*, *e.g.*, Consider This Podcast (NPR), *Is This the End of the Rule of Law in America?*, https://www.npr.org/2025/06/15/1254247891/donald-trump-national-guard-los-angeles-protests-ice.

[2] Kim Lane Scheppele, *The Life of the Rule of Law*, 20 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 17, 18 (2024). As Ashraf Ahmed writes, the rule of law "counts only allies and no enemies." Ashraf Ahmed, *Defending Rule of Law Minimalism*, 87 LAW & CONTEMPORARY PROBLEMS 67, 67 (2025).

[3] Scheppele, *supra* note 2 at 20–21.

[4] Martin Loughlin, *The Rule of Law: A Slogan in Search of a Concept*, 16 HAGUE JOURNAL ON THE RULE OF LAW 509, 510 (2024).

[5] Joseph Raz, *The Law's Own Virtue*, 39 OXFORD JOURNAL OF LEGAL STUDIES 1 (2019).

[6] *Id.*

The project of reconstructing and articulating the idea of the rule of law matters because public discourse flounders when we lack a clear understanding of the content, value, and importance of this notion. More specifically, if there is no clear sense of what the rule of law requires and why it matters, it is easy for the notion to be coopted, for its value to be distorted, and for ordinary people to lose respect for it. And this is precisely, I worry, where we find ourselves: in a world where rule of law talk is everywhere but its importance seems to be lost on many citizens. Indeed, despite the many discussions and critiques of government action in terms of the rule of law here and abroad, even those who use this language sometimes seem to lack the ability to forcefully explain why the rule of law should matter to everyone.

This diagnosis is not meant as a critique. Moments of political crisis and acrimony, as those that we are going through in much of the world, are not the most likely settings to generate careful reflection about why we should care about the things that matter to us. Lawyers, politicians, journalists, and civil society advocates need to be involved in day-to-day fights for what they take to be the integrity of legal rules and institutions. But this makes it even more necessary for academics and scholars to articulate and explain the value of the rule of law. The rule of law—or *legality*, as I will sometimes call it—is a value we should care about, and showing why is, today, one of the most urgent intellectual tasks.

The aim of this Article, then, is to explain in plain and clear terms what—on a plausible reconstruction—the rule of law is, and why every one of us should care about it. Because of this aim, this Article is not concerned with technical legal questions. There are many experts in the legal academy and the professional bar who are in a great position to talk about such questions, both in specific legal systems and at the international level. The Article's aim is rather to explore the background ideal that makes those questions relevant—the ideal that explains why we should care about the legal standing of the decisions of public officials.

The core of the rule of law, I will argue, is the notion of the subjection of political power to the discipline of law. Everything else that I will say about the rule of law—its content, its requirements, its value, and its politics—follows from this central notion. As I will also argue, the rule of law is as important as the ideals of freedom, equality, and democracy—in fact, I will argue, it is an important instrument for realizing those values.

I start, in Part I, by offering a concise account of the central ideas captured by the notion of the rule of law. I discuss the commonly used slogan of *the rule of law, not men*, and explain why the rule of law is not the same as the idea of *law and order*. In this part, I also connect the rule of law to some central ideas of modern political thought, by drawing a contrast between the state of nature and the civil condition realized by compliance with the rule of law and connecting the latter to the republican ideal. I also explain why, and in what sense, the rule of law is a distinct ideal, separate from other political values.

Part II articulates in more detail the central idea of subjection of power to the law. As I will explain, this idea is in fact a summary encapsulation of two interrelated elements: the idea that the law enacted by those in power should be able to reliably and predictably guide behavior and the notion that those in power ought to be bound by law. In this part, I also engage with more detailed discussions of discretion and the separation of powers.

Part III explains why the rule of law matters—why we should all care about the value of legality. As I will explain, the rule of law is compatible with all sorts of bad things. It is not sufficient to secure freedom, equality, or justice. But I will argue why it is nevertheless fundamental, in our conditions, to secure those values. I will also show why legality is connected to democratic disagreement and deliberation, and why the opposite of the rule of law is tyranny.

Finally, Part IV offers a more concrete guide to action. It asks how we can sustain the value of the rule of law, particularly in times of political crisis and polarization. As I will argue, the value of the rule of law thrives in a culture that values legality and where officials and citizens are committed to it.

I. The Rule of Law: Basic Ideas

In this Part, I articulate the basic ideas underlying the rule of law as a thin, mostly procedural notion that, nevertheless, has real normative bite: it subjects political power to publicly articulated legal norms so that social life is subject to law rather than to anyone's personal will. As I explain, even unjust regimes must sometimes honor legality to reap its benefits in terms of legitimation. I also explain why the rule of law is different from "law and order." While the latter articulates an idea of discipline and control that prizes compliance and represses disobedience, the

rule of law is the notion of controlling political power and preventing its abuse. Philosophically, as I will explain, the rule of law is the antithesis of the state of nature: instead of private judgment and domination, we are subject to omnilateral, public rules that prevent unilateralism. In republican terms, the rule of law reduces the risk of domination by requiring power to be exercised impersonally and for legal purposes. Finally, as I will explain, while the rule of law is only one value among many, complex, it is very hard to imagine that free societies could realize democracy, rights, or equality without it.[7]

Before I move on, I should make a small clarification. In discussions of the rule of law, it is common to distinguish between thin and thick versions, as well as between procedural and substantive versions of this idea.[8] I think there is a lot to learn from these distinctions. My own sympathies tend to lie with a thin and procedural understanding, as I have already suggested briefly and will explain in more detail below. But I will not spend too much time here on this debate. Suffice it to say that any plausible account of the rule of law cannot be *so thin* that it becomes mysterious why it matters normatively. At the same time, the account cannot be so *thick* that the rule of law becomes undistinguishable from other ideas—such as equality, democracy, justice, and efficiency—even if those ideas might be related to the rule of law.

Relatedly, there is an extensive literature on the "methodology" of debates about the rule of law.[9] That literature contains important discussions between legal theorists. But those are not the debates I am interested in here. Instead of getting into the weeds of those methodological debates, I want to offer a clear articulation about the rule of law that will be transparent and clear.[10]

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[7] This "cannot" is not a claim about conceptual or metaphysical impossibility. It is a kind of probabilistic generalization about what is most likely to be the case in our actual world.

[8] *See generally* Jeremy Waldron, *The Rule of Law*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2016), https://plato.stanford.edu/entries/rule-of-law/.

[9] *See*, *e.g.*, Ahmed, *supra* note 2; Paul Burgess, *Neglecting the History of the Rule of Law: (Unintended) Conceptual Eugenics*, 9 HAGUE J RULE LAW 195 (2017); Paul Burgess, *The Rule of Law: Beyond Contestedness*, 8 JURISPRUDENCE 480 (2017); Tom Hannant, *Deadlock in Rule of Law Theory and the Potential of Internal Critique*, LEGAL THEORY 1 (2025).

[10] Of course, questions of method matter. But instead of discussing them here, I invite (the few) readers who might be interested in methodological questions to infer my methodological views from my substantive discussion in what follows.

i. Law Against Power

In the early days of the Soviet dissident movement, a somewhat obscure figure, Alexander Volpin, initiated a tradition of resistance that had the air of paradox. Instead of arguing *against* the laws of the Soviet Union, Volpin's strategy consisted in taking those laws seriously, and demanding that Soviet authorities do so as well.[11] This somewhat paradoxical strategy is based, I believe, on a sound intuition: the observance of law (even of somewhat unjust law) by public officials is an important restriction on the abuse of power by those officials. A similar line of thought led E.P. Thompson to argue that the rule of law, by "imposing effective inhibitions upon power and the defense of the citizen from power's all-intrusive claims," is "an unqualified human good."[12]

But how could the rule of law limit the power of governments and government officials? Isn't the law the instrument of official power, and its enforcement the display of state coercion? More significantly: Isn't the law an important legitimizing device for those with political power? Part of the explanation, according to Thompson, had to do with the fact that law can't act as this kind of ideological legitimator of power without itself displaying some degree of independence from power, and some semblance of a commitment to impartiality and justice. As he wrote:

> "If the law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually *being* just."[13]

As Jeremy Waldron explains, what Thompson wants to remind us of here is that those in power can't get the good publicity that comes from law if

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[11] Here, I am summarizing a much more complicated set of arguments brilliantly recounted by BENJAMIN NATHANS, TO THE SUCCESS OF OUR HOPELESS CAUSE: THE MANY LIVES OF THE SOVIET DISSIDENT MOVEMENT 23–44 (2024).

[12] E. P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 266 (1975). For recent discussion, *see* Britton-Purdy, *supra* note 1 at 305–307.

[13] THOMPSON, *supra* note 12 at 263.

the law does not uphold its own logic of impartiality and its own promise of justice at least some of the time.[14] As long as those in power want the "but it is legal" response to work, they must allow, at least sometimes, the law to operate impartially, as an arbiter of their own power.

A good illustration of the rule of law's operation in this way is provided by the Chilean case. In Chile, dictator Augusto Pinochet ruled brutally between 1973 and 1990, incarcerating, torturing, expelling, and disappearing his opponents. Promoting itself as a "transitional regime," the dictatorship argued that it would build the foundations for a new political order. This supposedly transitional stage included the drafting of a new constitution. During the drafting process, the military *junta* presided by Pinochet decided—after some back and forth—to include a constitutional provision that would prove to be quite significant. Under that provision, Pinochet would serve as President for eight years, starting in 1980. A referendum would be held in 1988 to confirm whether Pinochet would continue as President for eight more years.[15] The referendum was to take place, of course, on the regime's terms: with limited political freedoms, with a muzzled press, and with no robust judicial oversight. But it turns out that the constitutional text also included the creation of a Constitutional Court. This court, its structure, and its appointments system were all designed, to put it mildly, to incentivize subservience to the regime.[16] Everything—including the Court's own track record—before the referendum suggested that the regime would have very little trouble "winning." Nevertheless, the "No" option won, and Pinochet had to step down. That win, as Chilean constitutional scholar Sergio Verdugo argues, was facilitated by a series of decisions by the Constitutional Court. And those decisions relied on the very same constitutional provisions drafted by the dictatorship to legitimize its hold on power.[17] Of course, democracy returned to Chile for many reasons, including the courage of activists and citizens who organized to fight for democracy. But legal rules—and judges' willingness to apply them against the interests of those in power—also played an important role.

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[14] Jeremy Waldron, *Does Law Promise Justice?*, 17 GA. ST. U. L. REV. 759, 469–470 (2001).
[15] Sergio Verdugo, *How Can Judges Challenge Dictators and Get Away with It?*, 59 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 554, 587 (2021).
[16] *Id.* at 592.
[17] *Id.* at 594–599.

ii. The Rule of Law, not Men

But what is the rule of law anyway? As we have seen, the fact that the rule of law is present in public discourse does not mean that there is widespread consensus on what it means. On the contrary, Waldron suggests that the rule of law is an "essentially contested concept."[18] Others say it is not a single concept that one could define in terms of necessary and sufficient conditions, but a cluster of ideals.[19] This is an apt observation when it comes to the specialized analysis and argument that characterizes the work of legal and political philosophers and social scientists. It is also apt as an observation of the discourse of all the institutions, domestic and international, that use the language of the rule of law. And it is also accurate when it comes to politics—after all, politicians and citizens with all sorts of different views seem to rely on the language of the rule of law for multiple, and sometimes inconsistent, argumentative purposes.

Nevertheless, there is a set of core ideas and notions that are central to the rule of law tradition. Those ideas are closely connected to modern constitutionalism, and I would summarize them in a slogan: *the subjection of power to the law*.

This idea of the subjection of power to the law—to which we shall return below—is sometimes captured in the familiar slogan that opposes the rule of law to the rule of men.[20] The point of the opposition is not to suggest that law is not made by human beings, but rather that those with political power must exercise it through legal means. Thus, *the rule of law, not men* is meant to signal the opposition between the rule of law and absolute power unrestrained by law.[21] The idea is that the government and its agents are supposed to be bound, in their actions, by law.[22] Moreover, when the government and its agents act, they should do so through legal mechanisms and following legal procedures.[23] What

[18] Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137 (2002).
[19] Lawrence B. Solum, *Equity and the Rule of Law*, 36 NOMOS: AMERICAN SOCIETY FOR POLITICAL AND LEGAL PHILOSOPHY 120, 121 (1994). Others, more pessimistically, worry that the rule of law is just an indeterminate slogan. *See* Loughlin, *supra* note 4 at 515.
[20] *See* F. A. HAYEK, THE CONSTITUTION OF LIBERTY: THE DEFINITIVE EDITION 221 (2011).
[21] KRISTEN RUNDLE, REVISITING THE RULE OF LAW 6 (2022).
[22] Joseph Raz, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY , 212 (1979).
[23] GERALD J. POSTEMA, LAW'S RULE: THE NATURE, VALUE, AND VIABILITY OF THE RULE OF

this means in practice is that political power is only legitimately exercised, under the rule of law, if that exercise itself complies with the law. *The rule of law, not men* is thus an ideal about the precise way in which political power ought to be used by those who have it—it is not, as a too literal reading of the slogan might suggest, the idea that political power is not exercised by human beings.

iii. Not "Law and Order"

There is a lot more one could say about this basic idea of the rule of law (and that I will say below). But from the outset, it is important to make a clarification: the rule of law is not "law and order."

It has become common for contemporary political actors and candidates for office to frame themselves as defenders of "law and order" and to promise a firm stance that will be tough on criminal activity. This rhetoric is part of a long tradition of politicians promising a forceful, effective, and ruthless approach against crime to protect law-abiding citizens.

The idea that the state should be in the business of preserving order and security is compelling. Thomas Hobbes thought that the very foundation for the authority of the state was, precisely, the preservation of peaceful and stable coexistence between people. In doing so, Hobbes articulated a very plausible idea: life for people is better under conditions of physical security, stability, and peace, and the state plays a crucial role in securing those conditions.[24] Not coincidentally, one way of characterizing a state as a failure—in fact, the very definition of a "failed state"—is to say that it cannot control violence and create peace and stability.[25]

Hobbes himself, however, was not a theorist of law and order as that phrase is understood today. In fact, I believe there are many elements in his articulation of political authority at odds with that idea. Nevertheless, he was right to think that there are very powerful reasons why people should care about the state's ability to preserve peace and security. People are aware of these reasons and of the central importance of peace and security, which perhaps explains why

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LAW 51 (2022).

[24] *See generally* THOMAS HOBBES, LEVIATHAN (J.C.A. Gaskin ed., 1998).

[25] Rosa Ehrenreich Brooks, *Failed States, or the State as Failure*, 72 U. CHI. L. REV. 1159, 1160 (2005).

the deployment of the rhetoric of law and order is politically successful. Even when it is deployed in bad faith or thoughtlessly, as it usually is, the rhetoric captures something important: the state must be able to secure peaceful coexistence and to prevent and sanction private violence. But even though it has roots in a justified concern about peace and stability, the language of law and order—as deployed in everyday politics—goes further: it suggests a picture where the state uses its coercive power mercilessly and severely in order to curtail disobedience and repress any hint of noncompliance.

Indeed, the language of law and order conveys an image of strict obedience to law by citizens, of strong legal enforcement to curtail disobedience in order to preserve peace or security, and of delegitimization of any form of protest or resistance. As the sociologist Katherine Beckett explains, in our context, the discourse of law and order was deployed, for instance, as an effort by some officials to criticize and undermine the civil rights movement and its strategies.[26] Of course, genealogy is not destiny: I don't mean to suggest that people or politicians who care or talk about "law and order" are necessarily interested in undermining civil rights or peaceful protest. But the origins of "law and order" are a clue, I believe, to a deeper issue: law and order is about the imposition of discipline by public officials, about the use of legal and institutional mechanisms to secure compliance and crush disobedience. It is not about the rule of law.[27]

Because of this, *law and order* is at best a distortion of the value of legality: its goal is not the subjection of political power to law but the forceful imposition of order through authoritative command. The rule of law, in contrast, is not concerned with imposing order and crushing disobedience, but with avoiding the abuse of political power.[28] As a consequence, the rule of law and law and order can even be at odds with each other (for example, when "law and order" is used to attempt to avoid procedural safeguards or to decrease the legal constraints on law enforcement).[29]

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[26] KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 28–29 (1997).

[27] Nick Cheesman, *Law and Order as Asymmetrical Opposite to the Rule of Law*, 6 HAGUE JOURNAL ON THE RULE OF LAW 96, 110 (2014).

[28] POSTEMA, *supra* note 23 at 54.

[29] Cheesman, *supra* note 27 at 98.

In fact, the rule of law treats legal officials and citizens *asymmetrically*. As we will see, the rule of law places burdens and limitations on officials that it does not place on ordinary people.[30] The rule of law is an ideal about the subjection of those officials to law, not an ideology of imposing the law on everyone, no matter what, and with full force. It is a regulatory ideal for the state and its personnel.[31] That ideal is based on the thought that law is an essential mechanism for "articulating, channeling, constraining and informing" the exercise of political power.[32]

This is not to say that peace, security, and order are irrelevant, or that there might not be good reasons why, at least in certain societies, citizens should generally be disposed to obey the law (and these reasons, I would argue, *include* the value of the rule of law).[33] Even more, the rule of law also requires public authorities to abide by laws that might require them to prosecute illegal behavior, to prevent non-compliance, and to ensure respect for law and individual rights. Similarly, the rule of law does demand those authorities to enforce the law impartially. All of these things are true, and might explain why sometimes the ideas are equated (after all, if these ideas were completely independent from each other, it wouldn't make sense to spend a whole section of this Article distinguishing between them). My point is simply that we should not confuse ourselves by thinking that the rule of law and the discourse of law and order are the same. They are not, and in important respects they can even be at odds with each other.[34]

iv. Leaving the State of Nature Behind

If you have ever watched any of the *Mad Max* movies (and even if the details of the plot are a bit blurry), you probably remember that the story takes place against the backdrop of a collapsing society. Ultimately (this is particularly clear in the two last *Mad Max* movies, *Fury Road* and *Furiosa*), there is an almost

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[30] John Gardner, *The Supposed Formality of the Rule of Law*, *in* LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL 195, 213–214 (2012).

[31] PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD 9 (2016).

[32] Martin Krygier, *Rule of Law (and Rechtsstaat)*, *in* THE LEGAL DOCTRINES OF THE RULE OF LAW AND THE LEGAL STATE (RECHTSSTAAT) 45, 46 (James Silkenat, James Hickey Jr., & Peter Barenboim eds., 2014).

[33] As I argue in Felipe Jiménez, *Legality and Commitment*, 29 JOURNAL OF ETHICS AND SOCIAL PHILOSOPHY 394 (2025).

[34] JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 142 (2020).

complete failure of civilized society as a consequence of war and environmental degradation.[35]

Max Max is an illustration of an old and important idea that is central to Western political thought—the idea of the state of nature. The state of nature is a situation without institutionalized, centrally promulgated and applied public rules. The point of reflecting about the state of nature is not to accurately depict what the world was like before the existence of political organization in cities, kingdoms, and states. Rather, the aim of the tradition of philosophical reflection about the state of nature has always been to illustrate the reasons we have for creating or maintaining a political organization.[36] Thus, many modern political philosophers and theorists start from the state of nature to think about the principles that should govern the political order and that explain why that order might be justified. The story often ends up with a "social contract" that gives rise to the state and that allows citizens to leave the state of nature, setting the terms for peaceful cooperation. This is a long and important tradition that goes from Thomas Hobbes's argument for the absolute authority of the sovereign to the contemporary liberal philosophy of John Rawls, who identifies principles of justice as those that we would select in an idealized original position where we operate under a "veil of ignorance."[37]

It is also common for ordinary people to sometimes make social-contract-type arguments in everyday political arguments. For example, sometimes people argue that by living in the territory of a state and benefiting from its public services, one has implicitly "entered into" an agreement to abide by the laws of that state.

No one who has thought about this carefully would reach the conclusion that we actually enter into contracts with the state, just like the contracts we enter into to hire a plumbing company, to buy a house, or to open a bank account. The best interpretation of the social contract tradition in political philosophy is that the ideas of the state of nature and the social contract are intellectual devices or thought experiments aimed at determining what the

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[35] MAD MAX: FURY ROAD, Warner Bros. Pictures (2015); FURIOSA: A MAD MAX SAGA, Warner Bros. Pictures (2024).

[36] Michael Smith, *The State of Nature*, *in* OXFORD STUDIES IN NORMATIVE ETHICS VOLUME 11 , 270 (Mark Timmons ed., 2021).

[37] *See* HOBBES, *supra* note 24; JOHN RAWLS, A THEORY OF JUSTICE (1971).

proper organization of the political community should be.[38]

The device of the state of nature, in particular, is supposed to illustrate the dangers of social life in the absence of an authority that can coordinate behavior and settle disagreements. In the state of nature, and in the absence of some centralized authority, human beings are governed by their passions and biases, their commitments are not trustworthy, and therefore everyone has an incentive to rely on their own abilities and strength to protect themselves from others.[39] This is a state where everyone is a potential enemy to everyone else, where cooperation is scarce, where arts, science, and culture don't exist, and where our lives are—in Hobbes's memorable phrase—"solitary, poor, nasty, brutish, and short."[40]

Hobbes's preferred solution, famously, was a centralized and non-democratic form of sovereign authority epitomized by the idea of absolute monarchy.[41] But there is no reason why the idea of the state of nature must lead us in that direction. In fact, a lot of the social contract tradition goes in the opposite one. John Locke, for instance, argued that in the state of nature everyone has the authority to protect their own rights. For a stable civilized life in common to be possible, everyone has to give up "this natural power," and accept to subject themselves to the impartial resolution of any disputes by established institutions like courts. This is what it means, according to Locke, to live in civil society and to avoid the state of nature.[42] Because of this, on Locke's view, absolute monarchy is not a solution to the problems of the state of nature but rather a version of that problem: the whole point of entering into the social contract is to avoid anyone being a judge in their own cause, which is precisely the situation of an absolute monarch.[43]

Yet the main problem with the state of nature—and therefore the virtue of a civil condition where we are all bound by the same laws—is, in my view, most clearly identified by Kant. In the state of nature, we can never be secure

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[38] See RAWLS, *supra* note 37 at 19.
[39] HOBBES, *supra* note 24 at XVII.
[40] *Id.* at XIII.
[41] This is, of course, a very broad simplification of Hobbes's thought.
[42] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT: AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT 87 (1982).
[43] *Id.* at 89–90.

against violence from one another. In that state each individual is entitled to do what seems right to them.[44] But precisely because of this, in the state of nature we are always at risk of having to subject our behavior to the private judgment of someone else (typically, the most powerful, the strongest, or the most charismatic).[45] Note that this is true even if—and this is Kant's great insight—people are acting in good faith, not driven by material interests alone: the danger is, precisely, that we might attack and dominate each other *in the name of justice*.[46] In response to this, Kant argues, we need an "omnilateral" will than can impartially resolve our disagreements about justice. Arguably, that is precisely the role that the law publicly promulgated by the state ought to play.[47] In a society where the law is made, applied, and enforced by public institutions to everyone equally, we can live in what Kant and his followers call "a rightful condition."[48]

I bring up all of this because it offers a useful way in which we can think about the core of the rule of law: it is a rejection of the state of nature.[49] Our self-interest and our disagreements about what's right are a threat to peace, cooperation, stability, and equal freedom. A public set of laws impartially enforced are a solution to that threat. Living under the rule of law is therefore living in a civil society. Which means that those who want to undermine the rule of law want, quite literally, to live in a state of nature. They want to live in a situation where they can impose their self-interest and their personal views about what's right on everyone else, without going through the troublesome process of actually reforming the law through the appropriate institutional mechanisms and without allowing the law to constrain their behavior. That is a world where they get to act, again literally, like *assholes*: people who allow themselves to enjoy special advantages and to dictate how everyone else should live, while ignoring our shared rules.[50]

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[44] IMMANUEL KANT, THE METAPHYSICS OF MORALS 44 (1991).
[45] ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 146 (2009).
[46] Jeremy Waldron, *Kant's Legal Positivism*, 109 HARVARD LAW REVIEW 1535, 1546 (1996).
[47] *Id.* at 1558.
[48] RIPSTEIN, *supra* note 45 at 198.
[49] Making a similar connection, Donald Bello Hutt, *No Rule of Law without the Hobbesian State*, 38 RATIO JURIS 144, 157–160 (2025).
[50] *See* AARON JAMES, ASSHOLES: A THEORY 5 (2012).

v. A Republican Ideal

The rule of law is thus the antithesis of the state of nature: it forces those in positions of power to exercise it within the constraints of law.[51] In this way, the rule of law affirms something important: what governs our lives together is the law rather than anyone's (including any public official's) view about what should be done.

Of course, those in power can modify and enact laws that align with their views. The whole theory underlying representative democracy is precisely that the people can elect representatives who will indeed change the law in ways that are consistent with the people's views (whether that is how it actually operates is, of course, a different question).[52] But let's look at that example in more detail: Who is elected to become a representative? How? Which rules do we use to run the elections? And then, after they are elected, how do representatives introduce motions to legislate? How does Congress enact new law? What gives Congress that power? What are the limitations of that power? And who will decide if individual people have complied or not with the newly enacted law? The answer is always law. So, yes, politics (including democratic politics) is about governing social life under someone's (in the case of a democracy, the majority's) view about how we should run things. But, under the rule of law, that can only be validly achieved by complying with other legal rules. The rule of law does not deny that we will be governed by human laws. It acknowledges that the law is always implementing someone's contested political view.[53] But how that view is implemented, subject to what constraints, whether when implemented it has been breached, and so on, are all issues that depend on the law. This is precisely why we, as private citizens, can count on law to plan our affairs.

So, when a public official uses state coercion without relying on legal

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[51] JEREMY WALDRON, THOUGHTFULNESS AND THE RULE OF LAW 2 (2023).

[52] *See generally* Tom Christiano & Sameer Bajaj, *Democracy*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta & Uri Nodelman eds., 2024), https://plato.stanford.edu/archives/sum2024/entries/democracy/.

[53] A technical way to put the point is to say that legal rules are "endogenous institutions:" they are provided by the agents regulated by them rather than imposed from the outside. *See* Kenneth A. Shepsle, *Rational Choice Institutionalism*, *in* THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS , 25–26 (Sarah A. Binder, R. A. W. Rhodes, & Bert A. Rockman eds., 2008).

norms and procedures, the official is putting him or herself in a position of superiority over—and subordinating—others.[54] Compliance with the rule of law is thus a mechanism that limits the possibility of domination. When the state acts in compliance with the rule of law, its power is exercised impersonally, on the basis of public reasons established in legal norms. As Paul Gowder puts it, the rule of law avoids the possibility of officials being allowed to treat their political power as part of their personal prerogatives. Instead, the rule of law demands that power be used only for the purposes and under the terms set by the law.[55] The action of public officials is, when constrained by the rule of law, not the unilateral action of a private actor but the impartial action of public institutions.[56]

What all of this suggests is that the rule of law is a *republican* ideal—in the sense that it allows living under a republic as a form of government. A republic is, precisely, a state where the action of public officials is subject to the law.[57] According to the republican tradition, freedom consists in not being subject to someone else's arbitrary interference or domination.[58] Of course, the rule of law is not sufficient for domination to be absent: as we will discuss later on, many unjust and arbitrary laws can be implemented in ways that are compatible with the rule of law. But one thing is important here: a system without the rule of law—a system where public power is not subject to law—will *definitely* be a system of domination and arbitrary interference. The fact that public officials are constrained by law means that we are not subject to their whim, and that we can plan and decide what to do by relying on public, general legal rules. This is a fundamental aspect of the rule of law.[59]

vi. One Value Among Many

Despite its centrality, we should be aware that the rule of law is only one of the ideals that constitute the repertory of the modern political tradition: other values

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[54] GOWDER, *supra* note 31 at 19.
[55] *Id.* at 12.
[56] ERNEST J. WEINRIB, RECIPROCAL FREEDOM: PRIVATE LAW AND PUBLIC RIGHT 185 (2022).
[57] *Id.*
[58] Christian List, *Republican Freedom and the Rule of Law*, 5 POLITICS, PHILOSOPHY & ECONOMICS 201, 201 (2006).
[59] *See* Bello Hutt, *supra* note 49 at 148.

include justice, democracy, human rights, equality, etc.[60] This means that a good legal system will conform to the rule of law but will also conform to other ideals and values.[61]

Joseph Raz explains that awareness of the fact that the rule of law is only one value among many can help us avoid what he characterizes as the fallacy of assuming that the rule of law is of overriding importance.[62] I tend to agree that we should be aware that other things matter too, and a lot. For example, a very economically unfair system could perfectly well be consistent with the rule of law. The rule of law is not concerned with the content of the law but with its modes of production and application.[63] So, yes, other things matter, and we should care about those other things too. Nothing I will say about the rule of law is meant to displace all the other relevant political values we should also care about, or to obscure the importance of morally evaluating the content of the law. Moreover, we should not confuse the rule of law with those other values or with the moral justifiability of the content of legal norms.

But I would still argue that the rule of law has, against Raz, overriding importance. As I will explain later on, the rule of law, while different from other political values, is an important condition for satisfying many of them. It is true, thus, that—as Raz argues—a "non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies."[64] But without the rule of law, complex societies like ours cannot be democratic, respect human rights, achieve economic justice, or erase racial and gender discrimination in a way that is respectful of human agency and avoids arbitrary power.[65]

Thus, we should acknowledge that the rule of law is different from justice, democracy, and equality. But we should not ignore the rule of law's

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[60] Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 2 (2008).
[61] Raz, *supra* note 22 at 219.
[62] *Id.* at 210. Arguably, Raz's position changed somewhat in this regard later in his career. *See* Raz, *supra* note 5.
[63] Raz, *supra* note 5 at 2.
[64] Raz, *supra* note 22 at 211.
[65] *See infra* Part III.

distinctive value.[66] Nor should we discount its important connections to other values we care (and should care) about.

II. WHAT IT REQUIRES

I wrote in the previous part that the rule of law is essentially the notion of the subjection of political power to law. While the notion of subjection to law might seem to put power at the mercy of law, in reality—as I will argue in this Part—subjection of power to the law acts both as a constraint on, and as a facilitator of, the exercise of political power. The subjection of power to the law performs these two roles because those in political power can reliably guide the behavior of those subject to the law if they subject their own decisions and actions to the law. This is why it is, at least to an extent, in the long-term interest of those in power to comply with the rule of law. Thus, strictly speaking, the rule of law involves two interrelated elements that together give content to the notion of subjection of power to the law: law must be such that it can guide behavior, *and* the law must constrain the actions of those who hold power.

With greater or lesser clarity, a lot of the traditional discussion on the rule of law picks up on this relationship between guidance and constraint by law. Take, for example, the following account of the rule of law by Hayek:

> "Stripped of all technicalities, [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."[67]

Thus, the slogan of subjection of power to the law has two core elements: (i) "government in all its actions is bound by rules," so that (ii) these rules will make it possible for people to follow the law and plan their affairs. The second element suggests that the law produced by public authorities should be general, predictable, public, and stable—this is, in practice, what makes it possible for people to foresee and plan their affairs. But, of course, for the law to

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[66] POSTEMA, *supra* note 23 at 99–100.

[67] F. A. HAYEK, THE ROAD TO SERFDOM 112 (2007). This paragraph is often the starting point of analysis in the rule of law literature. *See*, *e.g.*, Burgess, *supra* note 9 at 485.

actually allow people to do so, police officers, tax collectors, prosecutors, judges, and even democratically elected officials must act in ways that are consistent with those general, predictable, public, and stable rules. That is what gets us to element (i).

I will explore each of these elements in detail below. I will also connect both of them to some central ideas that have surrounded discussions of the rule of law, such as the idea of discretion and the notion of separation of powers. Overall, this discussion will set out what the rule of law requires. Before doing so, however, let me say a bit more about the notion that the rule of law constrains power as much as it enables it.

i. Enabling and Constraining Power

Typically, once a year, the citizens and residents of most industrial democracies have to file tax declarations and statements and pay a portion—sometimes a significant portion—of their pre-tax income to contribute to fund the operations of their governments. In the United States, the federal government collects income taxes in this way. Paying taxes is a usual, familiar, and perhaps routine encounter between citizens and the power of the state: we pay on time because we are told to do so, and we know that bad consequences follow if we don't.

Many people dislike paying taxes. I think this dislike—along with the notion that the state is taking our hard-earned money, so that all taxation is a bit morally suspect—is not based on particularly good reasons. The protection of our rights, the satisfaction of many collective needs, some degree of redistribution, and even the rule of law itself, all depend on taxation.[68] In fact, the very fact that we can have property rights and talk about *our* money is indissolubly intertwined with the system of taxation.[69] Of course, there is such a thing as unjust taxation, and I think we should all dislike *that*. But what matters here is that taxation is one of the main ways in which we encounter the power of the state and in which public officials use their power to get us to do as they say, even when we disagree in substance with what we are being told to do.

In the United States, in particular, the constitutional text explicitly

[68] *See* STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES (1999).
[69] *See* LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP (2002).

grants Congress the power to impose and collect taxes.[70] By exercising this power granted by law, in the way prescribed by law, Congress can get us to pay taxes and therefore achieve important public policy goals. This highlights an important, but sometimes ignored, aspect of the rule of law that I have already mentioned but that deserves emphasis. By subjecting the actions of those in power, the law doesn't just restrain them: it also allows them to do certain things they would not be able to do (or at least, would not be able to do as easily) without the existence of legal rules.

Thus, the idea of subjection to law is not a purely negative idea. Under the rule of law, political power is enabled: it operates through law in order to achieve its goals.[71] Political power is not something to be lamented and constrained or even just a necessary evil—it is something we need in order to achieve valuable collective ends and goals.[72] And the rule of law is a useful means for the exercise of that power. Another way to put this is the following: the constitution imposes all sorts of limitations on Congress, but it also creates Congress and sets a series of powers that it would not have in the absence of the constitutional text. Law also sets out more detailed rules, procedures, and mechanisms for the exercise of such powers. By complying with the constitution, Congress gets to direct the behavior of firms and individuals in specific ways, thereby achieving important collective goals that would be harder to achieve without law.

H.L.A. Hart referred to this aspect of law as its *power-conferring* side. Law is not just about limiting government but in fact it is about establishing government and granting it certain powers (a parallel observation is true about private legal powers).[73] These power-conferring rules are like recipes.[74] They tell public officials what they need to do in order to create new legal duties, such as the duty to pay income taxes. Seen from this perspective, by following the law—by following the standards and procedures for legislating, regulating, and adjudicating—public officials are able to create new rules for everyone and to

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[70] U.S. Const. Art. I, § 8.
[71] WEINRIB, *supra* note 56 at 184.
[72] *See* Martin Krygier, *What's the Point of the Rule of Law?*, 67 BUFF. L. REV. 743, 772–773 (2019).
[73] H.L.A. HART, THE CONCEPT OF LAW 27–33 (1994).
[74] *Id.* at 33.

change the law accordingly.

Law thus gives those in power mechanisms and procedures to achieve their aims.[75] This presents the relationship between political power and law in a new light: law is not just an external constraint on a power that exists independently from it.[76] Law, as Gerald Postema puts it, "literally constitutes" power, by creating its tools, defining its scope and form of exercise, allocating it, and so on.[77]

There is a related observation here that is worth emphasizing. When those who exercise power subject their own behavior to the law, they are able to achieve their goals more effectively. This observation has led some theorists to think that the relationship between the rule of law and law is akin to the relationship between the sharpness of knives and knives. A knife is better *as a knife* if it is appropriately sharp than if it is not. Similarly, we are told, the law is better *as law* if it complies with the rule of law. The rule of law is thus seen as a necessary condition for the law to effectively serve any purpose, good or bad.[78] From this point of view, then, the rule of law is an instrument of power. But this does not mean that it is morally neutral or irrelevant. Institutionalized power serves collective goals, many of them valuable and important. The rule of law makes the law more effective at achieving those collective goals.[79] This is precisely what the example of taxation shows.

But by enabling power in this way and making it effective through legal mechanisms, the rule of law also constrains it. The constitution enables Congress and the President to do certain things (it enables power). But those things must be done in certain ways, following certain procedures, and within a certain limited domain if they are to be legally valid. Because of this, those who believe they can effectively violate the rule of law and diminish it without at the same time undermining the capacity of the state to achieve collective goals and to successfully guide behavior are misleading themselves. The ability to achieve any

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[75] POSTEMA, *supra* note 23 at 46. This is what Holmes calls the "facilitative dimension" of constitutionalism. STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 6 (1995).

[76] *See* HOLMES, *supra* note 75 at xi; Krygier, *supra* note 72 at 773–774.

[77] POSTEMA, *supra* note 23 at 47.

[78] Raz, *supra* note 22 at 225–226.

[79] *Id.* at 226.

goals through law and the subjection of power to law are intertwined, and the first follows from the second. This is why the core of the rule of law is the subjection of power to law. It is not a coincidence that times of systematic disregard for the rule of law are also times when the capacity of the state to achieve valuable goals and the state's ability to effectively channel and guide the behavior of citizens and firms are weakened. I turn to this latter requirement of the rule of law—the effective guidance of behavior—next.

ii. Guidance Through Law

Lon Fuller presented the idea of the rule of law through a story about a fictional king, Rex. Rex came into power with the zeal of a radical who wanted to change things, and in the process—so the story is supposed to go—learned the value of the rule of law the hard way.

Fuller's description of Rex's first act in office is worth recounting: "Since he needed a clean slate on which to write, he announced to his subjects me immediate repeal of all existing law, of whatever kind. He then set about drafting a new code."[80] Realizing that he couldn't draft general rules very well, Rex decided instead to appoint himself a judge. The problem is that no one could derive, from his multiple decisions, any kind of general guidance about what to do. So, in response, he decided to learn how to write good legal rules and drafted a code. But since he was not fully sure about whether he had nailed the job, he decided to keep the code secret.[81]

It is easy to guess how the rest of the story goes. Rex's subjects become very upset because they didn't like being judged by rules they couldn't learn about in advance. So, he goes back to the drawing board, and decides to publish a new, complete code that reflected the entirety of his preferred rules. Now the problem is that the rules are inconsistent. And so on and so forth, until—and this is Fuller's basic message—Rex discovers that it's easier and more efficient to govern by having clear, general, predictable, public, non-retroactive rules. Rex's parable is thus a story about how even the self-interest of those in power should lead to (at least a thin version of) the rule of law—about how, if you want to effectively guide the behavior of a population, compliance with the rule of law

[80] LON FULLER, THE MORALITY OF LAW 34 (1964).
[81] *Id.* at 33–38.

is a good idea.

This is important because one of the main reasons why societies find it useful to organize themselves through law is because law allows them to coordinate social life by guiding the behavior of people, firms, and public officials. It is an old trope in legal philosophy that one of the main functions of law is precisely the control and guidance of behavior.[82] In simple words, if you want people to pay taxes, it's a good idea to let them know they should pay taxes in advance; when they should file their tax declarations; what amounts are due and in virtue of what; etc.

If law is meant to guide, then, it should be good at that job. Compliance with the rule of law, from this perspective, is meant to allow the law to guide behavior effectively, and therefore to let people know how they should act and what they should do to avoid breaking the law.[83]

From this simple idea, legal philosophers have derived different versions of a "rule of law laundry list:" a series of elements with which the law should comply in order to effectively guide behavior. Fuller's own list (which shares much with other theorists' preferred lists) included the following elements:

- The law must be general: it should basically consist of a framework of general rules (as opposed to a collection of haphazard individual orders).[84]
- The law must be publicly known or "promulgated:" in principle, it should be possible for people to figure out what their legal obligations are.
- The law should not be retroactive: you can't tell people how to act unless to tell them before they act.[85]
- The law should not be plagued with irresolvable contradictions: otherwise, how could people know what they should do?
- The law should not demand the impossible.
- The law should be relatively stable: if you want people to be able to

[82] HART, *supra* note 73 at 40. *But see* Joshua Pike, *The Law Does Not Exist to Guide Us*, 14 JURISPRUDENCE 95 (2023).
[83] Gardner, *supra* note 30 at 195.
[84] FULLER, *supra* note 80 at 46.
[85] *See* Raz, *supra* note 22 at 214.

follow the law and let it guide their conduct, too frequent changes in the law will hinder this aim.
- The behavior of public officials should be consistent with the law.[86]

One can argue the details of one or more of these aspects, but centrally what they require is for law to be such that it can effectively guide behavior. Not just any behavior, by the way, but the behavior of people with the capacity to deliberate, think, and plan. In this way, the rule of law makes the law, at least in principle, available to us: as something that we can learn about, evaluate, use to assess the behavior of public institutions and private actors, and argue about (both in general and in particular cases).[87] In this way, the rule of law treats us—those subject to the law—as agents who can think, deliberate, and plan, and to whom the decisions and actions of public officials can (and should) be justified.[88]

That is the central idea. And it matters much more than any specific laundry list.[89] Consider, for example, the idea that the law should be relatively stable. If laws are changed too often and in unpredictable ways, it will be hard for us to know exactly what the law requires. This matters because law plays a huge role in our long-term plans—financial, personal, etc.[90] By remaining relatively stable, the law is more likely to be followed—it is more likely to effectively guide the conduct of people. But not only that: by remaining stable, the law treats us as *agents* who can apply the law to themselves to plan their affairs. When we are governed by officials who comply with the rule of law, we are treated in a way that is different from "herding cows with a cattle prod or directing a flock of sheep with a dog."[91]

Again, those in power should care about this because of moral reasons that have to do with respect for our agency.[92] But they should care about this because, as Fuller's story about Rex teaches us, making law effective at guiding behavior makes it more effective at achieving whatever goals those in power want

[86] FULLER, *supra* note 80 at 46–91.
[87] GOWDER, *supra* note 31 at 7.
[88] *Id.* at 7, 16.
[89] One could, in fact, easily (and perhaps more usefully) talk about the content and value of the rule of law without getting distracted by these laundry lists. *See* Krygier, *supra* note 72 at 749.
[90] FULLER, *supra* note 80 at 53. See also Raz, *supra* note 22 at 214–215.
[91] Jeremy Waldron, *How Law Protects Dignity*, 71 THE CAMBRIDGE LAW JOURNAL 200, 206 (2012).
[92] *See infra* Part III.

to achieve.

iii. The Subjection of Power to Law

How would Rex act if he really wanted to be able to guide the behavior of his subjects effectively, according to Fuller? The answer, again, is by following the rule of law. This has a bit of the air of paradox, as we saw in Part I. It seems to suggest that the best way for someone like Rex to achieve his goals is to subject himself to the discipline of law.

As what I have said so far already suggests, I don't think that the mere political self-interest of those in power is enough to explain why they should comply with the rule of law. It is certainly possible (and there are examples) of rulers who can hold power and goad their subjects into compliance without following the rule of law. Be that as it may, it seems very plausible to think that law will *more effectively* guide conduct over the long run, particularly in a complex and diverse society like ours, if the behavior of public officials is consistent with the law and is therefore predictable, stable, and so on.

But set these empirical speculations aside for now. For the law produced by public authorities to be able to guide behavior through general, predictable, public, and stable rules, those rules must strictly constrain the behavior of public officials. If the law is public, general, and stable, but the behavior of public officials is not consistent with them, then the law will just be dead letter. In other words, all of the principles that Fuller mentions as principles of guidance can only be actually realized if those in power actually subject their behavior to the law. This is sometimes called *congruence* between the actions of public officials and the law.[93]

"Congruence" sounds technical and perhaps not particularly significant. But it is the core of the rule of law. It is the notion that public agents cannot justify their actions on the basis of their whim, their self-interest, their subjective inclinations, or even their deeply held moral commitments. Rather, their actions can only be justified by reference to the requirements of general, public legal rules. This is why there is an obvious connection between the rule of law and

[93] FULLER, *supra* note 80 at 81.

the limitation of power.[94]

When we live under the rule of law, then, we are less likely to be subject to the arbitrary power of those in office—they can't simply do as they please.[95] The rule of law is what marks the distinction between living in what Kant and others called "the civil condition" and living in the uncivil, violent, and dangerous world of Hobbes's state of nature. The rule of law denies the idea that those in power can impose their will on the rest of the population without any restrictions or accountability.[96] Instead, the rule of law affirms that "those who control the power of the state may not use it whenever and however they want."[97]

To use a familiar distinction, then, the rule of law is not just about the law in the books. It is also about the law *in action*—i.e., about how public officials actually act in enforcing, applying, and administering the law.[98] The idea of legality does not just demand that the law "in the books" should be a certain way: publicly available, general, not retroactive, etc. Legality requires "law in action" to be consistent with the law in the books. This is not to say that all the law should be enforced scrupulously, all the time, everywhere and in every single instance. There is space for legitimate discretion and for the rational administration of public resources. It is not the case, too, that the sole or predominant aim of government action should be the enforcement of the law. Rather, the point is that the law should *constrain* the space for legitimate government action. Whatever the government does should be consistent with the law.

And here we can come back again to something I mentioned earlier: the rule of law is not "law and order." It is not the ideology of forcefully enforcing the law on citizens aggressively and through whatever means necessary in order to get them to submit and to comply. It is rather the notion that the action of public officials that is not consistent with the law is unacceptable, because it signals that they believe they are above the law. The rule of law entails that the

[94] POSTEMA, *supra* note 23 at 28.
[95] *Id.* at 29.
[96] *Id.* at 29–30.
[97] GOWDER, *supra* note 31 at 12.
[98] *See* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

behavior of everyone, including those in power, is subject to law.[99]

It is important, though, to note that the rule of law is about *formally* limited political power through law. It is the idea that legal rules constrain the behavior of public officials. But it says nothing about the content of those rules. The idea that we should have robust substantive limits on how power is exercised—for example, through the establishment of constitutional rights—is the related idea of *constitutionalism*.[100] The ideas are related because both are about the constraint of power. But constitutionalism goes further than the rule of law. It is not just about legal rules constraining power. It is also about the substance of those constraints.

iv. The Value of Discretion

Sometimes, theorists of the rule of law speak of discretion as *the* bad thing that the rule of law tries to avoid.[101] Much of what I've said about the subjection of those in power to the law might seem to suggest a similar orientation. This is not entirely unwarranted: *widespread* and *unfettered* discretion would of course be antithetical to the rule of law.

At the same time, the idea that we could organize social life in a large and complex society without any degree of official discretion seems, of course, absurd. It is hard to anticipate everything, and it is impossible to write perfectly clear legal rules that resolve every case without any space for discretion.[102] More importantly, sometimes discretion is a good thing (compare, for example, interest rates being open to determination by market mechanisms that respond to the discretionary judgment of expert economists versus interest rates being set by legislation). So, instead of assuming that all forms of discretion are necessarily at odds with the rule of law, we should distinguish between discretion that is consistent with the rule of law and discretion that is not.[103]

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[99] A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 114 (1982).

[100] *See generally* Wil Waluchow & Dimitrios Kyritsis, *Constitutionalism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta & Uri Nodelman eds., 2023), https://plato.stanford.edu/archives/sum2023/entries/constitutionalism/.

[101] *See*, *e.g.*, DICEY, *supra* note 99 at 213–267.

[102] GOWDER, *supra* note 31 at 14.

[103] *See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 25–26

In other words, we need to distinguish between discretion allowed by legal rules and discretion that is not allowed by legal rules. The former is perfectly compatible with the rule of law. This does not entail, of course, that discretion allowed by law is always a good idea. What the right degree of discretion for any decision maker might be—the President, prosecutors, administrative agencies, judges, police officers, etc.—depends on many factors. For example, some people think that prosecutors having discretion about which criminal cases to pursue allows for nuanced moral judgment of particular cases.[104] Or one might think that prosecutors should exercise discretion to move forward only with cases they are very confident they can win.[105] Or one might think that, say, presidential discretion in law enforcement can sometimes be a check against excessively punitive criminal laws.[106] You might disagree with any of these arguments (in fact, I disagree with some). The crucial point, though, is that we need to separate questions about which forms of discretion, assigned to which institutions, are good or bad, from the general evaluation of discretion from the perspective of legality.

What matters here is that not every form of discretion goes against the rule of law. Discretion involves judgment. It involves a certain space for the decision-maker to deliberate and think on their own. When allowed by law, discretion is exercised within parameters and subject to legal rules and procedures that ensure accountability and the possibility of contestation.[107]

Sometimes, our legal rules grant discretion deliberately. This is not surprising. We sometimes want to have people in charge who make decisions on the basis of their expert judgment, their wisdom, or their prudence (in fact, discretion is closely connected to these virtues).[108] No constitutional democracy imagines that presidents, prime ministers, cabinet secretaries, or scientific and

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(1969).

[104] Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMPLE POLITICAL & CIVIL RIGHTS LAW REVIEW 369, 370 (2010).

[105] Celesta A. Albonetti, *Prosecutorial Discretion: The Effects of Uncertainty*, 21 LAW & SOCIETY REVIEW 291 (1987).

[106] *See* Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489 (2017).

[107] POSTEMA, *supra* note 23 at 30.

[108] H.L.A. Hart, *Discretion*, 127 HARVARD LAW REVIEW 652, 656 (2013). For an account of equity in judicial decision-making along these lines, see Solum, *supra* note 19.

economic experts leading government agencies will operate without space for their own judgment. In these types of situations, discretion is a feature, not a bug, of institutional design.

But sometimes discretion is accidentally granted. It is not part of a deliberate design of institutions but simply an accident generated by ambiguous or vague rules, for example.[109] But even this type of discretion might be compatible with the rule of law. In these situations, the rule of law demands public officials to use their power in good faith and in ways that are open to evaluation and contestation through legal and institutional channels.[110] It also demands that they decide in a responsible manner, in the service of their public role.[111]

All of this means that discretion can still be brought under the rule of law: discretion under the rule of law requires the making of these discretionary decisions on the basis of stable, clear, public, and general legal rules.[112] As Paolo Sandro argues, within a system that complies with the rule of law, discretionary power is a power created by law, limited by legal norms and principles—and the abuse of that power is itself policed and controlled by law.[113]

Still, we should acknowledge that there is some tension between the rule of law and discretion, particularly when discretion is exercised by reference to political considerations.[114] But the tension should not be resolved by acting like discretion is always undesirable or pretending like it is entirely avoidable. Instead, it should be resolved by thinking carefully and creatively about the best mechanisms to ensure accountability and the possibility of contestation. This is the stuff that experts in administrative law discuss all the time, and they should keep discussing it. In the American legal system, it is central to the review of administrative action under the Administrative Procedure Act and other bodies

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[109] The distinction between these two types of discretion is helpfully discussed by PAOLO SANDRO, THE MAKING OF CONSTITUTIONAL DEMOCRACY: FROM CREATION TO APPLICATION OF LAW 159–160 (2021). A similar and very helpful discussion—expressed somewhat differently—can be found in JOSEPH HEATH, THE MACHINERY OF GOVERNMENT: PUBLIC ADMINISTRATION AND THE LIBERAL STATE 264–278 (2020).

[110] GOWDER, *supra* note 31 at 7.

[111] Hart, *supra* note 108 at 657.

[112] Raz, *supra* note 22 at 215.

[113] SANDRO, *supra* note 109 at 159.

[114] RUNDLE, *supra* note 21 at 51.

of law. But the fact that we are having these debates about how to control discretion and avoid its abuse shows that we all acknowledge that there should be *some* discretion in our legal system.[115] What the rule of law demands is for discretion to be legally generated, controlled, and justified.

v. The Separation of Powers

The idea of the separation of powers is, like the rule of law, central to the modern Western political tradition.[116] It is also central to modern constitutional democracy.[117] Strictly speaking, and as a purely conceptual matter, the separation of powers is not itself part of the rule of law. We could have different powers, none of them acting according to law, and we could also have compliance with the rule of law with an institutional allocation of powers that looks very different from the traditional separation of powers. There is no necessity here. And yet the ideals are—as a matter of political history and underlying motivation—closely connected to each other. From the perspective of the rule of law, the thought has been that the separation of powers is practically necessary, or at least extremely useful, to secure the ideal of legality.

What is the separation of powers? Kant offers one articulation. On his view, the separation of powers is the distinction between three powers with distinct functions: a legislative authority that creates law; an executive authority that rules in conformity to law; and a judicial authority that decides cases according to the law.[118]

Why should power be separated in this way? According to Madison's famous articulation, the accumulation of all powers in the same person or institution would be "the very definition of tyranny."[119] This isn't much of an argument as a matter of pure logic. But the connection between accumulated power and tyranny is certainly plausible if we look at the historical experiences of absolute monarchy and dictatorship all around the world. The separation of

[115] Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1488 (1983). *See also* Ronald A. Cass, *Vive La Deference: Rethinking the Balance between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294, 1295 (2015).
[116] *See* CHARLES DE SECONDAT BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS (1989).
[117] SANDRO, *supra* note 109 at 261.
[118] KANT, *supra* note 44 at 45.
[119] James Madison, *The Federalist No. 47 - The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts*, *in* THE FEDERALIST PAPERS , 243 (2009).

powers is indeed an attempt to limit power and to make it more accountable by dividing it, and thus it is not surprising that people have thought it is connected to the rule of law.[120]

From this perspective, the rule of law can be seen as one central reason that explains why the separation of powers is important.[121] Indeed, if the rule of law demands the impartial administration of public, general rules, in a way that aims to ensure whether (non)compliance with such rules has occurred and that the legally appropriate sanction or effect will be attached to said (non)compliance, then the connection between this ideal and the separation of powers becomes quite clear.[122] Again, this is not a conceptual connection—the claim is not that the separation of powers is *part of* the rule of law. Instead, it is a claim about what type of institutional configuration is likely to ensure, as a factual matter, the realization of this ideal. Again, like the rule of law in general, this claim is not just about setting out limits or impediments on the exercise of political power. It is also about channeling that power effectively.[123]

As an ideal for institutional configuration, the separation of powers distinguishes between different types of tasks for political institutions: legislative tasks for the legislature, adjudicative tasks for the judiciary, and administration, implementation, and enforcement tasks for the executive.[124] The rule of law, meanwhile, is concerned with securing the conditions for effective guidance. And, as Raz puts it, an independent judiciary that performs its adjudicative role without undue influence from other powers is essential for ensuring those conditions.[125] From the perspective of guidance, then, it is quite plausible to think that there is a strong connection between the separation of powers and the rule of law. The same is true from the perspective of the other, connected element of the rule of law—the subjection of power to law.[126]

III. ITS VALUE

[120] RUNDLE, *supra* note 21 at 37.
[121] Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433, 445 (2013).
[122] Waldron, *supra* note 60 at 7–8.
[123] *See* Waldron, *supra* note 121 at 457.
[124] *Id.* at 459–460. *See also* WEINRIB, *supra* note 56 at 186–189.
[125] Raz, *supra* note 22 at 216–217.
[126] POSTEMA, *supra* note 23 at 121.

Why, you might wonder, should we care about the rule of law and its requirements? Why should the accusation that some action, practice, or institution is incompatible with the rule of law carry normative weight? This is the question about the value of the rule of law. Why is the virtue of legality valuable, important, or weighty? This Part answers that question.

One familiar and plausible answer to the question, as far as it goes, is that the rule of law is an antidote to, or at least a protection against, the arbitrary exercise of power.[127] Indeed, I have already argued that the rule of law is a republican ideal precisely in that it denies the acceptability of arbitrary power and the domination it involves.

I say this answer is fine as far as it goes because in some sense it pushes the question elsewhere: why should we care about arrangements that avoid arbitrary power? Why is it a good thing to arrange things in such a way that arbitrary power is less likely to exist? This might seem like a silly question, but it is not. As the current situation in much of the world teaches us, it is urgent to be able to answer it clearly and compellingly Thus, the argument in what follows agrees with Krygier in that the core concern of the rule of law is arbitrary power.[128] But I want to set out, as clearly as possible, why this concern should also be the concern of every reasonable citizen: why we all have reason to care about the rule of law and its opposition to arbitrary power. That argument will ultimately take us back to the idea that the rule of law is the rejection of arbitrary power or tyranny, but only once we have articulated the good things that, in avoiding arbitrary power, the rule of law secures for us.

i. Limited Intrinsic Value

We can start with the intrinsic value of the rule of law. There are many philosophical discussions about what it means for something to have intrinsic value.[129] But, setting those controversies aside for now, what I mean here is something relatively straightforward: there is something morally significant *in the mere fact* of subjecting human interaction, and particularly the interaction of

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[127] Krygier, *supra* note 72 at 760.

[128] *Id.* at 761.

[129] *See generally* Michael J. Zimmerman & Ben Bradley, *Intrinsic vs. Extrinsic Value*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2025), https://plato.stanford.edu/entries/value-intrinsic-extrinsic/.

those in power with those subject to it, to law.[130]

This might sound a bit bizarre. But to get a sense of what I mean, we can start with an observation thar arises out of Kant's views about legal authority. On a Kantian view, states' claim to legitimate authority—and to the use of coercion to enforce their law—stems from the fact that, "in their absence, arbitrary individual force prevails, even if people act in good faith."[131] The central question, from this perspective, is how individuals with different ends and projects could pursue them in conditions of equal freedom.[132] And the answer to that central question, under the Kantian view, is positive law.[133] Positive law can "authoritatively and impartially" decide controversies between private individuals.[134] In the absence of authoritative settlement, questions about individual rights are affected by problems of indeterminacy and disagreement (and the resultant risk of unilateral imposition of any particular individual's private judgment).[135] Law, from this perspective, authoritatively determines how agents ought to interact with each other, and the mere fact that it acts in this way as an impartial arbiter is morally valuable.

While significant, this value is limited. It is compatible with all sorts of bad things. And it does not fully show why we should care about the rule of law. Nevertheless, it is a small but important part of the story about the value of the rule of law.[136] All other things equal, things are morally better when we subject the exercise of power to law—even if the law's content is in some ways morally objectionable.

One way to think about the relationship between the intrinsic value of the rule of law and the multiple ways in which the content of the law might be

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[130] Similarly, Michael Sevel, *The Values of the Rule of Law*, *in* ROUTLEDGE HANDBOOK OF THE RULE OF LAW , 141 (Michael Sevel ed., 2024).
[131] Arthur Ripstein, *Authority and Coercion*, 32 PHILOSOPHY & PUBLIC AFFAIRS 2, 3 (2004).
[132] *Id.* at 10–11.
[133] See Waldron, *supra* note 46.
[134] ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 218 (2012).
[135] Sari Kisilevsky, *Kant's Juridical Conception of Freedom as Independence*, 29 STUDI KANTIANI 41, 50 (2016); Martin Stone, *Kant's Apparent Positivism*, *in* FREEDOM AND FORCE: ESSAYS ON KANT'S LEGAL PHILOSOPHY 165, 169 (Martin Stone ed., 2017).
[136] For a similar argument that emphasizes that this intrinsic value is *conditional*, *see* Colleen Murphy, *Lon Fuller and the Moral Value of the Rule of Law*, 24 LAW AND PHILOSOPHY 239, 252 (2005).

defective (and therefore why this intrinsic value, while significant, is limited) is to go back to Raz's discussion of the rule of law. He writes:

> "A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. This does not mean that it will be better than those Western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law."[137]

Raz is undoubtedly right about this observation. But the observation does not suggest, as one might (too quickly) infer, that the rule of law lacks intrinsic value. The observation, rather, should lead us to realize that the intrinsic value of the rule of law is limited. If the rule of law matters, it must be because it is helpful in realizing other values too. I turn to these sources of the rule of law's instrumental value in the next section.

ii. Instrumental Value: Not Sufficient or Necessary, but Useful

The rule of law is not a perfect guarantee of anything. It is neither necessary in all possible settings nor sufficient, by itself, to secure the realization of any values.[138] Still, the rule of law can be a useful instrument or means to realize, or facilitate the realization of, important political values. A legal system might comply with the rule of law and still fail to be democratic, just, egalitarian, efficient, humane, etc. We should not mix up the rule of law with "the rule of *good* law."[139] Still, the rule of law might make it easier to have good law. That is the claim that I want to explore here, from the perspective of a variety of political values.

A useful starting point here is Fuller's suggestion that there might be a

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[137] Raz, *supra* note 22 at 211.

[138] On this two possibilities, *see* Sevel, *supra* note 130 at 142.

[139] Andrei Marmor, *The Ideal of the Rule of Law*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 666, 666 (2010). This is a common observation in the rule of law literature. *See*, *e.g.*, Raz, *supra* note 22 at 216, 219–220.

closer affinity between the rule of law and good law than between the former and evil law. As he argued, when those in power "are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward good."[140] In using this quasi-empirical and probabilistic claim, Fuller is clearly making an argument that cannot be falsified by making the obviously correct observation that, in particular cases, the rule of law is compatible with injustice, inefficiency, oppression, and many other evils.[141]

On Raz's view, by contrast, the rule of law is a limited virtue with, mostly, a negative function: to limit the harm that law itself might do to freedom and human dignity. The rule of law is also not, according to Raz, of *ultimate* value. Because of this, it can also be the case that the pursuit of other valuable goals is sometimes at odds with compliance with the rule of law.[142] On this type of view, the rule of law is morally valuable only to the extent that the aims that the legal system pursues through it are morally valuable.[143]

I tend to agree with Fuller here. It is certainly true that there is no necessary or universal causal connection between the rule of law and justice, efficiency, etc.[144] And sometimes those who see an affinity between the rule of law and justice and other virtues go too far in their belief in the likelihood that both will tend to "travel together."[145] But this awareness of the limits of Fuller's observation is compatible with what I would take as the deeper truth within it: that the rule of law is more than a merely negative virtue with limited value, because it is a *particularly useful* means for achieving the realization of other political values. To the extent we care about such values (as we should), and unless the structure of our social world radically changes, we should also care about the rule of law.

1. The Economics of the Rule of Law

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[140] Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARVARD LAW REVIEW 630, 636 (1958).

[141] Frederick Schauer, *Lon Fuller and the Rule of Law*, *in* ROUTLEDGE HANDBOOK OF THE RULE OF LAW , 117 (Michael Sevel ed., 2024).

[142] Raz, *supra* note 22 at 228–229.

[143] For discussion, *see* Murphy, *supra* note 136 at 246–248.

[144] Maris Köpcke Tinturé, *Concept and Purpose in Legal Theory: How to "Reclaim" Fuller*, 58 THE AMERICAN JOURNAL OF JURISPRUDENCE 75, 79 (2013).

[145] *See*, *e.g.*, POSTEMA, *supra* note 23 at 103.

There are many methodological difficulties involved in attempts to ascertain the impact of the rule of law on growth and economic development.[146] Nevertheless, at a very general level, there is widespread agreement that stable and robust legal and political institutions can have a significant impact on countries' economic performance.[147] Moreover, as a historical matter, the possibility of a large-scale, industrialized, and advanced economy seems connected to the state's ability to effectively establish the framework for market interaction and to regulate it.[148] Still, it is generally quite hard to figure out in which direction causation goes: are institutions the determinant of economic growth, or the other way around?[149]

Setting aside the issue of causation and the complex question about how to establish causal connections and mechanisms between institutions and economic success, most economists and social scientists agree that impartial enforcement of predictable legal norms regarding property and contract have positive effects on investment and trade.[150] Moreover, when property rights are protected from the risk of unlawful expropriation, there are higher levels of growth, productivity, and investment.[151] Similarly, economists like Douglass North argue that the effective legal enforcement of contractual agreements is a central determinant of efficient markets and economic growth.[152]

The previous paragraph should already provide a hint regarding a deep theoretical problem in the economic and social scientific literature that is—ostensibly—concerned with the rule of law. Economists and social scientists more generally tend to equate the rule of law with protecting property rights

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[146] *See generally* Kevin Davis & Michael Trebilcock, *The Relationship between Law and Development: Optimists versus Skeptics*, 56 AMERICAN JOURNAL OF COMPARATIVE LAW 895 (2008); Stephan Haggard & Lydia Tiede, *The Rule of Law and Economic Growth: Where Are We?*, 39 WORLD DEVELOPMENT 673 (2011).

[147] *See*, *e.g.*, Daron Acemoglu, Simon Johnson & James A. Robinson, *Institutions as a Fundamental Cause of Long-Run Growth*, 1 *in* HANDBOOK OF ECONOMIC GROWTH 385 (Philippe Aghion & Steven N. Durlauf eds., 2005).

[148] Ding Chen & Simon Deakin, *On Heaven's Lathe: State, Rule of Law, and Economic Development*, 8 LAW AND DEVELOPMENT REVIEW 123, 124 (2015).

[149] Stephan Haggard, Andrew MacIntyre & Lydia Tiede, *The Rule of Law and Economic Development*, 11 ANNUAL REVIEW OF POLITICAL SCIENCE 205, 208 (2008).

[150] *Id.* at 206.

[151] *Id.* at 208.

[152] Douglass C. North, *Institutions, Ideology, and Economic Performance*, 11 CATO J. 477, 481 (1991).

(and perhaps contract enforcement). This obviously seems to ignore conceptual possibilities: non-capitalist economies that nevertheless abide by the rule of law and, conversely, capitalist economies that violate aspects of the rule of law.[153] More generally, a conception that focuses exclusively on property and contract rights is a very narrow and impoverished conception of what the rule of law is.[154]

As impoverished as it is, this conception almost dominates most economists' work on the rule of law. Take, for example, the following argument (in a paper supposedly about "the rule of law"):

> "[T]here seems to be a reasonably strong consensus that property rights matter, supported by both cross-national and survey work. But there is also concern that the security and enforcement of property rights might be wholly endogenous to some antecedent political conditions, or that the effects of property rights are at least conditional on other, complementary institutions."[155]

For anyone who doesn't make the mistake of equating the rule of law and property rights, this is obviously true—and perfectly compatible with the idea that the rule of law matters. As I argued above, the rule of law refers to a series of ideas, and those ideas are not just about the law in the books but about law in action—about, in other words, how public officials actually behave. This suggests that a focus on formal institutions without looking at their enforcement is a mistake (as much of the literature now recognizes).[156] More importantly, it suggests that the rule of law cannot be narrowed down to the protection and enforcement of property rights.

The impoverished conception of the rule of law as the enforcement of property rights and the associated tendency to equate the rule of law with formal institutions is not just a theoretical problem. In fact, at least some of the practical problems in rule of law reform efforts are connected to this issue. Indeed,

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[153] GOWDER, *supra* note 31 at 2.

[154] *See generally* JEREMY WALDRON, THE RULE OF LAW AND THE MEASURE OF PROPERTY (2012).

[155] Haggard, MacIntyre, and Tiede, *supra* note 149 at 209.

[156] Okezie Chukwumerie, *Rhetoric versus Reality: The Link between the Rule of Law and Economic Development*, 23 EMORY INTERNATIONAL LAW REVIEW 383, 388 (2009); Christopher Woodruff, *Measuring Institutions*, *in* INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION , 106 (Susan Rose-Ackerman ed., 2006).

because of a widespread perception in international policy circles that the rule of law (narrowly understood as formal institutions concerned with the enforcement of property rights) was *the* central determinant of economic success, there were many projects—driven by international institutions like the World Bank—at the end of the 20th century that attempted to reform institutions across the world to implement the rule of law (narrowly understood). In many circumstances, these reform efforts failed to produce the expected economic effects.[157] A significant part of the explanation for this failure is that securing the rule of law is not just a matter of transplantation of legal texts and institutions (a point I shall return to below).[158] But a deeper explanation is that the rule of law is not just about legal texts or about formal institutions concerned with the enforcement of property rights. It is an idea of subjection of power to law—an idea that is not as easy to implement as the transplantation of legal codes.

The problem of countries that have experienced economic success *without* the rule of law—such as China and Singapore—might seem more damaging to my argument that the rule of law is a useful instrument for achieving it.[159] But, again, we should be willing to accept that the rule of law is neither necessary nor sufficient for securing economic growth. Nevertheless, in the circumstances of large and anonymous societies, the rule of law does have significant virtues as an instrument of economic success.[160] This is a small but nevertheless important part of the reason why we should care about the rule of law. But, of course, if all we care about is economic growth and development, the rule of law might seem disposable. Thankfully, though, we care about other values too.

2. The Morality of the Rule of Law: Freedom, Equality, Justice

Law constrains our behavior. In this narrow sense, a legal system might seem to decrease (at least some aspects of) our freedom.[161] Still, as Jeremy Waldron

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[157] Chen and Deakin, *supra* note 148 at 126–127.

[158] *Id.* at 142.

[159] Chukwumerie, *supra* note 156 at 426.

[160] Chen and Deakin, *supra* note 148 at 142.

[161] I say "some aspects of" to note that what I write is mostly true about *negative freedom* (i.e., the absence of external constraints). But legal constraints can also increase (at least some aspects of) positive freedom (i.e., the freedom to act and fulfil our own potential) and republican freedom (i.e., freedom from domination). On these aspects or conceptions of freedom, *see* ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY (1959); Matthew H. Kramer, *Freedom and the*

argues, freedom is possible if people know how they are expected to act under the law (and how they should act if they want to avoid detrimental effects) and therefore can plan their affairs.[162] This explains why the rule of law can be seen as an answer to the question about how we can foster the conditions for human freedom.[163] The rule of law does not say that we will not be coerced—it says that we can only be coerced, in Dicey's words, "for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land."[164]

The connection between the rule of law and freedom is closely related to the idea of predictability. Within the liberal tradition, public officials are in positions that allow them to use the coercive power of the state and therefore to dramatically affect our lives. The possibility of this interference is a concern because of individuals' autonomy, and more specifically given the impact that coercion (and its threat) can have on their ability to lead their life according to their own conception of how it should go.[165] In this way, the rule of law allows individuals to interact with those in power in ways that are compatible with a commitment to the notion that each person is entitled to determine their own ends and life plans.[166] The rule of law provides a certain stability that enables individuals to plan their lives, fostering a kind of personal freedom tied to the predictability of political action.[167]

But predictability is only part of the contribution that the rule of law makes to human freedom. A second aspect is concerned with the possibility that the law will be applied by ordinary people to themselves: that instead of bossing them around, the law will rely on their own agency and their own ability to deliberate, reason, control, and modulate their behavior in response to norms addressed to them.[168] In other words, when the law addresses us as potential self-appliers of the law, it also addresses us as agents that can deliberate and decide

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Rule of Law, 61 ALA. L. REV. 827 (2010); PHILIP PETTIT, REPUBLICANISM (1999).

[162] Waldron, *supra* note 60 at 6.

[163] *See* RUNDLE, *supra* note 21 at 26.

[164] DICEY, *supra* note 99 at 110.

[165] Jeremy Waldron, *The Rule of Law in Contemporary Liberal Theory*, 2 RATIO JURIS 79, 84 (1989).

[166] Along these lines, *see* David Dyzenhaus, *Liberty and Legal Form*, *in* PRIVATE LAW AND THE RULE OF LAW , 93 (Lisa M. Austin & Dennis Klimchuk eds., 2014).

[167] Raz, *supra* note 22 at 220–221.

[168] Waldron, *supra* note 91 at 206.

on their courses of action as free agents rather than as objects to be handled.

Joseph Raz discusses the connection between the rule of law and freedom, partly through the notion of dignity, and it is worth spending some time here on his discussion. He says that "observance of the rule of law is necessary if the law is to respect human dignity."[169] This form of respect is evinced by the fact that the rule of law treats people as agents capable of rational deliberation and of planning their future. Nevertheless, Raz argues, observance of the rule of law is not a guarantee that the law will not violate our dignity (even if deliberate violation of the rule of law violates human dignity). True, the rule of law treats us as agents—it makes it the case that law guides our behavior by affecting its surrounding circumstances and affecting our rational deliberation.[170] But one can treat human beings as agents in this sense and nevertheless subject them to laws that severely undermine their freedom.[171]

All of this is true, again, as a matter of conceptual possibility. The rule of law is not sufficient to guarantee that human freedom is respected. But as Raz points out, the violation of the rule of law will harm or at least threaten freedom. Particularly in the circumstances of large and complex societies, the rule of law allows those in power to achieve their goals (when it comes to the guidance of people's behavior) in ways that do not ignore, but rather presuppose, the fact that we are agents who can make their own decisions and plan their own affairs. Again, this is compatible with oppression and the violation of freedom of some or many of us. But the violation of the rule of law is inherently incompatible with respect for everyone's freedom.

This leads me to a connected idea. The rule of law is, by its nature, *egalitarian* in at least a limited sense: the law is the same for everyone, and no one can claim to be above the law.[172] This egalitarian aspect of the rule of law is limited because it is compatible with socioeconomic and political inequality. Moreover, it is compatible with forms of treatment that are unequal: the rule of law treats all persons the same by subjecting to the same body of law, but the content of that body of law might contain many rules that allow for the unequal

[169] Raz, *supra* note 22 at 221.
[170] *Id.* at 222.
[171] *Id.* at 221–222.
[172] WALDRON, *supra* note 51 at 2.

treatment of classes of those same persons.[173]

Thus, the rule of law is not a perfect guarantee of equality. But it does require that the law, whatever its content, be applied without any consideration to class, racial, or personal distinctions.[174] This is particularly captured by the rule of law principle of generality: when the law is a framework of general norms that are applied as such, the law establishes a universal standard of behavior that applies to everyone equally.

While importantly egalitarian in this respect, we should be extremely careful here. So I want to emphasize that the rule of law is compatible with all sorts of material inequalities. And it is also compatible with legal norms that fail to treat us as equals. We should thus be wary of going too far in the direction of overreading egalitarian commitments into the rule of law. In the American scholarly literature, for example, Paul Gowder argues—correctly—that the principle of generality captures an egalitarian idea: we are all equally subject to the law. But from this correct observation he moves on to argue that

> "generality is necessary and sufficient for the state to satisfy three uncontroversial egalitarian demands. First, generality satisfies the demand that the state be free from legal caste…. Second, generality is necessary and sufficient to satisfy the demand that the costs of legal public goods be reciprocally borne…. Third, generality is necessary to satisfy the egalitarian demand that the interests of all subjects of law be counted. A state that does not satisfy the principle of generality has laws that are not justifiable to some subjects, that is, that treat those subjects' interests as dispensable, as not worthy of consideration in making public policy…. Making a general law is a way of respecting the right that each has to have his or her interests matter for the community that proposes to command his or her behavior."[175]

I believe that Gowder is right that generality is connected to a certain egalitarianism. But I find it implausible to think that generality is "necessary and sufficient" to ensure that the costs of the public goods associated to law are borne

[173] POSTEMA, *supra* note 23 at 60.
[174] *Id.* at 62.
[175] GOWDER, *supra* note 31 at 40–41.

in an egalitarian manner. And by a similar token, I think that a legal system that complies with the rule of law, including the principle of generality, is compatible with the treatment of certain subjects' interests as unworthy of consideration and their oppression.[176]

Thus, we should avoid overstating the connection between the rule of law and equality. Still, the connection exists: the rule of law is egalitarian in one sense: it treats everyone with the same set of standards and "flattens" differences in social status by ignoring them (unless they are reflected in the content of the law).[177] But I would disagree with a perspective that equates the egalitarian aspects of the rule of law with egalitarianism in the content of its rules. Of course, Gowder is not confused about this: he explicitly frames his account of the rule of law as one under which legal rules don't make morally questionable distinctions between individuals.[178] Nevertheless, I think we are better off separating the content of the law from the rule of law. Of course, the law should be consistent with what equality demands. But a legal regime that fails to abide by those demands (as, at least under many plausible conceptions of equality, most legal regimes do) can still be consistent with the rule of law.

The same type of approach makes sense when it comes to justice. The questions about what justice is, what it requires, its scope, its forms, and so on, are endless and have generated a massive literature in political philosophy.[179] But let's assume, with Rawls, that justice is a central ("the first," he wrote) virtue of social institutions.[180] This means that the demands of justice are crucial to morally evaluate our social arrangements in general, and our legal arrangements in particular. The demands of justice are, at a high level of abstraction, the demands of giving each individual their due—in the case of legal institutions, the demands generated by the *desideratum* to treat everyone as they ought to be treated.[181] Of course, this merely opens up the crucial question of what it is that

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[176] Waldron, *supra* note 165 at 93.

[177] Nicos Stavropoulos, The Rule of Law (Forthcoming, Jurisprudence) (2025), https://papers.ssrn.com/abstract=5550060.

[178] *See* Paul Gowder, *The Rule of Law and Equality*, 32 LAW AND PHILOSOPHY 565, 566 (2013).

[179] *See generally* David Miller, *Justice*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta & Uri Nodelman eds., 2025 ed. 2025), https://plato.stanford.edu/archives/spr2025/entries/justice/.

[180] RAWLS, *supra* note 37 at 3.

[181] This builds upon JUSTINIAN, INSTITUTES 1.1 ("*Iustitia est constans et perpetua voluntas ius*

justice actually requires—again, one of the central and most enduring topics of political philosophy.

But whatever it is that justice requires, there has always been a perceived connection between justice and law, and sometimes that connection has been cashed out in the notion of the rule of law.[182] One articulation of this connection is found in Hart's assertion that, "though the most odious laws may be justly applied, we have, in the bare notion of applying a general rule of law, the germ at least of justice."[183] Going even further, Hart suggested that the principles of the rule of law were themselves "requirements of justice."[184] As John Gardner suggests, this is not quite right. Many of the elements of the rule of law are not themselves demands of justice (think about stability, prospectivity, or generality). Instead, it is more accurate to say that the demands of justice will be likelier to be violated when the rule of law is violated—the connection is not one of necessity but rather of empirical regularity.[185]

Of course, whether following the law will ensure justice depends on the content of the law.[186] And while judges and legal officials might ignore the law to achieve unjust results, they might also apply unjust laws stringently in order to achieve injustice.[187] So, where do we find the explanation for the empirical regularity, the probabilistic connection, between compliance with the rule of law and the achievement of justice? One possibility, suggested by Leslie Green, is that "a functioning legal system is often *a means to justice*, and sometimes a humanly necessary means."[188] Legislatures, courts, statutes, and so on are part of the institutions and instruments that we typically need in order to deliver justice.[189] As Green puts it, in our societies, justice practically requires the presence of "institutions that make binding decisions about the application of

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suum cuique tribuendi" ["Justice is the constant and perpetual will to render to each his due"]), in *The Institutes of Justinian* 1 (J.B. Moyle trans., 5th ed. 1913) (533).

[182] *See generally* Waldron, *supra* note 14. *See also* John Gardner, *Hart on Legality, Justice, and Morality*, *in* LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL , 232 (2012).

[183] HART, *supra* note 73 at 206.

[184] *Id.* at 207.

[185] Gardner, *supra* note 182 at 231.

[186] Leslie Green, *The Germ of Justice*, *in* THE GERM OF JUSTICE: ESSAYS IN GENERAL JURISPRUDENCE , 153 (2023).

[187] *Id.* at 168.

[188] *Id.* at 170.

[189] *Id.* at 173–174.

rules to individual cases."[190]

All of this is intimately connected to the fact that legal systems typically provide mechanisms for the fair resolution of disputes on the basis of legal rules and standards.[191] But the rule of law's contribution to justice goes beyond the resolution of disputes. Consider distributive justice. It is almost impossible to think that we could satisfy the demands of distributive justice—ensuring that the benefits and burdens associated to social life are fairly distributed—without a robust system of public taxation, expenditure, and transfer. And as I have already argued, it is almost unthinkable that we could have a well-functioning system of taxation, expenditure, and transfer without the rule of law, at least in our circumstances.[192]

Yet still the rule of law *is not* the rule of just law. Awareness of this can invite a certain lack of enthusiasm about the rule of law. Consider the argument by former Canada Supreme Court Justice Rosalie Abella: as she argues, the significance of philosophical debates about the rule of law "is lost on most lawyers, let alone members of the public."[193] Instead of the "semantically ambiguous rhetoric" of the rule of law—compatible with "apartheid, segregation, and genocidal discrimination"[194]—we should focus on what actually matters (justice).[195] I frankly see no reason to adopt this strategy. Certainly, justice matters a lot. But that does not mean that it is the only thing that matters. And the rule of law is certainly compatible with multiple forms of injustice. But again, that does not mean that it is irrelevant. More strongly, it is highly unlikely that we could achieve anything like justice without the existence of legal institutions and rules and their constraint over those who exercise power.

3. The Political Value of the Rule of Law: Disagreement and Democracy[196]

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[190] *Id.* at 155.

[191] Civil recourse theory can be read as a version of this idea in tort law. *See generally* GOLDBERG AND ZIPURSKY, *supra* note 34.

[192] *See* Liam Murphy, *Institutions and the Demands of Justice*, 27 PHILOSOPHY & PUBLIC AFFAIRS 251, 263–264 (1998).

[193] Rosalie Silberman Abella, *International Law and Human Rights: The Power and the Pity*, 55 MCGILL L. J. 871, 877 (2010).

[194] *Id.*

[195] *Id.* at 878.

[196] My distinction between the morality of the rule of law and the political value of the rule of

Disagreement about politics is a central aspect of our experience as democratic citizens. And this disagreement is precisely what we should expect when reasonable people reason freely.[197] When we reason freely, indeed, we end up disagreeing about which standards should govern us, and therefore we need procedures and practices to determine what those standards should be, and to later implement them. More importantly, we need a practice that—as Waldron puts its—"is resilient in the face of disagreement," particularly the disagreement of those in charge of applying our collectively determined standards. That is precisely the role of the rule of law in a democratic system.[198]

As Waldron goes on to explain, the rule of law requires public officials to abide by and apply the law even when their own personal judgment is contrary to the content of that law.[199] This goes back to the earlier opposition we explored between the rule of law and the state of nature: the task of enacted law is precisely to replace the disagreement and conflict that characterize the state of nature with an authoritative determination.[200] In a democracy, moreover, this authoritative determination is taken to be authoritative not because it is the determination that every single citizen would agree with, but rather because it is a determination that arises as a reasonable resolution of disagreement through a process in which citizens have been able to participate.[201]

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law might seem spurious: whatever is valuable *politically*, one might think, is valuable only and to the extent that it also is valuable *morally*. I am not certain that that is the case—there is a long tradition of thought that makes plausible arguments about a distinctively political normativity. *See*, *e.g.,* Mike Gadomski, *Making Sense of Political Normativity*, 30 JOURNAL OF ETHICS AND SOCIAL PHILOSOPHY (2025); Bernard Williams, *Realism and Moralism in Political Theory*, *in* IN THE BEGINNING WAS THE DEED: REALISM AND MORALISM IN POLITICAL ARGUMENT 1 (Geoffrey Hawthorn ed., 2005). More importantly, even if there is no distinct domain of political normativity and political value is just moral value, it is still perfectly plausible, I think, to draw some distinction between substantive moral values that bear on the arrangements and structure of society in general and substantive moral values that bear specifically on the political processes and practices of that society. My concern here is with the rule of law's contribution to political culture and processes understood narrowly as the culture and processes concerned with the channeling, deliberation, and procedural resolution of our political disagreements.

[197] JOHN RAWLS, POLITICAL LIBERALISM 54–58 (1993).

[198] Waldron, *supra* note 46 at 1538.

[199] *Id.* at 1539.

[200] *Id.* at 1545.

[201] Jeremy Webber, *A Democracy-Friendly Theory of the Rule of Law*, 16 HAGUE J RULE LAW

This takes me to a more general observation about the relationship between the rule of law and democracy. Of course, a healthy democracy depends on robust respect for freedoms of speech, association, and assembly, as well as many other preconditions. But the rule of law allows for certainty about lawful behavior and unlawful behavior and for the constraint of the behavior of those in power in ways that are obviously conducive to a healthy democracy.[202] Perhaps more importantly, the rule of law allows democratic majorities to govern social life effectively and in a way that avoids arbitrary power.[203]

Gerald Postema argues that, although the rule of law can exist without democracy (even though the motivations that underlie democracy are connected to those that underlie the rule of law), democracy cannot exist without the rule of law.[204] I think that might be an exaggeration. Not only are the rule of law and democracy distinct ideals (as Postema recognizes). A democracy that does not comply with the rule of law is certainly imaginable.[205] The rule of law, in fact, is concerned with people as subjects of the law rather than (as in democratic theory) its (mediated) makers.[206] That does not mean that the rule of law is irrelevant for democracy. It is its means—in fact, it is the means by which democratic rule can fully uphold a commitment to individual freedom. This is compatible with the claim (far humbler than Postema's) that democracy and the rule of law can reinforce each other.[207] For example, as Gowder argues, perhaps the very practices of reason-giving and constraint by law that the rule of law entails might lead to a useful learning process whereby participants in the legal system slowly learn to engage in that form of evaluation regarding the very content (and justice) of their laws—a task that is central to a healthy democracy.[208] This reinforcement, and the related idea that the rule of law facilitates democratic governance, does not suggest (against Postema) that

339, 351 (2024).
[202] *Id.* at 350.
[203] POSTEMA, *supra* note 23 at 111.
[204] *Id.* at 111–112.
[205] *See* Britton-Purdy, *supra* note 1 at 313.
[206] *Id.* at 312. *But see Id.* at 314–315.
[207] *See* Roberto Rigobon & Dani Rodrik, *Rule of Law, Democracy, Openness, and Income*, 13 ECONOMICS OF TRANSITION 533, 538–539 (2005).
[208] Gowder, *supra* note 178 at 154.

democracy *requires* the rule of law.

4. The Rule of Law Against Tyranny

Despite the connections I have drawn between the rule of law and other political values, the central political contribution of the rule of law, I would argue, is its displacement of tyranny. Here, I end up in the same place as many other rule of law theorists that contrast the rule of law and arbitrary power. Nevertheless, I have taken a somewhat indirect route to make this argument—explaining, first, the various contributions of the rule of law as an instrument of other political values. This is not to suggest that these two argumentative strands are independent: on the contrary, the rule of law facilitates our realization of the demands of justice and freedom and our achievement of economic success in part *precisely because* it denies tyrannical power. In other words, the rule of law's displacement of arbitrary power is not an isolated moral achievement; it is the structural precondition that allows law to effectively serve as an instrument for equality, justice, freedom, and economic development. Now that we have explored that instrumental role, we can turn to the rule of law's value in terms of its displacement of tyranny.[209]

The concept of tyranny is not the most salient in contemporary political thought. It has been replaced by other notions like *dictatorship* and *authoritarianism*.[210] But I think it is important to reclaim the idea of tyranny, particularly when it comes to discussions of the rule of law, because one straightforward and simple understanding of *tyranny* is that it is power without legal restraints.[211]

It is central to tyranny that it systematically violates legal and constitutional constraints through the arbitrary exercise of political power.[212]

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[209] The reason for this argumentative strategy is partly about persuasion: arguments about the rule of law that go too quickly towards the avoidance of arbitrary power or tyranny can seem less powerful when they are not preceded by a more concrete argument about the instrumental value of that avoidance.

[210] Xavier Márquez, *Ancient Tyranny and Modern Dictatorship*, 87 THE REVIEW OF POLITICS 67, 68–69 (2025); Cary J. Nederman, *Three Concepts of Tyranny in Western Medieval Political Thought*, 14 CONTRIBUTIONS TO THE HISTORY OF CONCEPTS 1, 1 (2019).

[211] *See* Sian Lewis, *Tyranny*, BRITANNICA, https://www.britannica.com/topic/tyranny (last visited Nov. 14, 2025).

[212] MARIO TURCHETTI, TYRANNIE ET TYRANNICIDE DE L'ANTIQUITÉ À NOS JOURS 32–33

This notion of tyranny arose in Greek thought, in which the general tendency was to see tyranny as an arbitrary form of individual political power (typically opposed to monarchy, a legally legitimate form of individual political power).[213] On this classical Greek view, tyranny was the unconstrained and unjust rule of a single (ethically bad) individual.[214] The tyrant was the "bad king," precisely because of his arbitrary and a-legal or illegal rule.[215] But the fact that the arbitrary tyrant is an individual is not central: as the famous phrase "tyranny of the majority" suggests, what's central is the fact of arbitrary, legally unconstrained power.[216] Against this form of (whether individual or collective) tyrannical power, the rule of law reflects a commitment to making law's operation somewhat independent from the will of those in power.[217] Observance of the rule of law blocks "many of the more common manifestations of arbitrary power."[218]

It is important, though, to bear in mind—and we shall come back to this point later on—that the rule of law is not an inherent property of law wherever it exists. Thus, and against the simplistic ideas sometimes associated to it, the notion of the rule of law is not that law can, by itself (as if it were an anthropomorphic agent), eliminate the risk of tyranny. In fact, the rise of "autocratic legalism" shows that the trappings of law, and even of a constitutional democratic legal system, can be instrumentalized and hijacked by autocrats.[219] It is always possible, as recent experiences all over the world suggest, for autocrats to rely on seemingly legal methods and strategies to undermine

(2013). *But see* Nederman, *supra* note 210 at 4.

[213] Márquez, *supra* note 210 at 76.

[214] *Id.* at 77.

[215] *Id.* at 78. This is not to say that tyrants do not (or did not) care about legal rules. As one author writes, "[law] plays a central role in tyranny; the sovereign will as law, legalism masking arbitrariness and rule by law are all present. Law's use is a significant indicator of tyranny. Classical Greek tyrannies were full of law, but this is rule by law and not rule of law where tyrants cloak their actions in superficial legality." AOIFE O'DONOGHUE, ON TYRANNY AND THE GLOBAL LEGAL ORDER 93–94 (2021).

[216] *See generally* TAMÁS NYIRKOS, THE TYRANNY OF THE MAJORITY: HISTORY, CONCEPTS, AND CHALLENGES (2018). *See also* Hannah Arendt, *The Great Tradition: I. Law and Power*, 74 SOCIAL RESEARCH: AN INTERNATIONAL QUARTERLY 713, 714–715 (2007).

[217] WEINRIB, *supra* note 56 at 183.

[218] Raz, *supra* note 22 at 219.

[219] Kim Lane Scheppele, *Autocratic Legalism*, 85 THE UNIVERSITY OF CHICAGO LAW REVIEW 545, 547 (2018).

democracy and the rule of law.[220]

Nevertheless, even this instrumental use of legal forms has its limits and, perhaps more importantly, both recognizes and relies on the value and legitimating force of the rule of law. As Kim Lane Scheppele puts it, autocratic legalism undermines many of the central values of constitutional democracy in a way that, by relying on formal legal mechanisms, acknowledges the significance of those very values. As she puts it:

> "If making laws in a proper way were not so important for generating political legitimacy, the autocrats would not have bothered being so legalistic. Instead, they are trying to capitalize on the normative force of formal constitutional procedures in order to justify their actions."[221]

The fact that the trappings of legality can be used to undermine it should be a strong indication of a fact that I have alluded to: the rule of law cannot sustain itself and is not a fail-proof safeguard against tyrannical power. On the contrary, just like any other political value, the health and robustness of the rule of law depend on our commitment to it.[222] I turn to this point in the next (and final) part of the Article.

IV. SUSTAINING THE RULE OF LAW

Most rule of law theorists address the question of which features and structures a legal system must have in order to comply with this value. But, as Aziz Huq correctly notes, rule of law theorists rarely explain how this value is sustained and how a legal system can satisfy its demands over time.[223]

This omission is unfortunate. The prevention of tyrannical power cannot rest solely on legal institutions. Instead, it requires a politically engaged citizenry that is actively concerned with how political power is exercised.[224] From this perspective, it is a good thing if citizens are concerned with the avoidance

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[220] *Id.* at 547–548.
[221] *Id.* at 562–563.
[222] I explore this issue in more detail in Jiménez, *supra* note 33.
[223] AZIZ Z. HUQ, THE RULE OF LAW: A VERY SHORT INTRODUCTION 60 (2024).
[224] By reference to Hannah Arendt, O'DONOGHUE, *supra* note 215 at 114.

of tyranny, and more broadly if our political culture reflects this concern beyond its institutions.[225] It is important for our shared public culture to be based on allegiance to—and a due recognition of the importance of—the rule of law. Thus, for the rule of law to be viable and stable, it is fundamental that society at large values legality—that its public political culture is a *culture of legality*.[226] By a culture of legality, I mean a background set of beliefs, norms, and values that cherish and support the idea of the rule of law.

I am not the first to note that the rule of law requires this widespread support. As Gowder notes, the rule of law requires, in practice, a widespread commitment to hold those in power to account.[227] Raz makes a larger point along similar lines: all of the central institutions of the rule of law require "a pervasive common culture" that reflects a commitment to respect and abide by the law and to use it as the main shared standard for evaluation in public affairs.[228]

The establishment and viability of such a culture require many contributions from multiple actors. From courts, it requires a sustained practice of subjection of their decisions to the law in a way that is articulated clearly and publicly, and that justifies such decisions by reference to the shared values and norms of the legal culture.[229] From lawyers, it requires a commitment to the rule of law and therefore a serious engagement with their public ethical duties regarding the legal system rather than a narrow and blind commitment to the private interests of their clients.[230] From citizens, it requires a willingness to defend the law collectively, to use their political rights to ensure that the law is enforced against the powerful and that the enforcement of the law has sufficient institutional support.[231] And from public officials, it requires an active deference

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[225] Against ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2011).

[226] I take the phrase from Joseph Raz, *The Politics of the Rule of Law*, 3 RATIO JURIS 331 (1990).

[227] GOWDER, *supra* note 31 at 144.

[228] Raz, *supra* note 226 at 339. *See also* SCOTT HERSHOVITZ, LAW IS A MORAL PRACTICE 145 (2023).

[229] Raz, *supra* note 226 at 336.

[230] *See generally* W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1 (1999); W Bradley Wendel, *Should Lawyers Be Loyal To Clients, the Law, or Both?*, 65 THE AMERICAN JOURNAL OF JURISPRUDENCE 19 (2020).

[231] Paul Gowder, *What the Laws Demand of Socrates—and of Us*, 98 THE MONIST 360, 360 (2015).

and fidelity to the law.[232]

What I have called the culture of legality does not arise spontaneously. It must be cultivated through practices, institutional norms, and patterns of public argument that socialize citizens and officials into the idea that law matters. We sometimes seem to assume that the rule of law will naturally thrive so long as the right formal institutions are in place. But the historical record suggests otherwise: even well-designed institutions decay when the surrounding political environment no longer treats legal constraints as authoritative. In this sense, the sustainability of the rule of law is partly a problem of political education. A society in which people cannot distinguish between law as a public standard and mere partisan preference is one in which the rule of law is permanently at risk.

We should also acknowledge that the rule of law is fragile precisely because it requires a degree of self-restraint that is difficult to maintain in moments of political crisis, even by good faith actors. The temptation to see the law as an obstacle is strongest when citizens are convinced that the stakes are existential—again, even in good faith. In those moments, the culture of legality must be strong enough to counteract a familiar rhetorical strategy that will be offered particularly by political actors who act in bad faith: the idea that legal constraint is an indulgence we cannot afford in our circumstances. Against these arguments, a culture of legality would insist on the notion that fidelity to law is not a luxury or a procedural nicety but a precondition for any stable pursuit of contested political ends.

What I have said so far might seem a bit vague and general. But in fact, it requires something quite specific. As I have argued elsewhere, individual agents—citizens and officials—can have genuine reasons to act according to law when they adopt a commitment—a robust, practical determination—to do so. And one reason why they might and should adopt such commitments is precisely the value of the rule of law. The goods produced by the rule of law depend on a legal system's ongoing efficacy, which in turn requires widespread voluntary compliance, particularly by legal officials. Thus, because agents have reason to value the rule of law, they also have reason to adopt the general commitment

[232] POSTEMA, *supra* note 23 at 66.

needed to sustain it.[233]

But there is another commitment that is required here, which is the commitment of citizens to collectively defend the rule of law against officials who might disregard the law.[234] What this suggests is that, as Kim Lane Scheppele argues, the rule of law cannot just rest on lawyers and judges. It requires an active citizenry that understands, at least in broad terms, how constitutional and legal mechanisms can protect the integrity of their legal system.[235]

This commitment is not automatic. It requires that ordinary people feel that something is at stake for them in the legal system. The rule of law is not enough to sustain itself, and therefore the content of the law also matters.[236] That content has to be such that it makes it likelier that the citizenry at large will be committed to the law and to its defense.[237] Legality cannot be sustained by exhortation alone. It must rely on legal norms and arrangements that people reasonably perceive as fair and adequate.

This takes me to another important observation: in the real world, the rule of law matters to people, to the extent it does, mostly when they experience the danger and the aggression of unconstrained political power.[238] This has the unfortunate consequence that the rule of law's value might be unapparent except when it is too late. What can we do, then, in practice, to ensure that the rule of law is sustained? How can we ensure that we have a widespread culture of legality grounded in citizens' and officials' commitment to the rule of law?

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[233] This is a very short summary of Jiménez, *supra* note 33.

[234] GOWDER, *supra* note 31 at 9.

[235] Scheppele, *supra* note 219 at 583. This is, of course, quite general, and will play out in different ways in different legal systems, and will depend not just on citizens' attitudes but also on how specific features of the legal system impact those attitudes. For a recent analysis of this dynamics in the Chilean case, *see* Marcela Prieto Rudolphy and Sergio Verdugo, *Not a Zombie Constitution: Limited Resilience and Chile's Unfinished Constitutional Journey*, forthcoming in Constitutional Democracy in Crisis? II (Antonia Baraggia, Mark Graber, Sandy Levisnson, & Mark Tushnet eds., 2026).

[236] Noam Gur & Jonathan Jackson, *Procedure–Content Interaction in Attitudes to Law and in the Value of the Rule of Law*, *in* PROCEDURAL JUSTICE AND RELATIONAL THEORY 111, 128 (Denise Meyerson, Catriona Mackenzie, & Therese MacDermott eds., 2020).

[237] Jiménez, *supra* note 33.

[238] Krygier, *supra* note 72 at 757.

I would say that the first thing we need is an active, engaged, and committed legal profession (and not just judges).[239] As Postema argues, lawyers play a hugely important role in the shaping, conservation, and protection of the law.[240] They are also the main intermediaries between the law, citizens, and public officials.[241] In this role, they have the ability (and the responsibility) to preemptively constrain the behavior of their clients through legal advice, to temper public power through advice and their enforcement decisions (in the case of government lawyers), and to actively pursue the control of government action.[242]

The second thing we need is, as so many theorists of the rule of law have argued, an independent judiciary. Judges must apply the law correctly and base their decisions on their reasoned judgements about what the law requires, but for this to be possible they must be independent from external pressures.[243] This means that the education, appointment, and promotion practices and mechanisms in the legal system ought to ensure judicial independence.

Third, and as I have already argued, an actively engaged citizenry is fundamental to protect and sustain the rule of law. Now many citizens might legitimately complain that they have lives to lead—they can't be tuned into politics and live persistently politically vigilant lives. This is both unfeasible and a very bad way to live. But they can certainly vote, and when they do so they should think about the virtues, dispositions, and character of those they vote for.

Which takes me to the fourth element: the rule of law depends crucially on "the character and motivations of those elected or appointed to high office."[244] As Heath notes, while most discussions of the rule of law focus on the judiciary, the executive branch's behavior is hugely important. Courts can only do so much, and even more so than law in general, the law that constrains executive power cannot rest solely on coercive enforcement. It requires an

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[239] POSTEMA, *supra* note 23 at 126.
[240] *Id.* at 127.
[241] *Id.*
[242] *Id.* As Postema notes, lawyers themselves also need constraints. *Id.* at 129.
[243] Raz, *supra* note 22 at 216–217.
[244] Aziz Z. Huq, *Legal or Political Checks on Apex Criminality: An Essay on Constitutional Design*, 65 UCLA L. REV. 1506, 1530 (2018). Cited by POSTEMA, *supra* note 23 at 129.

executive that has internalized the idea of fidelity to law.[245]

And all of these requirements themselves depend on a shared public culture that values and cherishes the law as a constraint on power, even when we disagree with it.[246]

CONCLUSION: WHY RULES MATTER

In a recent book, Barry Lam argues against an excessive emphasis on rules and the sense of certainty they provide, and in favor of discretion and moral responsibility.[247] Similarly, Nicholas Bagley has recently argued against what he calls "the procedure fetish:" the fixation on procedural rules at the expense of effective, timely, and powerful governance.[248] Even before that, John Gardner argued that an excessive legalization of social life can be a threat to the rule of law. [249]

There is certainly a lot to agree with in Lam's concerns about legalism and its displacement of moral judgment, in Bagley's worries about an excessive and harmful focus on procedural regularity in governance, and in Gardner's rule of law argument against the excessive juridification of life.

Nevertheless, the rule of law is a reminder that rules matter enormously, and that social life without them would be impossible, or at least significantly worse.[250] In a large, complex society characterized by the fact of reasonable pluralism, legal rules allow us to dispute, deliberate, and disagree without succumbing to unilateralism. Precisely because political morality is contested, we need public standards that bind the powerful even when they are tempted to collapse law into their own vision of the good or, worse, the unconstrained satisfaction of their self-interest.

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[245] HEATH, *supra* note 109 at 257.

[246] Of course, this does not mean that we should become legalists who avoid the moral evaluation of the law. On the contrary, the idea is that we should be able to distinguish between our moral judgments about the content of the law and our moral judgment of the idea of constraint by law (even by law we find morally objectionable or suboptimal).

[247] BARRY LAM, FEWER RULES, BETTER PEOPLE: THE CASE FOR DISCRETION (2025).

[248] Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 350 (2019).

[249] John Gardner, *The Twilight of Legality*, 43 AUSTL. J. LEG. PHIL. 1, 4–5 (2018).

[250] As all of them correctly recognize. *See*, *e.g.*, LAM, *supra* note 247 at 9.

If the argument of the Article is correct, the choice we face is not between rule-bound governance and effective or ambitious governance, but between rule-bound governance and governance that is unconstrained. The former is imperfect and sometimes frustrating. But the latter threatens to take us back to the conditions of private judgment and domination that civil society is meant to be the antidote for.

Ultimately, the rule of law matters, not because it promises everything good (although it certainly helps), but because it helps us avoid a lot that is bad. It protects us from the worst and most abusive exercises of political power and makes it possible for people who disagree to cooperate and live together. This is why legal rules matter—not because they guarantee good outcomes, but because they discipline the exercise of power. To defend the rule of law is therefore to defend the minimal conditions under which our more ambitious political values can even begin to be articulated and pursued.