2022

The Essential Meaning of the Rule of Law

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INTRODUCTION

We have heard much in recent times about the rule of law. Everyone seems to be in favor of it. Everyone seems to think that those with whom they strongly disagree are violating it. Let me remind you of a few examples.

President Obama, frustrated by Congress's failure to adopt immigration reform, stated at a cabinet meeting that he still had a "pen and a phone."[1] He proceeded to announce a policy called DACA, short for Deferred Action for Childhood Arrivals, which effectively adopted a type of amnesty for some 700,000 persons who had arrived in the country as children without legal authority.[2] This was denounced by political opponents as "executive legislation" and a violation of the rule of law.[3]

His successor, President Trump, accumulated a record of sorts for being charged with flaunting the rule of law.[4] To cite just one episode, he demanded that Congress appropriate funds for construction of a wall along the border between Mexico and the U.S. When Congress enacted an appropriations bill that specifically excluded any such appropriation, Trump refused to sign it,

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[*] Charles Evans Hughes Professor, Columbia Law School. Earlier versions of this essay were presented at conferences of academics and judges in the fall of 2021 sponsored by the Law and Economics Center of the Antonin Scalia Law School at George Mason University. I am grateful to Madhav Khosla and Ben Liebman for drawing my attention to literature on legal philosophy and the dual state and China, respectively. Avi Weis and Kyle Oefelein provided invaluable research assistance.

[1] Jennifer Epstein, *Obama's Pen-and-phone Strategy*, POLITICO (Jan. 14, 2014, 11:49 am), https://Politico.com/story/2014/01/Obama-state-of-the-union-2014-strategy-102151.

[2] Press Release, White House, Obama Administration, Remarks by the President on Immigration (June 15, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration. *See also* Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs and Border Prot., Alejandro Majorkas, Dir., U.S. Citizenship and Immigr. Servs. & John Morton, Dir., U.S. Immigr. and Customs Enf't (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

[3] *See, e.g.*, Michael W. McConnell, *Michael McConnell on Executive Orders, DACA, and the Constitution*, SLS BLOGS (Sept. 6, 2017), https://law.stanford.edu/2017/09/06/michael-mcconnell-on-executive-orders-daca-and-the-constitution/. When the Trump Administration rescinded the DACA program on the ground that it was not based on lawful authority, the Supreme Court, in a divided decision, remanded the rescission order for a further explanation of how this would affect the reliance interests of DACA recipients. Dep't of Homeland Sec. v. Regents of California, 140 S. Ct. 1891 (2020). Justice Thomas complained in dissent that the executive needed no further explanation when seeking to restore the "rule of law." *Id.* at 1931 (Thomas, J. dissenting in part).

[4] *See, e.g.*, Peter L. Strauss, *The Trump Administration and the Rule of Law*, 170 REVUE FRANCAISE D'ADMINISTRATION PUBLIQUE 433 (2019).

triggering a 35-day shutdown of the government.[5] Trump eventually relented, but instructed subordinates to scrounge for other pots of money to build the wall. One identified source was Section 8005 of the Defense Appropriations Act of 2019, which authorized the re-transfer of up to $4 billion in Defense Department "working capital funds" based on "unforeseen military requirements," as long as transfer of the funds had not been "denied by the Congress."[6] The Sierra Club obtained an injunction against this use of these funds, which was hailed by leading Democrats as a vindication of the rule of law.[7] A divided Supreme Court stayed the injunction, noting that the government had made a "sufficient showing" that the Sierra Club had "no cause of action to challenge compliance with Section 8005."[8] So construction of the wall was allowed to proceed, until the Biden Administration brought it to an end.[9]

Not to be left behind, President Biden has also been condemned for lack of fidelity to the rule of law. As part of the federal response to the COVID pandemic, the Centers for Disease Control ordered a nationwide moratorium on evictions of tenants for nonpayment of rent. This was later ratified and extended for a short period of time by Congress. As the expiration of the moratorium approached, the CDC decided it could extend the moratorium without additional congressional authority, based on a 1944 statute that authorized it to issue orders for fumigation, pest extermination, and "other measures, as in [its] judgment may be necessary" to prevent "sources of dangerous infection to human beings."[10] When the Supreme Court, acting on a stay application, expressed skepticism about whether the statute authorized an eviction moratorium, the Biden Administration asked Congress to enact emergency legislation extending the moratorium. But when Congress failed to act, the CDC extended the moratorium anyway. Speaking to reporters, Biden admitted that the extension order was on shaky legal ground, but he said it was worth doing because "by the time it gets litigated, it will probably give some additional time."[11] This too was decried as a violation of the rule

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5 Mihir Zaveri et al., *The Government Shutdown Was the Longest Ever. Here's the History*, N.Y. TIMES (Jan. 25, 2019), https://www.nytimes.com/interactive/2019/01/09/us/politics/longest-government-shutdown.html.

6 Department of Defense Appropriations Act of 2019, Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999 (2018).

7 Press Release, Nancy Pelosi, Speaker, House of Representatives, Pelosi Statement on Court Ruling Against President Trump's Border Wall (Dec. 10, 2019), https://Pelosi.house.gov/news/press-releases/Pelosi-statement-on-court-ruling-against-president-trumps-s-border-wall/.

8 Trump v. Sierra Club, 140 S. Ct. 1, 1 (2019) (per curium).

9 Press Release, White House, Biden Administration, Fact Sheet: Department of Defense and Department of Homeland Security Plans for Border Wall Funds (June 11, 2021), https://Whitehouse.gov/omb/briefing-room/2021/06/11/fact-sheet-department-of-defense-and-department-of-homeland-security-plans-for-border-wall-funds/.

10 Public Health Service Act of 1944 § 361(a), codified at 42 U.S.C. §264(a).

11 Press Release, White House, Biden Administration, Remarks by President Biden on Fighting the COVID-19 Pandemic (Aug. 3, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/03/remarks-by-president-biden-on-fighting-the-covid-19-pandemic.

of law, as the Supreme Court effectively held when the issue returned on another stay application.[12]

As these examples suggest, recent Presidents have become increasingly bold in taking action that has not been authorized by law or is at best only dubiously authorized by law. The examples also reveal that political opponents of the President have not been shy about condemning these actions as violating the rule of law. These and other episodes suggest that the idea of the rule of law is centrally concerned with the understanding that the executive must confine its actions to what is authorized by law and must abide by the limits prescribed by law.

Charges of rule of law violations also increasingly appear in controversial judicial decisions. Consider, as one example of several, the Supreme Court's recent *Dobbs* decision overruling *Roe v. Wade*.[13] The majority, speaking through Justice Alito, decried *Roe* as having no basis in the Constitution or in practice deeply rooted in the Nation's history and traditions. He declared it was "time to heed the Constitution and return the issue of abortion to the people's elected representatives" and "[t]hat is what the Constitution and the rule of law demand."[14] The dissenters saw the very act of overruling *Roe* an affront to the rule of law. They claimed the decision was "based on nothing more than the new views of new judges" and "[t]he majority thereby substitutes a rule by judges for the rule of law."[15] The Justices, one can safely conclude, regard the rule of law as vitally important to the legitimacy of the judicial enterprise. Some tend to equate the rule of law with fidelity to the original understanding of the Constitution and other enacted laws; others tend

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[12] Ala. Assn. of Realtors v. Dept. of Health and Hum. Services, 141 S. Ct. 2485, 2490 (2021) (lifting stay of injunction against the order). A similar fate awaited an emergency regulation of the Occupational Safety and Health Administration requiring all firms with 100 or more employees to require that they be either vaccinated or regularly tested. *See* Nat'l Fed'n of Ind. Bus. v. Dep't. of Labor, 142 S. Ct. 661, 664–65 (2020).

[13] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022), overruling Roe v. Wade, 410 U.S. 113 (1973).

[14] *Id.* at 2243.

[15] *Id.* at 2335 (dissenting opinion of Justices Breyer, Kagan, and Sotomayor). Justice Kagan expanded on the importance of stare decisis to preserving the rule of law in another dissenting opinion:

> Adherence to precedent is "a foundation stone of the rule of law." "[I]t promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." …. [T]he entire idea of *stare decisis* is that judges do not get to reverse a decision just because they never liked it in the first instance. [T]hey need a reason *other than* the idea "that the precedent was wrongly decided." For it is hard to overstate the value, in a country like ours, of stability in the law.

Knick v. Twp. Of Scott, Pennsylvania, 139 S. Ct. 2162, 2189–90 (2019) (Kagan, J. dissenting) (citations omitted).

to equate the rule of law with adherence to principles established by prior judicial decisions.[16]

Academics I am obliged to report—some of them at any rate—seem to think the idea of rule of law is either very slippery or meaningless. Jeremy Waldron, after reviewing the charges and counter-charges in the Florida electoral recount in 2000, pronounced the rule of law an "essentially contested concept."[17] Judith Shklar would not even dignify the rule of law by calling it a concept, labeling it "just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling class chatter."[18]

Against the admonition of Professor Skhlar, I propose to expend some intellectual effort in trying to make sense of the idea. Does the rule of law have an essential meaning, such that it is possible to say that a judge or other government official or even an entire polity is or is not faithful to the rule of law? Is it possible to disentangle the rule of law from other aspects of the modern liberal state, such as respect for individual rights? If the rule of law has a core meaning, are there certain institutional features, like an independent judiciary, that are critical to establishing a legal system governed by the rule of law? Is it possible to have a society with a large administrative apparatus exercising great discretionary power and still speak of it as one that it characterized by the rule of law?

My claim is that the rule of law does have an essential meaning: it describes a political ideal in which the executive arm of the state exercises coercive power against individuals only when this is authorized by settled principles of law. As such, the rule of law describes a state of affairs—predictability about the prospect of government coercion—which is widely regarded as desirable. But it does not describe everything that we might want to include in the description of a good or just society. My further claim is that it is important to maintain a distinct understanding of the meaning of the rule of law, in order to know when it is appropriate to criticize an official or condemn a government regime for violating the rule of law. If we begin to use the phrase to refer to an enlarged set of attributes that we regard as good or desirable, then the phrase is apt to degenerate into a slogan, as Professor Shklar suggests, and its value in pinpointing a certain type of legal behavior that may warrant correction is compromised.

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16 *See generally* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 24–36 (1997) (discussing different "ideal types" of the rule of law in Supreme Court opinions).

17 Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 L. & Phil. 137 (2002).

18 Judith Shklar, *Political Theory and the Rule of Law* at 1, *in* THE RULE OF LAW: IDEAL OR IDEOLOGY (A. Hutchison and P. Monahan eds. 1987).

I. TWO TRADITIONS ABOUT THE MEANING OF THE RULE OF LAW

Commentators have discerned that there are two distinct traditions in terms of explicating what we mean by the rule of law.[19] These traditions go by different names. Sometimes the distinction is framed in terms of a "formal" versus a "substantive" view of the rule of law. Others have contrasted a "thin" as opposed to a "thick" version. These labels seem designed to subtly disparage the first version at the expense of the second.[20] To avoid any such implication, I will speak of the "predictable law" conception of the rule of law as opposed to the "rights conception" of what it means to refer to the rule of law.

A. *The Predictable Law Model*

Certain anticipations of the predictable law conception of the rule of law can be found in Aristotle and in coronation oaths that prevailed in the middle ages.[21] But the modern form of this understanding originates with the Magna Carta, a list of concessions that a group of nobles extracted from King John in 1215. Clause 39 famously stated:

> No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land.[22]

If we take this as the original expression of the predictability understanding, it is worth unpacking some of its features. Note that the threat against which the promises are extracted is a certain kind of tyranny emanating from the executive, in this case the King, who speaks with the royal "we." There is no mention of general lawlessness or criminality, of which we can surmise there was plenty in 1215. Note too that there is no mention of courts other than the allusion to the jury, if that is what is meant by "the lawful judgment of his peers." The promise by the King is to avoid taking a variety of coercive actions against "free men" except when this accords with "the lawful judgment of his peers" or is consistent with "the law of the land." The latter phrase is a bit mysterious, because in 1215 the King himself was generally thought to be the principal expounder of the law. But perhaps the "law of the land" was understood to mean something like the settled or customary

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19 *E.g.*, BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 91-113 (2004).

20 For a critique of the distinction between "formal" and "substantive" conceptions of the rule of law, see John Gardner, *The Supposed Formality of the Rule of Law*, in LAW AS A LEAP OF FAITH 195-220 (2012).

21 TAMANAHA, *supra* note 19, at 7–25.

22 J.C. HOLT, MAGNA CARTA 461 (2d ed. 1992).

law of the realm.[23] If so, we can interpret clause 39 to mean that the executive will not take adverse action against citizens of the realm unless those actions are consistent with settled legal understandings about when it is permissible to do so. So understood, Magna Carta captured the predictable law meaning of the rule of law.

Later English commentators reinforced the predictable law understanding of the rule of law.[24] We can perhaps jump forward to the British constitutional theorist A.V. Dicey, who authored an influential treatise in 1885 generally credited with coining the phrase, "the rule of law."[25] Dicey offered this as his primary definition of the rule of law: "No man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land."[26] This is close to a restatement of clause 39 of Magna Carta, although the reference to the lawful judgment of one's peers has been expanded to law "established in the ordinary legal manner before the ordinary Courts of the land." Dicey went beyond predictability, however to posit additional elements of the rule of law, including that no person is above the law. Under the English constitution, he wrote, "every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."[27] Thus, for Dicey, the rule of law also means that administrative officials, if they act against persons without legal authority, can be brought into court and charged with a dereliction of duty.

A third commentator commonly credited with developing the predictability understanding is Friedrich Hayek. "Stripped of all technicalities," Hayek wrote in his most popular work, 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."[28] Hayek's principal contribution to understanding the rule of law was in precisely identifying as its central purpose predictability about how the state will use its "coercive powers in given circumstances." If it is possible to "foresee with fair certainty" what the state will permit and what it will prohibit, individuals will adjust their plans and actions so as to advance their aspirations within the space left open

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23 In 1215 and for many years afterwards the law was conceived to be something that was discovered not made. *See* F.A. HAYEK, THE CONSTITUTION OF LIBERTY 234–36 (1960) [hereinafter HAYEK, CONSTITUTION]; TAMANAHA, *supra* note 19, at 56.

24 Hayek's intellectual history of the rule of law includes statements from John Locke, David Hume, and Edmund Burke, among others. *See* HAYEK, CONSTITUTION, *supra* note 23, at 251–60.

25 A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (9th ed. 1945) (orig. 1885).

26 *Id.* at 110.

27 *Id.* at 193.

28 F.A. HAYEK, THE ROAD TO SERFDOM 112 (2007) (orig. 1944) [hereinafter HAYEK, SERFDOM].

for individual initiative. The rule of law, so understood is an essential condition of liberty.[29]

Like Dicey, Hayek offered additional attributes of the idea of the rule of law. It was imperative "that the discretion left to the executive organs wielding coercive power should be reduced as much as possible."[30] He readily conceded that there must be rules of conduct, such as laws of contract, property, tort, and crime. But he insisted that the rules should be as formal as possible. They should be expressed in general or abstract terms not aimed at any particular group or individual, apply equally to all, and be highly certain.

The predictability version of the rule of law did not stop with Hayek. The contemporary legal philosopher Joseph Raz should be counted as an adherent of this school. Following Hayek, Raz identified the "basic intuition" behind the rule of law as the idea that "the law must be capable of guiding the behavior of its subjects."[31] In order to perform this guidance function, Raz wrote, the law must be prospective, general, clear, and relatively stable. Raz identified several institutional features that are likely to be important in generating predictable legal rules, including an independent judiciary, fair and impartial hearings when individuals are accused of violating the law, judicial review of administrative action to assure that it conforms with delegated power, and limits on the discretion of the police to assure compliance with the law.[32]

Raz provocatively argued that any legal system that shares these features can claim to be one based on the rule of law. It need not be a democracy but could also be a "non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution."[33] Indeed, he went so far as to argue that the law may "institute slavery without violating the rule of law."[34]

Another relatively contemporary proponent who shares the predictability perspective was Harvard Law Professor Lon Fuller. In a book originally published in 1964 entitled *The Morality of Law*,[35] Fuller sought to explicate the general features of a legal system that give it moral authority. He did not claim the title "rule of law" for his conception. But the features of a legal system that command this moral respect, as he identified them, bear a close resemblance to what Dicey, Hayek and Raz called "the rule of law." Specifically, Fuller listed the following features of a legal system that give rise to a claim to what he called an inner morality: generality, clarity, public promulgation, stability over time, consistency between official rules and the actual

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29 Hayek reaffirmed this basic position in a more scholarly volume published in 1960. *See* HAYEK, CONSTITUTION, *supra* note 23, at 215–31.

30 HAYEK, SERFDOM, *supra* note 28, at 112.

31 JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW 210, 214 (1979).

32 *Id.* at 214–18.

33 *Id.* at 211.

34 *Id.* at 221.

35 *See generally* LON L. FULLER, THE MORALITY OF LAW (rev. ed. 1969).

conduct of legal actors, and prohibitions against retroactive law, contradictions in the law, and against requiring the impossible of those subject to the law.[36] Each of these features operates to make the law more predictable to those to whom it applies. Fuller's exegesis of the characteristics that entitle a legal system to claim moral authority can therefore be said to encapsulate what would be required by the rule of law, if that is understood in the sense of predictable law.

What is one to make of the fact that the various thinkers I have grouped together as endorsing a predictable law conception have all discussed factors in addition to predictability as being constitutive of the rule of law? Am I being excessively reductive in characterizing their views as variations on this one theme? I think not, for three reasons.

First, many of the additional features cited by these thinkers reduce to more specific features of a legal system that make the law predictable. Lon Fuller is perhaps the clearest example of this. His eight desiderata of a legal system that aspires to inner morality are all characteristics that allow persons to predict when the law will be applied in a coercive or disabling fashion. This is quite clear with respect to clarity, public promulgation, consistency between the law on the books and the law in action, prospectivity, and non-contradiction. These are all features that allow those subject to the law to predict how it will be applied. The requirement of generality is less obviously related to predictability, but by this Fuller meant that the law is sufficiently rule-like or contains principles that are sufficiently broad that they can be perceived as applying to a variety of circumstances as opposed to being purely case-specific or ad hoc.[37] The requirement of stability performs, in Fuller's explication, an epistemic function: if the law changes too frequently it is less likely to be known and if not known will not be predictable.[38] And the requirement that the law not require the impossible can be seen as related to predictability, since an impossible legal duty is likely to be interpreted and enforced in an unpredictable manner.[39] The list of ancillary features offered by Raz – prospectivity, generality, clarity and stability – can be explicated in a similar way.

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[36] *Id.* at 46–91. Fuller's work has recently featured in a debate over whether the modern administrative state is or is not consistent with Fuller's conception of the morality of law. Cass Sunstein and Adrian Vermeule have argued in a long article in the Harvard Law Review and a follow-on book that the modern administrative state, with its commitment to judicial review and its general requirement of reason-giving, largely conforms to Fuller's vision of the morality of law. Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924 (2018); CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW AND LEVIATHAN (2019). Richard Epstein, in a response, disagrees, citing the vagueness of statutory constraints under which agencies operate and doctrines of deference to agencies even on questions of law. *See generally* RICHARD A. EPSTEIN, THE DUBIOUS MORALITY OF ADMINISTRATIVE LAW (2020).

[37] FULLER, *supra* note 35, at 46-49 (explaining that to avoid "directing . . . every action" a ruler "may find it essential to articulate and convey . . . certain general principles of conduct.").

[38] *Id.* at 79-80.

[39] *Id.* at 70-79.

Second, many of the additional features stressed by thinkers I have grouped in the predictable law school are in fact institutional conditions that are necessary (or at least desirable) in producing a system of predictable law. A central weakness of the rule of law literature is the failure to distinguish between what we mean by the rule of law (the concept) and what sort of institutional arrangements are likely to generate a system characterized by the rule of law (a question of causation). When Raz identifies an independent judiciary, fair and impartial hearings, judicial review of administrative action, and limits on police discretion as important to the rule of law, he has slipped from explicating the meaning of the rule of law to offering some views about the types of institutional arrangements important in generating it. Similar points can be made about Dicey and Hayek insofar as they make an independent judiciary or a common law baseline features of a regime characterized by the rule of law. I do not mean to belittle the significance of the question of what conditions are likely to produce or sustain the rule of law– it is of paramount importance. But it may be easier to make some headway on the question of causation if the meaning of the rule of law is kept distinct from ruminating about the conditions that make it possible.

Third, some of the thinkers I have associated with the predictable law meaning of the rule of law have also been concerned more broadly with what it means to live in a free or just society. Hayek is perhaps the most prominent example here. His later work, such as *The Constitution of Liberty*, includes extensive material about the rule of law, but was concerned more broadly with determining the conditions of a society characterized by individual freedom, as he understood it. So for example, he endorsed a written constitution and a bill of rights as part of legal system that secures liberty.[40] But I think it would be a mistake to interpret these broader reflections as qualifying his understanding of the rule of law. He continued to believe that the rule of law was a critical feature of any system of government that promotes individual freedom, and he continued to define the rule of law to mean that "government must never coerce an individual except in the enforcement of a known rule."[41]

What can be said by way of generalization about the predictability version of the rule of law? First, the target of concern is the exercise of government power over individuals. Little attention has been given by adherents of this view to the possibility of private lawlessness, such as rampant crime or intimidation by gangs. The rule of law is not synonymous with "law and order."[42] Neither is the focus on the possibility of legally authorized

40 HAYEK, CONSTITUTION, *supra* note 23, at 275-86, 324-28.

41 HAYEK CONSTITUTION, *supra* note 23, at 309-10.

42 One could argue that there is a connection, in that predictable enforcement by the government of laws against private lawlessness will tend to reduce the incidence of private lawlessness. But additional conditions must be met for the equation to hold, including the enactment of sufficiently clear and comprehensive legal prohibitions on private lawlessness, sufficient deterrents in these laws to discourage private lawlessness, adequate funding of the police and courts to enforce these laws, and accurate

subordination of groups, such as the disenfranchisement of women or even apartheid, if such classifications are sanctioned by general laws and are enforced in a consistent and even-handed manner.

Second, the dominant virtue that animates this view is predictability. In particular, predictability about what the government can do to individuals in the way of taking their liberty and property. "Law," a word of many meanings, refers in this conception to regularity, as in the laws of physics.

Third, the proponents of the predictability view have advanced only sketchy ideas about the institutional features of a legal system that generate predictable law, even as an incompletely realized ideal. The importance of an independent judiciary is a recurring theme. But little attention has been given to the conditions that would lead an independent judiciary to develop predictable rules or would incline executive actors to enforce the orders of an independent judiciary. In this sense, the literature associated with the predictability understanding is incomplete.

B. *The Rights Conception*

What is here called the "rights conception" of the rule of law has been given a variety of names.[43] Some commentators speak of a "substantive" (as opposed to the formal) version of the rule of law; others of a "thick" (as opposed to the thin) version. What distinguishes the rights conception from the predictability view can be easily identified: the rights version does not reject the idea that law should be predictable, but adds that it must also predictably protect. This includes a list of rights deemed to be fundamental, such as the freedom of speech, the equal treatment of persons without respect to race or gender, the right to a fair trial, the prohibition of slavery, freedom from torture, and so forth. In effect, the understanding—that law must be knowable and predictable—is augmented in the rights conception by a list of rights, such as is found in the U.S. Bill of Rights, the Universal Declaration of Human Rights of 1948, or the European Convention on Human Rights.

A lucid expression of the rights conception has been provided by the esteemed British judge, Lord Bingham, in a book aptly titled *The Rule of Law*.[44] Bingham begins his book with an account of the predictability conventional view, which includes Magna Carta and A.V. Dicey (but oddly does not mention Hayek). Then, in a few short pages, he announces that this view

identification by the police and courts of those who have violated the laws. One could argue that private lawlessness, in the form of assaults, robberies, and frauds, is as much or more of a threat to individual liberty, as conceived by Hayek and other proponents of the predictability conception of the rule of law. But, for whatever reasons, this has not been the focus of this tradition in the literature on the rule of law.

43 The "rights" conception is the name given to the substantive conception of the rule of law by Ronald Dworkin. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 11 (1985).

44 *See* TOM BINGHAM, THE RULE OF LAW (2010).

must be supplemented with a conception that embraces the protection of fundamental human rights. Lord Bingham explains:

> A state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed. So to hold would, I think, be to strip 'the existing constitutional principle of the rule of law' . . . of much of its virtue.[45]

For Bingham, in other words, the "rule of law" includes not just predictable law but all the protections of individuals associated with the modern liberal constitutional order, especially those adopted by various international conventions on human rights.

No doubt there are a variety of explanations for this evolution in the understanding of the rule of law. A pivotal event was likely the Nuremberg Trials conducted by the victorious allies in 1945-46 to try leading figures of the defeated Nazi regime. The Nazis of course were guilty of enormous atrocities. Churchill at Yalta argued that the Nazi leaders should just be rounded up and shot.[46] He was outvoted by Roosevelt and Stalin, the latter on the ground that a criminal prosecution would make a valuable show trial.[47] The ex-Nazis were accordingly charged with various offenses, including the crimes of engaging in offensive war and genocide, which at that time had a weak provenance in terms of customary international law.[48]

The Nuremberg defendants naturally took the position that their actions were legal under German law as it existed when they took them. They were just following orders, and the orders came from higher authorities empowered to give them. Thus, they argued, the charges of the Nuremberg prosecutors, including Robert Jackson, on leave from the U.S. Supreme Court, were a form of ex post facto criminal liability inconsistent with the rule of law.[49] A careful dissection of the facts would probably have revealed that many, perhaps most, of the atrocities were not expressly authorized by duly enacted German law—certainly not by any law that was publicly known and applied in a consistent fashion.[50] But the tribunal did not have the time or the patience to undertake such a careful refutation of the defense.

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45 *Id.* at 67.

46 Ian Cobain, *Britain Favoured Executive Over Nuremberg Trials for Nazi Leaders*, THE GUARDIAN (Oct. 25, 2012, 7:05 pm), https://www.theguardian.com/world/2012/oct/26/britain-execution-nuremberg-nazi-leaders.

47 *Id.*

48 As the chief prosecutor, effectively conceded. *See* Second Day, Wednesday, 21 November 1945, *in* 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 14 NOVEMBER 1945–1 OCTOBER 1946 98–102 (1947).

49 *See* Charles E. Wyzanski, *Nuremberg: A Fair Trial? A Dangerous Precedent*, THE ATLANTIC, Apr. 1946, at 60–65 (voicing similar concerns).

50 For an account of the deterioration of the Nazi legal system as the regime went on, see INGO MULLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH (Deborah Lucas Schneider, Trans., 1991).

The primary response, both at the trials and afterwards, was that the conduct of the defendants was contrary to customary international law, which in turn included inchoate ideals about the importance of fundamental human rights. Which is to say, if we assume that fundamental human rights are incorporated into the concept of the rule of law, the prosecutions were consistent with the rule of law.

The rights conception of the rule of law, as articulated by Lord Bingham, is largely a continuation and expansion of the version that grew out of the Nuremberg prosecutions. It is not surprising that he would come to see universal human rights as a critical aspect of the rule of law. His career as a senior British judge coincided with the enactment of the Human Rights Act of 1998, which was intended to give at least some direct effect in the United Kingdom of the European Convention on Human Rights and its interpretation by the European Court of Justice.[51] Later in his career, he also witnessed the adoption by Parliament of the Constitutional Reform Act of 2005, which transformed a committee of the House of Lords into a Supreme Court, and laid the groundwork, in the eyes of some, for more rigorous enforcement of individual rights notwithstanding traditional British norms of legislative supremacy.[52] As a senior judge charged with the faithful enforcement of these provisions, it is not surprising that he came to regard them as a critical component of the rule of law.

More generally, the rights version of the rule of law is clearly the dominant conception today among the spokespersons of the United Nations and leaders of the European Union. Particularly notable in this regard are the efforts of the Venice Commission, established by the European Council. In its *Report on the Rule of Law*, issued in 2011, the Commission concluded that the rule of law was "indefinable," but could be captured by a "checklist" of attributes, against which individual legal regimes or actors can be judged.[53] The checklist includes features commonly associated with the predictability conception, such as the principles that executive actors are bound by existing law, the law should be certain, and individuals should be able to challenge government actions before independent and impartial courts.[54] But it also

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51 Erin F. Delaney, *Judiciary Rising: Constitutional Change in the United Kingdom*, 108 NW. U. L. REV. 543, 556–57 (2014).

52 For these developments, see *id.* at 555–73.

53 EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), REPORT ON THE RULE OF LAW (2011). The statement that the rule of law is undefinable appears in a summary document released on the internet. Venice Comm'n, *Rule of Law*, COUNCIL OF EUROPE, https://www.venice.coe.int/WebForms/pages/?p=02_Rule_of_law&lang=EN (last visited Sept. 19, 2022) ("While drafting the report, the Venice Commission reflected of [sic] the definition of the Rule of Law and reached the conclusion that the Rule of Law was undefinable… Rather than searching for a theoretical definition, it therefore took an operational approach and concentrated on identifying the core elements of the Rule of Law."). The report itself, with the checklist, can be found at VENICE COMM'N, REPORT ON THE RULE OF LAW, COUNCIL OF EUROPE (Mar. 25--26, 2011), https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e [hereinafter Venice Comm'n, Report on the Rule of Law].

54 Venice Comm'n, Report on the Rule of Law, *supra* note 53, at 10–12.

includes "respect for human rights" and the principle of non-discrimination on grounds such as "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[55] Applying this checklist, the Venice Commission later released reports condemning the member states of Hungary and Poland for violations of the rule of law, particularly for measures interfering with the independence of the judiciary.[56] These reports ultimately led to efforts by the EU Commission to impose monetary sanctions on Hungary and Poland in an effort to deter these transgressions.[57]

What can be said by way of generalization about the rights conception of the rule of law? First, the rights conception does not reject the value of predictability in the law. Rights proponents always endorse features that predictability theorists applaud as designed to "guide the behavior" of those subject to the law: clarity, generality, publicity, prospectivity, congruence between the law on the books and the law as enforced, the right to judicial review by independent courts, etc. In this respect, there is an important overlap between predictability theorists and rights theorists like Bingham and the Venice Commission.

Second, rights theorists reject the idea that the rule of law promotes liberty only in the Hayekian sense that what is not clearly prohibited is permitted. They fear, perhaps rightly, that a conception of the rule of law limited to predictability can be enlisted on behalf of a legal regime that uses the law to exploit minorities, suppress dissent, destroy free elections, or worse. Accordingly, rights theorists would build into the concept of the rule of law a set of stops, in the form of a list of individual rights, designed to eliminate the risk of the rule of law being invoked as an instrument to achieve ends that violate the norms of the modern liberal constitutional order.

Third, rights theorists generate a conception of the rule of law that is far more complex than that associated with predictability theorists. Once one works through the list of procedural and substantive rights endorsed by rights theorists, it is difficult to distinguish the rule of law from a catalogue of features that characterize liberal constitutionalism more generally. This

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55 *Id.* at 12–13.

56 DUNJA MIJATOVIC, COUNCIL OF EUROPE, REPORT FOLLOWING HER VISIT TO HUNGARY FROM 4 TO 8 FEBRUARY 2019 (May 21, 2019), https://rm.coe.int/report-on-the-visit-to-hungary-from-4-to-8-february-2019-by-dunja-mija/1680942f0d; DUNJA MIJATOVIC, COUNCIL OF EUROPE, REPORT FOLLOWING HER VISIT TO POLAND FROM 11 TO 15 MARCH 2019 (June 28, 2019), https://rm.coe.int/report-on-the-visit-to-poland-from-11-to-15-march-2019-by-dunja-mijato/168094d848.

57 Case C-157/21, Republic of Poland v. European Parliament, ECLI:EU:C:2022:98, ¶ 17 (Feb. 16, 2022); Case C-156/21, Hungary v. European Parliament, ECLI:EU:C:2022:97, ¶ 111--112 (Feb. 16, 2022). See also Gabriella Baczynska & Gergely Szakacs, *In a First, European Union Moves To Cut Hungary Funding Over Damaging Democracy*, REUTERS (Sept. 18, 2022), https://www.reuters.com/world/first-eu-seen-moving-cut-money-hungary-over-damaging-democracy-2022-09-18/; Daniel Tilles, *After Moving To Cut Hungary's Funds, EU Is "Analysing Poland", Which Has "Many Problems"*, NOTES FROM POLAND (Sept. 19, 2022), https://notesfrompoland.com/2022/09/19/after-moving-to-cut-hungarys-funds-eu-is-analysing-poland-which-has-many-problems/.

complexity also makes it difficult if not impossible to define the "rule of law" in any easily comprehensible manner, which in turn invites skepticism about whether the rule of law is more than a slogan or a charge to hurl against decisions or regimes that one dislikes.

II. WHICH IS THE BETTER VERSION?

The rule of law is a normative vision. It describes an ideal state of affairs—not any existing legal system. Of course, some legal systems come closer to realizing this ideal than others. But everyone seems to agree that no system, either historically or presently existing, has completely incorporated the ideal of the rule of law.[58]

If the rule of law simply describes a kind of ideal state, it might seem that the rights conception is superior to the predictability version. After all, the rights version contains more attractive normative features than does the predictability one. The rights version incorporates a panoply of individual rights, such as freedom of expression and freedom from race and gender discrimination. These rights are regarded today as essential aspects of a liberal constitutional order. And because it incorporates these restrictions on state action, the modern version does not suffer the embarrassment that something like the Nazi regime, or the apartheid regime of South Africa, or a system that permits slavery, might be deemed to be consistent with the rule of law. If one conception incorporates more valuable things than the other, and by incorporating more valuable things avoids the embarrassment of being potentially compatible with evil, why adhere to the narrow predictability ideal?

It must be stressed here that the issue is one of definition. Should the concept of the "rule of law" be defined relatively narrowly, in terms of the capacity of a system to allow individuals to predict when state officials will act coercively against them, or should it be defined relatively expansively, as entailing not just predictability but also a cluster of individual rights deemed to be fundamental? As a matter of policy, this is not an either/or choice. All or nearly all proponents of the predictable law conception also favor individual rights and all or nearly all proponents of the rights conception favor predictability.[59] The question is whether predictability and rights should be considered as separately as ideals, or should be merged into a single concept.[60]

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58 *E.g.*, HAYEK, CONSTITUTION, *supra* note 23, at 311 (describing the rule of law as "a meta-legal doctrine or a political ideal"). *See* Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 44–45 (2008) ("[T]he requirements associated with the Rule of Law are all matters of degree. . . . Moreover, this feature of the Rule of Law seems essential to the work that it does as a political ideal. We use it to make nuanced and qualified assessments as well as all-or-nothing condemnations or commendations of systems of governance.").

59 Hayek, for example, was a strong proponent of negative individual rights like freedom of speech even though he condemned socialism and egalitarian redistribution. HAYEK, SERFDOM, *supra* note 28, at 112–23.

60 HAYEK, CONSTITUTION, *supra* note 23, at 112–23.

A. *The Case for the Predictability Definition*

There are multiple overlapping reasons to prefer the narrow, predictability understanding of the rule of law. One is analytical clarity. The narrow definition identifies a state of affairs that is relatively easy to comprehend: is the polity so structured so that individuals know what to expect from government officials? The rights conception, while not repudiating the desirability of predictability, creates a much more complex menu of desirable governmental attributes. The government must not only be predictable, it must also adhere to a list of individual rights–a list which may be sharply contested and continually evolving. The rights conception thus "ranges over highly diverse subject matter…arguments and criticism purportedly in the name of the 'rule of law' tend to be arguments and criticisms in the name of too many things at once."[61]

Confining the rule of law to the narrow definition also helps highlight whether a particular regime is adhering to widely-shared conceptions of individual rights. Under the predictability conception, it is possible to say that a particular regime adheres to the rule of law but does not respect one or more individual rights. The criticism can be targeted to the failing. Under the rights conception, the judgment that a particular regime does or does not adhere to the rule of law is a composite of its record in terms of predictability and its respect for a list of individual rights. Thus, in denouncing a regime for its failure to adhere to the rule of law, it becomes unclear which failing is being singled out for condemnation. Is the regime coming up short because it acts capriciously, or because it fails to respect one or more rights?

It is also plausible that it is easier to reach general agreement about the desirability of legal predictability than it is about the relevant set of rights. As any lawyer will tell you, the law is never entirely predictable. New issues continually arise, which often generate conflicting answers when attempts are made to extrapolate from authoritative texts or what has been decided in the past. But there is nearly always a significant core of propositions that are settled.[62] Courts generally have little trouble identifying and adhering to such settled propositions. The same holds for executive actors charged with bringing enforcement actions. Also, legal predictability can be married to a wide variety of regimes, ranging from laissez faire to socialism, from dictatorship to democracy. Although it would be misleading to describe the predictability norm as "politically neutral,"[63] it is likely to receive widespread assent on the

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61 Robert S. Summers, *A Formal Theory of the Rule of Law*, 6 RATIO JURIS 127, 137 (1993). *See also* TAMANAHA, *supra* note 19, at 113 ("The rule of law cannot be about everything good that people desire from government. The persistent temptation to read it this way is a testament to the symbolic power of the rule of law, but it should not be indulged.").

62 *E.g.*, FREDERICK SCHAUER, THINKING LIKE A LAWYER 18-23 (2009).

63 Summers, *supra* note 61, at 136 (describing the formal conception of the rule of law as "more or less politically neutral").

ground that predictable law makes a legal regime—whatever its other value commitments—more effective.

The relevant set of rights that should be incorporated into the rights conception of the rule of law is more likely to be a matter of disagreement, as illustrated by unending controversy over questions like abortion and the death penalty. And the set of recognized rights is always changing, as witnessed by the emergence within a matter of two decades of strong support for LGBT rights. Many regimes (not as much the U.S.) have also come to embrace not only negative rights—rights to be free of certain kinds of government intrusion—but also positive rights, such as rights to basic subsistence, shelter, medical care, and an education.[64] To the extent that individual rights come to be understood to include such positive rights, this inevitably generates complicated questions about the definition of such rights, how their provision will be funded, and how they will be enforced, all of which makes the "rights" perspective more controversial.

Finally, it is significant that proponents of the rights conception all concur (at least implicitly) that it is important that the set of fundamental rights they endorse should be predictability enforced. In effect, predictable enforcement is a necessary condition of securing a regime that respects individual rights. Proponents of the rights perspective often skip quickly over the point, or assume that once the relevant rights are recognized, they will be enforced. But in an era in which authoritarian government is on the rise, enforcement of individual rights should not be taken for granted. Which suggests that predictable enforcement is worthy of attention separate and distinct from discourse about what rights should or should not be included in the system of law that governs the polity.

B. *Rights as a Shield from "The Prerogative State"*

An important counter-argument is that the rule of law, in the narrow sense of predictability, may be impossible to sustain unless the governing regime also respects at least a core of basic rights. The counter-argument presents an urgent question, as it has become clear that autocratic regimes like Putin's Russia and Communist China are increasingly prone to violate the rights of dissidents and other "enemies" of the regime. One-party rule, it seems, creates a kind of downward spiral in terms of respect for rights (at least the rights of anyone that the party in power deems to be a threat to its continued dominance). The question becomes: Does the progressive erosion of rights in one-party states eventually infect the entire legal system, such that the predictability of law also inevitably collapses? If so, then it would seem that the concept of the rule of law must include the protection of at least some basic rights, if it is to have any enduring (that is, predictable) aspect.

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64 *See, e.g.*, Jamal Greene, 12 Law & Ethics Hum. Rts. 37 (2018).

Discussions of this important question are often framed in terms of Ernest Fraenkel's analysis of the "dual state."[65] Fraenkel took as his object lesson Germany after the Nazi Party seized control pursuant to a decree of emergency powers in 1933.[66] Fraenkel described the resulting regime (up to 1941, when he fled to England and then the U.S.) as consisting of a dual state: the "prerogative state" consisting of any issues that the Nazis unilaterally decided were important to their continued absolute rule, and the "normative state," consisting of issues that the Nazis decided could be left to be governed by the legal norms that prevailed before they seized power.[67] The prerogative state was truly terrifying for those regarded as enemies according to Nazi ideology: communists, socialists, Jehovah's Witnesses, mentally impaired persons, and of course Jews. These persons were stripped of all rights, and it would seem they were denied any legal predictability, other than the prediction that they had no rights and their property, jobs, and very lives existed at the sufferance of Nazis.

Fraenkel also concluded, however, that the Nazis allowed the normative state, characterized by a significant degree of legal predictability, to continue to operate in critical realms like heavy industry and agricultural production. This was to facilitate the rearmament of Germany in preparation for war.[68] The Nazis wanted to create a powerful military machine and to do so before their potential adversaries caught on and joined in an arms race. This required leaving property rights, corporate governance principles, and contract law as it applied to heavy industry and agriculture largely undisturbed. Workers were stripped of their rights of collective bargaining. But the full employment produced by the rearmament campaign evidently quieted any mass movement of workers in opposition to the regime.[69]

Fraenkel's characterization of the Nazi regime as a dual state has played an important role in assessing the evolution of Communist China. Eva Pils has compared the regime of Chairman Xi Jinping to Fraenkel's prerogative state, with the gloomy assessment that the rights of dissenters have been almost completely crushed.[70] Taisu Zhang and Tom Ginsburg counter that even if China is becoming more of a dictatorship, it is doing so while also being increasingly committed to "bureaucratic legalization," which is regarded by the regime as an important tool for maintaining centralized party control over the country.[71] In other words, China, for its own reasons, has fostered a kind of normative state in the face of a prerogative state that eliminates nearly all vestiges of liberal rights.

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65 ERNST FRAENKEL, THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP (1941).

66 *Id.* at 3-56.

67 *Id.* at 5, 65.

68 *Id.* at 175–87.

69 *Id.* at 179-85.

70 *See generally* Eva Pils, *China's Dual State Revival* (unpublished draft) (on file with the author).

71 Taisu Zhang & Tom Ginsburg, *China's Turn Toward Law*, 59 VA. J. INT. L. 306, 312–13 (2019).

These ruminations on China seem to confirm Fraenkel's assessment of Nazi Germany (at least up to 1941): The dual state can effectively obliterate any semblance of human rights (and with it the rule of law) for any group deemed to be an "enemy" of the prerogative state. Yet at the same time, the prerogative state may continue to honor something like the rule of law in sectors of society deemed to be critical to the goals of the prerogative state. This conclusion would seem to support Raz's thesis that the rule of law in the sense of legal predictability can at least partially co-exist with regimes that otherwise engage in extreme violations of basic rights. It also suggests that protection of rights is not a necessary condition of preserving the rule of law, at least when it is in the interests of a prerogative state to do so. This last conclusion is obviously highly tentative, and it remains possible that a regime that holds individual rights of "enemies" in utter contempt will eventually degenerate into a pure terror state. But Fraenkel's account and assessments of contemporary China suggest that it is at least theoretically possible to distinguish the rule of law in the sense of predictability from the protection of basic individual rights.

C. *Summing Up*

None of the foregoing should be taken as a criticism of the importance of individual rights, whether embodied in a bill of rights or in various documents generated by bodies of international lawyers. Individual rights are unquestionably of great importance, and every decent government should strive to respect them. The point is simply that having a government that acts in predictable ways in the exercise of coercive power is also a good thing. And there is reason to keep the good that derives from government predictability distinct from the good that comes from government respecting individual rights.

The principal takeaway from this discussion is that the predictability understanding of the rule of law is preferable for several related reasons. The narrow understanding provides a more precise basis for criticizing (or praising) different government regimes. By adhering to the predictability version, we assure that the good that comes from government predictability is not submerged—and thus in danger of being forgotten—in a general approbation of the ideals associated with individual rights. Maintaining the predictability understanding also highlights that the good that comes from government predictability may be in tension with some of the more expansive conceptions of individual rights. It may not be possible to pursue both goals simultaneously, making it necessary to consider trade-offs. Finally, affirming the predictability understanding does not disparage the ideals associated with individual rights. It simply requires that they be justified on their own terms and not by generalized assertions that they are required by "the rule of law."

III. THE INSTITUTIONAL FOUNDATIONS OF THE RULE OF LAW

Our task is incomplete, because there are several versions of the predictability conception of the rule of law. Although the different conceptions of the rule of law are united in their understanding that a key purpose of the rule of law is to make the use of government coercion predictable, they offer divergent ideas about the institutional arrangements that provide this kind of certainty about the legal system. Some stress the importance particular substantive rules like the non-retroactivity of criminal law (*nulla poena sine lege*) and the principle of res judicata that bars re-opening final judicial judgments. Others stress the importance of judicial review of executive or administrative action. Still others stress the importance of access to open hearings and the requirement of reason-giving before coercive action is taken.[72]

Perhaps the most common theme in the literature on the rule of law, in the sense of predictability about government coercion, is the importance of an independent judiciary. So I propose to start there. Beginning with Dicey, theorists of the rule of law have emphasized the importance of an independent judiciary. Indeed, Dicey went so far as to write that a legal regime is characterized by the rule of law when its principles are "the result of judicial decisions determining the rights of private persons in particular cases brought before the courts."[73] But others, including Hayek, Raz, Jeremy Waldron, Bingham, and the Venice Commission have also put great stress on the importance of an independent judiciary. Unfortunately, there is less agreement on the institutional conditions that give rise to an independent judiciary.

American authors are likely to cite separation of powers, and the related idea of checks and balances, as necessary conditions supporting an independent judiciary. Several of the historic expositors of separation of powers, including Montesquieu and the authors of the Federalist Papers, associated the principle of separation of powers with the preservation of "liberty," which they understood as freedom to act within the constraints of law—an idea not dissimilar from Hayak's ideas about the relationship between predictability of the law and individual liberty.[74] Montesquieu wrote that the legislature and executive must be kept in separate hands, lest the same body of persons "should enact tyrannical laws, to execute them in a tyrannical manner."[75] He made a similar point about the judicial power:

> Again, there is no liberty, if the judiciary power be not separated from the legislative and the executive. Were it joined to the legislative, the life and liberty of the subject would

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72 *See* Waldron, *supra* note 58, at 60 (arguing that the rule of law must include "the opportunities for argumentation that a free and self-possessed individual is likely to demand").

73 DICEY, *supra* note 25, at 115.

74 BARON DE MONTESQUIEU, 1 THE SPIRIT OF THE LAWS [8] (Timothy Dwight et al. eds., Thomas Nugent trans., The Colonial Press, rev. ed., 1899) (1748) ("Liberty is a right of doing whatever the laws permit[.]").

75 *Id.* at 151–52.

> be subject to arbitrary control; for the judge would then be legislator. Were it joined to the executive power, the judge might behave with violence and oppression.[76]

The U.S. Constitution, reflecting in significant part the ideas of Montesquieu, contains a more fully worked out system of separation of powers. The document contemplates that the Congress will be the source of legal change. The executive branch was apparently conceived to be a rather skeletal operation, headed by the President, who was subject to an express duty to see that the laws are "faithfully executed."[77] And the federal judiciary was to have life tenure and secure compensation, assuring a high degree of independence from both the Congress and the President.[78]

The theory that would explain why such a separation of powers would lead to a preservation of liberty was not clearly spelled out, either by Montesquieu or the Framers of the Constitution. The best explanation is based on checks and balances. Coercion of citizens by the government requires the concurrence of all three institutional actors: the legislature must pass a law, the executive must enforce it, and the judiciary must interpret it. If kept separate, each branch of the government will be checked by the knowledge that the other two must go along in order to achieve the desired coercion. If the legislature knows that the laws it enacts will be enforced and interpreted by other actors, it will be deterred from enacting oppressive laws. If the executive knows that its enforcement policies will be subject to interpretation by the judiciary, and to override by the legislature, it will be deterred from enforcing the law in a partial or uneven fashion. And if the judiciary knows that its interpretations will be subject to enforcement by the executive, and override by the legislature, it will be deterred from adopting interpretations strongly opposed by the other divisions of government.

In the abstract, the idea that an institutional separation of powers will sustain an independent judiciary is not without merit.[79] Yet whether it consistently works this way in practice is open to doubt. With the extension of popular democracy to the method of selection of the President and the Senate, the prospect of swing elections producing unified control of the legislative and executive branches increases. And if unified control persists for a significant time, as it did during the post-Civil War period and during the New Deal, unified control can extend to the composition of the judiciary. If the

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76 *Id.* at 152.

77 U.S. CONST. art. II, § 3; THE FEDERALIST NO. 48, at 256 (James Madison) (George W. Carey & James McClellan eds., 2001).

78 U.S. CONST. art. III, § 1; THE FEDERALIST NO. 78, at 401 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

79 Kim Scheppele, in an interesting essay, points out that the recent rise in autocratic rule in Hungary, Russia, Turkey, and Venezuela has occurred in countries in which the constitution imposes fewer institutional checks on a popularly-elected executive than the United States. Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018). The first step taken by most of these autocrats, once they have secured enough power to direct constitutional changes, is to eliminate the independence of the judiciary. *Id.* at 551–53.

same party controls all three branches, there is much less potential for checks and balances working.

We also have the example of parliamentary systems, where the legislative and executive branches are effectively controlled by the parliamentary majority. Some of these systems, most prominently those of the United Kingdom and former colonies modelled on the government of the UK, rate high on the scale of respect for the rule of law in the sense of predictability, as well as individual liberty more generally. On the other side of the coin, history is littered with examples in which countries have adopted constitutions with highly articulated separation of powers provisions, only to collapse into one form or another of authoritarian dictatorship.[80]

The inconsistent correlation between constitutions based on separation of powers principles and respect for the rule of law has led some commentators to conclude that commitment to the rule of law is a function of cultural factors. The rule of law exists in countries, like England, "owing to a widespread and unquestioned belief in the rule of law, in the inviolability of certain fundamental legal restraints on government, not to any specific legal mechanism."[81] Dicey was apparently of this view, characterizing the respect for the rule of law in his country as ultimately grounded in "political" or "moral" factors, not legal institutions.[82] Hayek too ultimately settled for this explanation. "In a democracy," he wrote, the rule of law will not prevail "unless it forms part of the moral tradition of the community, a common ideal shared and unquestionably accepted by the majority."[83] As for the United States, Tocqueville suggested that a relatively strong commitment to the rule of law could be explained in part by the high percentage of lawyers in government.[84] Explication of existing principles of law is the stock in trade of lawyers, so a government of lawyers can be expected to be sensitive to preserving the rule of law.

Again, there is clearly something to the case for a cultural explanation.[85] But these explanations ultimately beg the question. How does a cultural commitment to the rule of law get started, unless the institutions of society make settled principles of law a significant factor in determining the distribution of rights and obligations in the society? A taste for legal predictability presumably gets started because the law is sufficiently predictable to generate significant payoffs to understanding the law. And lawyers are presumably attracted to government service in the U.S. because a capacity for explicating

80 *See* ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS 25 (2009) (noting that the U.S. Constitution with its separation of powers was widely copied in Latin American in the nineteen century, and nearly all these constitutions have disappeared).

81 TAMANAHA, *supra* note 19, at 58.

82 DICEY, *supra* note 25, at 26–35.

83 HAYEK, CONSTITUTION, *supra* note 23, at 311.

84 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 272–80 (Phillips Bradley ed., Henry Reeve & Francis Bowen trans., Alfred A. Knopf 1990) (1835).

85 *See* TAMANAHA, *supra* note 19, at 4 ("If it is not already firmly in place, the rule of law appears mysteriously difficult to establish.").

the law gives lawyers a comparative advantage relative to those who do not share such training. So we are back to searching for institutional variables that generate and sustain the rule of law, understood to mean a system characterized by a high degree of predictability about the requirements of the law.

There is also the problem of explaining the other half of the rule-of-law equation: the practice of the executive following the judgments of the courts before coercing members of the public. An independent judiciary may be wholly committed to the principled explication of the law. But if executive authorities regard themselves at liberty to disregard judicial judgments they consider inconvenient, individuals will have no confidence about predicting what they can and cannot do under the law.

In order to explain how an independent judiciary can give rise to legal predictability, we need a more complete theory of how an independent judiciary is likely to function given other limitations on its power. The salient point here, which has been largely ignored by commentators on the rule of law, is that the judiciary, even if assured of complete independence in rendering judgments in the cases that come before it, is in other respects completely *dependent* on the other branches of government.[86] These other respects include the scope of the courts' jurisdiction over particular categories of cases, appropriations for courthouses and ancillary personnel like clerks and bailiffs, and the power of the legislature to override judicial decisions, at least those not based on the Constitution. Perhaps most importantly, these other respects include enforcement of the judgments the courts have rendered. Few if any constitutions (including the U.S. Constitution) have conferred independent authority on courts to enforce their judgments; instead, they charge the executive branch with doing so.[87]

The role of judicial independence is the more familiar half of the picture. As Alexander Hamilton wrote in *The Federalist* No. 78, judicial independence is necessary in order "to guard the Constitution and the rights of individuals from . . . dangerous innovations in the government, and serious oppressions of the minor party in the community."[88] Yet if a legal system did no more than create a body of judges completely independent of the political process, this would raise something of the opposite concern—the prospect of appointing "a bevy of Platonic Guardians" that would rule society in the

86 For a model explaining in an analogous fashion how judicial restraint emerges from a balance between independence and dependence, see John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962 (2002).

87 Enforcement of judgments by the U.S. Marshall's Service, a division of the Justice Department, is required by statute. See 28 U.S.C. § 566(a). (A predecessor of the statute dates from the Judiciary Act of 1789, 1 Stat. 73, 87.) Interestingly, the statute requires the Service to enforce "all orders of the United States District Courts, the United States Courts of Appeals, the Court of International Trade, and the United States Tax Court," but does not require that it enforce orders of the Supreme Court. *Id.*

88 THE FEDERALIST NO. 78, supra note 78, at 405.

name of its own vision of the good.[89] Hamilton in writing *The Federalist* No. 78 was anxious to assure his audience that this would not happen. He emphasized that the federal judiciary would be "beyond comparison the weakest of the three departments of power."[90] It would have "no influence over either the sword or the purse" and thus would exercise "neither FORCE nor WILL, but merely judgment."[91] Indeed, he specifically noted that the judicial branch "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[92]

Extrapolating a bit, Hamilton was arguing that a body of judges which enjoys complete *independence* from the political branches in rendering judgments, but complete *dependence* on the political branches in other respects, will necessarily exercise "judgment" as opposed to "will" in deciding disputes that come before it. We can say that such judges would thus naturally gravitate to a strategy of resolving disputes in a manner consistent with settled law.

Why is that? Hamilton did not spell out why a combination of independence-in-judging with dependence-in-enforcing would produce judges inclined to enforce settled understandings of the law. Perhaps the explanation would go something like the following.[93] If judges are insulated from direct political pressure in how they decide individual cases, they will eschew favoritism toward politically favored parties or hostility toward politically disfavored ones.[94] One can say they will resolve questions of fact and law-application in the disputes that come before them in an impartial manner. At the same time, if judges know they are ultimately dependent on the political branches in other respects, they will not stray very far, certainly not on a consistent basis, from settled expectations about the nature of the decisional norms they use in assessing the conduct of the parties that come before them. They will adopt legal principles that are generally understood to conform to the rule of law in the sense of predictability. If they engage in too much legal innovation, they will find that their interpretations of the Constitution have been overridden by amendment, or their interpretations of federal statutes have been overridden by new legislation, or perhaps that Congress has curtailed their jurisdiction, limited the funds appropriated for courthouse renovations, or decided to pack the courts with more compliant judges.[95] In the

89 *See* LEARNED HAND, THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES 73 (1958) ("For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.").

90 THE FEDERALIST NO. 78, *supra* note 78, at 402.

91 *Id. (emphasis in original).*

92 *Id.*

93 *See* Thomas W. Merrill, *Legitimate Interpretation – Or Legitimate Adjudication*? 105 CORNELL L. REV. 1395, 1412–17 (2020) [hereinafter Merrill, *Legitimate Interpretation*].

94 *Id.*

95 For a more complete account of the many ways in which the courts are subject to "a wide array of controls by the political branches" see Ferejohn and Kramer, *supra* note 86, at 977 and more generally at 976-994.

extreme case, they will find that the executive has declined to enforce the judgments they have reached.[96]

The important point is that the independent judiciary must be aware of the potential for *pushback* by the political branches if the judges stray too far or too long from what the other political branches regard as acceptable legal norms. Probably the best form of pushback takes the form of discrete overriding of judicial decisions, as when the Sixteenth Amendment was adopted overriding a Supreme Court decision suggesting that an income tax was impermissible,[97] or when Congress adopted legislation overturning a decision holding that discrimination based on pregnancy was not sex discrimination.[98] These sorts of actions remind the courts that the legal system presupposes a "continuing dialogue among the three branches of government" about acceptable legal norms.[99] Jurisdiction stripping, funding cutoffs, and court packing are blunter instruments, and carry with them the risk of impairing judicial independence as well as enforcing appropriate judicial modesty. Nevertheless, if independent judges become convinced that there is little or no possibility of pushback, an important constraint that inclines them toward adhering to settled law will disappear.

To these general constraints under which courts operate, we can add the importance of stare decisis to judicial legitimacy. Historically, arguments from precedent have been closely associated with private law, where common law has played a prominent role. In recent decades, however, private law has become increasingly dominated by statutes, including uniform laws, model state laws, and federal and state regulatory enactments. Meanwhile, amendments to the Constitution and to many framework statutes have become increasingly difficult to obtain. With the "statutorification" of private law[100] and gridlock afflicting legislated changes in public law, arguments from precedent have receded in private law and surged to the fore in public law.[101] This is especially pronounced in federal constitutional law, where nearly every contested case is resolved by following, distinguishing, or qualifying existing precedent.[102] Arguments from precedent are also increasingly

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96 For an instructive study of episodes in which federal officials have declined to comply with district court judgments, see Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 712–35 (2018) (the courts generally backed down).

97 See U.S. Const., amend XVI, overriding Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895).

98 Pregnancy Discrimination Act of 1978, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2018)), overriding General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

99 United States v. Home Concrete & Supply, LLC, 566 U.S. 478, 503 (2012).

100 *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1–10 (1982).

101 *See* Thomas W. Merrill, *Interpreting an Unamendable Text*, 71 VAND. L. REV. 547, 578–83 (2018).

102 *See, e.g.*, Ethan Buenode Mesquita & Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AM. POL. SCI. REV. 755, 764 (2002) (noting that arguments from precedent

prevalent in cases governed by statute, especially where the statute has been around for a long time and frequently litigated. In general, the older the text, and the more frequently it has been interpreted in the past, the greater the likelihood that we will find legal argumentation based on precedent, rather than interpretation of the instructions of the enacting body. Public law, and especially constitutional law, has become the new common law.

The logic that impels courts to follow precedent when it exists, especially when the precedent is considered settled, is straightforward: if courts do not adhere to their own precedents, no one else will either. Having "no influence over either the sword or the purse," as Hamilton pithily observed, and no independent authority to enforce their judgments, the power of courts is a function of the predictability of their judgments.[103] And the predictability of their judgments is increasingly a function of their fidelity to their own precedents.

Generalizing, one can say that courts are driven to the predictability conception of the rule of law because they have so little power. Such power as they possess is a function of their fidelity to settled law. Sometimes this requires that they enforce the plain meaning of a recently enacted statute or a rarely interpreted constitutional provision. More often, it means that they enforce directly applicable judicial precedent.

What then about the other half of the picture: the willingness of the executive to comply with judicial judgments about the law? The rule of law, under the predictability conception, requires that the *executive* conform its actions to settled understandings of the law. Even if the judiciary, for its own reasons just considered, decides to adopt a strategy of adhering to settled principles of law, why does the executive follow suit? Why doesn't the executive branch set up an office, called the Enforcement Bureau, which considers whether to enforce particular judicial judgments based on their compatibility with current executive policy preferences?[104]

To some extent, of course, executive discretion to decline to enforce settled law already exists, in the form of prosecutorial discretion. If Congress enacts a statute making the sale of marijuana a crime, and the courts uphold convictions based on the statute, a subsequent administration can nevertheless decide to decline to prosecute such offenses based on changing social attitudes about recreational pot.[105] Note, however, that this type of executive

"vastly outnumber all other kinds of arguments in attorney's written briefs, the Court's written opinions, and the justices' arguments in conference discussions."); *see generally* Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018 (1996) (providing empirical data).

103 THE FEDERALIST NO. 78, *supra* note 78, at 402.

104 *Cf.* Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1037–38 (2013) (proposing the creation of an office within the White House to set guidelines for discretionary enforcement authority across the administrative state).

105 Memorandum from James M. Cole, Deputy Att'y Gen., Dep't of Just. to All U.S. Att'ys (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf (advising the exercise of prosecutorial discretion in enforcing the Controlled Substances Act when state laws legalize "small

discretion involves a decision to decline to exercise coercive authority against particular individuals. Although it may be inconsistent with settled law, it does not involve the use of executive power to coerce individuals in a manner inconsistent with settled law.

The more interesting question is why the government refrains from attempting to coerce individuals when settled law indicates that it is impermissible to do so. Let us take an imaginary hypothetical to see how this would play out. Suppose the Supreme Court holds that a particular drug, call it Euphoria, is not a controlled substance subject to criminal prosecution under the federal drug laws. The incumbent administration disagrees, believing for good reasons that Euphoria is highly addictive and dangerous. It directs the Justice Department to prosecute Elmer for selling Euphoria. What happens next? The public defender appointed to represent Elmer files a motion to dismiss, citing the relevant Supreme Court precedent. The district judge promptly agrees and dismisses the indictment. If the government appeals, the court of appeals affirms. If the Justice Department takes the matter to the Supreme Court, asking the Court to overrule the controlling precedent, the Court rejects the request, pointing out the importance of adhering to settled law and urging the Department to seek an amendment to the drug laws from Congress.

Suppose the Department then decides to seize Elmer and throw him in a federal detention center without a trial. What is going to be the likely response? The organized bar, the mainstream media, and even social media will erupt in protest. Former Justice Department lawyers will file admonitory letters. Congress will hold hearings. Editorials will be written suggesting that this is an impeachable offense. If the administration has any sense, it will promptly release Elmer and issue a statement explaining that the action was based on a miscommunication.

What explains this reaction? The proximate cause is the behavior of the courts. They have acted with unanimity and without hesitation, grounding their action in prior controlling authority. They have said unequivocally that the behavior of the government is contrary to the rule of law. The prestige of the courts, built up over many years of more-or-less faithfully adhering to settled law, is such that the judgment of the courts is fatally damning of the behavior of the executive. This is enough for almost everyone to reach the judgment that the executive action must be condemned.

The ultimate cause runs much deeper. There is a deep desire, on the part of almost everyone, to live in a society that adheres to settled principles of law. Almost no one wants to live in a society where the police engage in random acts of brutality, tax collectors demand bribes, and the courts base their rulings on what the party in power tells them to do. When ordinary citizens learn that the government has defied the courts and acted contrary to

amounts of marijuana"). *See generally* MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE (Jonathan Adler, ed. 2020).

what the courts say the law requires, they will be alarmed. Opinion polling will run strongly against the government. It has little choice but to back down.

The hypothetical is admittedly stylized and extreme, but it explains why the executive nearly always defers to the courts on the requirements of the law, at least when the courts have spoken clearly and consistently. People do not want to live under a rapacious state. Courts, as an institution that spans multiple administrations, will have built up a reputation for being more faithful to settled law than the executive. Thus, when the executive appears to be acting coercively in a manner than has been condemned by the courts as contrary to law, the people take this as a cue that the rule of law is jeopardy. This explains why the courts—the least powerful branch in terms of conventional sources of power—have been able to force the executive to adhere to the rule of law. They have done so only because of their own adherence to predictable law, at least to a greater extent than that of the executive.

IV. SOME IMPLICATIONS AND CONCERNS

The foregoing account, if correct, has several important implications for understanding the rule of law, as conventionally understood to mean predictability about government coercion. I will start with the implications, and then mention some concerns.

A. *Implications of the Predictability Understanding of the Rule of Law*

1. Is the Rule of Law a Virtue?

Perhaps the most far-reaching question raised by the predictable law conception is whether we can continue to describe the rule of law as a virtue. This is not a problem for the rights conception, since it posits that the individual rights associated with the liberal constitutional order are good things, and therefore the rule of law is a good thing. Nor is it a problem for libertarians like Hayek, who understand the rule of law as requiring a small set of general or abstract rules that leave large swathes of human activity unregulated. If one implicitly assumes that the rule of law, in the sense of predictability, will emerge in a society governed by a minimal state, then predictable law leaves large space for individual initiative, and hence liberty as thinkers like Hayek understand it. But if we define the rule of law as the predictable use of coercion by the executive, and exclude from the definition any conception of the permissible scope or ends of the state, then the rule of law can be married with all sorts of political regimes, including authoritarian or totalitarian states, and even states that practice apartheid or genocide. How can the rule of law be described as a virtue, if its only consequence – in some applications – would be to make the exercise of evil more predictable?

I think the argument can be made that the rule of law is a virtue even in these dire circumstances. The basic point is that if a regime is dedicated to perpetrating evil, those who may be victims are better off if this is predictable, than they will be if the designs of the state are concealed or obscure or are implemented in a random fashion by gangs of thugs allowed to commit atrocities without legal recourse. If the evil intentions of the state are publicly promulgated, clearly stated, consistently upheld that the courts, etc., then those who may fall victim to those designs will know that they must somehow try to avoid such an outcome, whether it be by escaping, resisting, or going into hiding. Forewarned is better than being fooled, or succumbing to wishful thinking.[106] This is hardly the kind of ringing endorsement of the rule of law familiar from various Law Day speeches. But it is enough to suggest that predictability about the possibility of coercion is always a virtue, even if the other conditions of the polity utterly fail to meet basic standards of human dignity.

2. Judicial Dependence

The previous sketch of the institutional features that give rise to the rule of law, in the sense of predictability, validates the common intuition that an independent judiciary is an important element in creating and sustaining the rule of law.[107] Courts must be sufficiently independent from the political branches that they can fearlessly enforce settled principles of law in resolving the cases that come before them. What most commentators on the rule of law have missed is the second half of Hamilton's essay in *The Federalist* No. 78: that courts must also be *dependent* on the political branches for their general efficacy, including enforcement of the judgments they reach.[108] If the political branches perceive that the courts apply decisional norms based on a good faith extrapolation from settled law, they will continue to abide by judicial understandings of the law. If they come to believe that courts are developing decisional norms based on their own policy preferences, support for the decisions of the independent judiciary will evaporate. If this happens, the rule of law may evaporate too.

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106 As John Gardner wrote:

> If the relevant populations are lucky enough to live under the rule of law, [they] should be able to find out, before and afterwards, what the law has to say about their actions, and the law should be such that, once they know what it says, they can judge when they are violating it and find a way to avoid doing so. They should be able to rely on what the law has to say to predict and plan for the official response.

Gardner, *supra* note 20, at 213.

107 *E.g.*, DICEY, *supra* note 25, at 3; HAYEK, CONSTITUTION, *supra* note 23, at 319-20; Raz, *supra* note 31, at 214; Bingham, *supra* note 43, at 91-96; Venice Comm'n Report on the Rule of Law, *supra* note 53, at 10-12; Waldron, *supra* note 58.

108 *See* THE FEDERALIST NO. 78, *supra* note 78, at 402, 404.

3. Judicial Review

The account developed here also suggests that a broad right of judicial review of executive action is critical in creating and sustaining the rule of law. If the ultimate purpose of the rule of law is to make the use of coercive force by the executive predictable, and if the judiciary's penchant for enforcing settled law is the lynchpin in creating such a condition, then the executive must be answerable to the courts. The examples of recent presidential behavior set forth at the beginning of this paper suggest that Presidents are most tempted to disregard the settled understanding of the law when they think their action will not be judicially reviewable—either because it involves an unreviewable enforcement policy,[109] or it involves compliance with appropriations statutes thought to be enforceable only by Congress,[110] or because they imagine judicial proceedings will drag out long enough to make the matter moot.[111] That Presidents are increasingly tempted to skirt the law when they think they can get away with it is deeply troubling.[112] Which suggests that there should be a strong presumption in favor of judicial review, as the courts have generally held.[113]

4. Settled Law

Hayek's insistence in his early writing that the rule of law requires bright-lines rules that admit of no discretion was overstated.[114] What is critical is that the executive be constrained by settled law. Settled law sometimes means relatively formal rules. But settled law also includes general standards that must be applied in a case-by-case fashion. Consider, for example, liability for negligence as it applies in the law of torts. Negligence liability is not open-ended: one must prove duty, causation and actual injury in addition to

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109 Executive decisions not to enforce the law are generally regarded as unreviewable. *See, e.g.*, Heckler v. Chaney, 470 U.S. 821 (1985).

110 *See* Gillian Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075. 1109–11 (2021) (describing doctrines limiting litigation over appropriations).

111 *See supra* note 11.

112 *See* Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953, 1968–77 (2015) (noting the rise of "Presidential Administration" in areas of public law largely immune from judicial review).

113 *See* Guerro-Lasprilla v. Barr, 140 S.Ct. 1062, 1069 (2020); Kucana v. Holder, 558 U.S. 233, 251-53 (2010); Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967).

114 Hayek's thought evolved significantly in this regard. In *The Constitution of Liberty*, published in 1960, he associated predictable law with the law that emerges a common law system. HAYEK, CONSTITUTION, *supra* note 23, at 215-31. By the time he wrote his final major work he conceived of law as a set of abstract principles that reflect a spontaneous order which is continuously modified by judges (and legislatures) in an evolutionary fashion. *See* 1 F.A. HAYEK, LAW, LEGISLATION, AND LIBERTY 94–123 (1973). The touchstone, however, always remained vindicating the expectations about the law held by individuals.

unreasonable behavior on the part of the defendant. And identifying what amounts to unreasonable behavior is also somewhat predictable: trial lawyers refer to published reports of jury verdicts in negotiating settlements, and insurance companies use rules of thumb in making payments.[115] In the end, however, liability turns on a standard, which necessarily applies ex post in a case-by-case fashion. This is settled law, and is not inconsistent with a regime characterized as one governed by the rule of law.

5. Common Law or Codified Law

There is no necessary connection between the common law and the rule of law, other than the historically contingent fact that the judicial habit of following precedent originated in the common law. One can easily imagine a code system, such as exists in civil law countries, which conforms to the ideal of the rule of law. In implementing a code, courts start with close interpretation of the text. Over time, however, these interpretations become settled, and adherence to the settled meaning of the text is a form of the rule of law. In the U.S. and other so-called common law jurisdictions, we see a strong movement toward codes over time, either restating or substituting for the common law. Given their common law background, courts in these countries readily adapt to treating precedents interpreting codes in a manner similar to the way they treat common law precedents. If anything, the conventions of stare decisis are stronger in matters of statutory interpretation than they are in common law interpretation.[116] Thus, although the common law tradition was arguably causally responsible in significant part for the development of judicial respect for the rule of law, the existence or persistence of such a tradition is not a necessary condition of achieving a system based on the rule of law.

6. No One is Above the Law

The idea that the rule of law requires that all persons be treated equally, found in Hayek's work and repeated in other commentary, is confusing. The

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115 *See* H. Laurence Ross, *Settled Out of Court*, in THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT 98-99 (2d ed. 1980).

116 The Supreme Court has repeatedly affirmed "that stare decisis has 'great weight…in the area of statutory construction' but 'is at its weakest' in constitutional cases." Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 703-04 (1999). The relative strength of stare decisis in common law cases is hard to specify, since the common law is the province of 50 different state courts. My general impression is that fidelity to precedent is somewhat weaker in common-law cases than in statutory cases, perhaps because courts are both the author and the expounder of the relevant sources of authority, and therefore regard themselves as having greater liberty to revise legal rules. *See generally* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 62-120 (1960) (discussing the "leeways of precedent").

more accurate proposition is that the rule of law ideal requires that no one is above the law. Thus, for example, if the regime is a monarchy, the king is likely to enjoy certain prerogatives that no other citizen of the realm can claim. But as long as the royal person enjoys only those prerogatives that are authorized by settled law, there is no violation of the rule of law. Thus, strict equality of treatment of persons under the law is not a necessary element of rule of law. If the law says that left-handed persons are entitled to a special government bonus, it would violate the rule of law to deny the bonus to a person who is provably left-handed. But it would not violate the rule of law to deny the bonus to a right-handed person. Obviously, one can argue that the left-handed bonus program is stupid, irrational, and perhaps that it even violates the Equal Protection Clause or one or more provisions of fundamental human rights. But it does not violate the rule of law, as long as it is enforced in accordance with settled expectations about the law.

B. *Some Concerns*

Grumpy judges and commentators have been decrying a decline in the rule of law for as long as the concept has been around.[117] The account developed here suggests several grounds for concern going forward, which will be briefly noted.

1. The Administrative State

A particularly difficult problem is posed by the continued growth of the administrative state.[118] The administrative state was originally conceived as a way to consolidate all governmental functions in a single body, thereby eliminating the roadblocks to an expansion of government power associated with the separation of powers.[119] Specifically, it was designed to reduce the influence of the judiciary, which was seen as a reactionary force impeding progressive reforms. These objectives obviously posed a distinctive threat to the rule of law, insofar as judicial review for compliance with settled law is the keystone of the rule of law. A corrective was adopted in the form of the Administrative Procedure Act (APA) in 1946, which was interpreted as creating a presumption in favor of judicial review and instructed reviewing courts to "decide all relevant questions of law."[120] But the APA acquiesced in allowing agencies to resolve fact disputes, subject to a deferential standard

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117 TAMANAHA, *supra* note 19, at 60 ("It is an odd paradox that the unparalleled current popularity of the rule of law coincides with widespread agreement among theorists that it has degenerated in the West.").

118 *Cf.* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

119 *See, e.g.*, JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938).

120 5 U.S.C. § 706.

of review.[121] This compromised the impartiality of adjudication associated with an independent judiciary.[122]

More recently, courts adopted the *Chevron* doctrine for addressing agency interpretations of law.[123] The *Chevron* decision itself might have been developed in a manner consistent with the rule of law.[124] But the typical formulation of the standard—requiring courts to accept reasonable agency interpretations of ambiguities in the statutes they administer—provides no obvious place for courts to consider whether an agency interpretation is consistent or inconsistent with settled expectations about the law. This has led to episodes in which the law oscillates from one administration to another, injecting significant instability into the law.[125] There are signs that the Court is alert to the problem, and may make appropriate adjustments in the *Chevron* doctrine at some point in the future.[126] But in its most aggressive applications, *Chevron*-style review must be regarded as a threat to rule of law values.

2. Congressional Weakness

For a variety of reasons, Congress has become a relatively weak institution. The causes range from extreme partisan division in the country, to the rise of one-party districts in which potential primary challenges from extremists discourage cross-party cooperation, to the demands of raising large campaign contributions from interest groups. The relative weakness of Congress means that power has flowed to the executive and the judiciary, in both cases with adverse implications for the rule of law.

On the executive side, recent presidents have turned to issuing Executive Orders to effect significant goals of the administration, directing

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121 *Id.* § 706(2)(E) (allowing courts to set aside the factual basis of agency decisions only if "unsupported by substantial evidence" considering the record as a whole).

122 Thomas W. Merrill, *Fair and Impartial Adjudication*, 26 GEO. MASON L. REV. 897 (2019).

123 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

124 *See* Thomas W. Merrill, *Re-Reading* Chevron, 70 DUKE L. J. 1153, 1178 (2021).

125 Some examples: (1) the regular flip-flopping between Republican and Democratic Administrations as to whether family planning clinics can provide the names of abortion providers to pregnant women; (2) the expansion and contraction in the scope of wetlands subject to federal permitting requirements as part of the "waters of the United States"; (3) rejection, adoption, rejection, and adoption of the so-called "net neutrality" requirement for internet service providers, depending on the party affiliation of the Chair of the Federal Communications Commission; and (4) the oscillation between skepticism and conviction about the need for urgent action to reduce to the risk of climate change associated with the accumulation in the atmosphere of greenhouse gases. The examples are discussed in THOMAS W. MERRILL, THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE 171-72, 173-75, 209-14, 317 n.28 (2022).

126 In *West Virginia v. EPA*, 142 S.Ct. 2587, 2608 (2022), the Court carved out an apparent exception from *Chevron* for agency decisions that expand agency authority in an "unprecedented" fashion based on "cryptic" statutory authority. *Cf.* Kisor v. Wilkie, 139 S. Ct. 2400, 2400 (2019) (recognizing an exception to the principle of deference to agency interpretations of their own regulations when the interpretation upsets reliance interests created by previous agency action).

subordinate officials to pursue one or another preferred policies.[127] These orders are inherently impermanent. They do not bind anyone outside the administration, and many are designed simply to reverse the executive orders of the previous administration.[128] The result is a lot of soft law that fluctuates from one administration to the next, leaving little that can form the basis of reliance on the future conduct of the government.

On the judicial side, the perception that Congress is largely incapable of overriding judicial decisions, the lapse of any serious concern with curtailing judicial jurisdiction, and the remote prospect of other forms of retaliation like Court-packing, encourages courts to become more aggressive about asserting their own policy preferences. At the Supreme Court level, this occasionally takes the form of a dramatic overruling like the *Dobbs* decision.[129] More commonly, it takes the form of what I have called "Scrabble Board precedentialism," in which the Justices aggressively manipulate quotations from prior decisions to justify changes in the law.[130] The result is opinions that, in form, appear to following existing precedent, but more accurately considered represent a change in the law. At the district court level, it takes the form of "nationwide" or (more accurately, universal) injunctions against executive policy initiatives.[131] Partisan litigators have little trouble identifying conservative judges who will enjoin Democratic initiatives, or liberal judges who will enjoin Republican ones. This embroils the judiciary in partisan disputes that must be resolved on stay applications, first to the circuit courts of appeals and then to the Supreme Court. These developments reflect a disturbing erosion of judicial commitment to enforcing settled law.

Ironically, the weakness of Congress—the branch of government designed to introduce changes in the law—has in fact worked to undermine the rule of law. This is because it has encouraged the executive to rule by Executive Order and other relatively impermanent types of authority that are inherently unstable. And it has tempted courts to enter the partisan fray, either through manipulation of precedent or by issuing injunctions that determine national policy, at least until they can be overturned.

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127 For an influential defense of Presidential direction of policy, see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001). For the turn to executive orders by the Obama Administration, see Binyamin Appelbaum & Michael D. Shear, *Once Skeptical of Executive Power, Obama Has Come to Embrace It*, N.Y. TIMES, (Aug. 13, 2016), https://www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html.

128 *See* KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER (2001).

129 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022), overruling Roe v. Wade, 410 U.S. 113 (1973).

130 *See* Merrill, *Legitimate Interpretation*, *supra* note 93, at 1450–56.

131 *Id.* at 1456–61.

3. Too Much Law

A different sort of concern is that too much law has accumulated over time—both through the periodic enactment of blockbuster statutes by Congress (when it can find the will to legislate) and of course through the process by which the administrative agencies continue to pump out regulations at an extraordinary rate. The result, as Judge Stephen Williams argued, is that predictability about the law becomes almost impossible for all but the largest corporations that can afford the services of big law firms.[132] For ordinary individuals and small businesses, the requirements of the law that affects them becomes increasingly incomprehensible. As a result, the space in which they have the freedom to exercise initiative becomes uncertain at best.

This may be the most serious threat to the rule of law, because there is no obvious solution. In a sense, it represents a kind of prisoners' dilemma, in which every Congress and every agency has good reasons to enact more laws, but no one has an incentive to consider the cumulative effect on society of incrementally adding to the great weight of law. The implications are dire insofar as the mounting pile of law points toward an increasingly oligopolistic structure of society—compliance with law creating a de facto barrier to entry. One wonders if the response of many individuals and small businesses may be to give up trying to comprehend the requirements of the law altogether—pushing us unto a society where law exists for oligopolistic firms, and everyone else follows the norms that prevail in their peer group, without regard to whether they conform to the law.

CONCLUSION

The essential meaning of the rule of law is that the government forbears from coercing individuals except when it is predictable that they will do so. Predictability about coercion opens up space for individuals to pursue their own aspirations—that is to say, it promotes freedom. This kind of predictability requires that courts find it in their interest to adhere to settled principles of law. If courts render predicable decisions, the executive will generally comply with judicial judgments, which means that the system will largely conform to the ideal of the rule of law. The rule of law is not the only desirable value that a system of government should seek to realize. But it is important that legal predictability be recognized as a good in and of itself, distinct from other important values.

Whether the rule of law can be preserved in the face of a burgeoning administrative state, a weakened legislature, and a system that is suffused with so much law that predictability becomes increasingly difficult, are

132 *See generally* Stephen Williams, *The More Law, The Less Rule of Law*, 2 GREEN BAG 2D 403 (1999).

extremely serious concerns. But a starting point in addressing these concerns is to recognize the essential meaning of rule of law.