
THE RULE OF LAW AND THE LEGITIMACY OF CONSTITUTIONAL DEMOCRACY

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I. INTRODUCTION

The rule of law is a cornerstone of contemporary constitutional democracy¹ as was underscored by its role in cementing the recent transitions from authoritarian or totalitarian regimes² to constitutional democracy in Eastern Europe and elsewhere.³ In the broadest terms, the rule of law requires that the state only subject the citizenry to publicly promulgated laws, that the state's legislative function be separate from the adjudicative function, and that no one within the polity be above the law. The three essential characteristics of modern constitutionalism are limiting the powers of government, adherence to the rule of law, and protection of fundamental rights.⁴ In the absence of the rule of law, contemporary constitutional democracy would be impossible. Beyond that, however, it is not clear what precise characteristics the rule of law must possess to help sustain constitutional democracy, what specific role it must assume to

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1. See Michel Rosenfeld, *Modern Constitutionalism as Interplay Between Identity and Diversity*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY 3, 3 (Michel Rosenfeld ed., 1994) [hereinafter Rosenfeld, *Modern Constitutionalism*].

2. For a discussion of the difference between authoritarian and totalitarian regimes, see JUAN J. LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION (1996).

3. See, e.g., Mark F. Brzezinski & Leszek Garlicki, *Judicial Review in Post-Communist Poland: The Emergence of a Rechtsstaat?*, 31 STAN. J. INT'L. L. 35, 35 (1995); Krisztina Morvai, *Retroactive Justice Based on International Law: A Recent Decision by the Hungarian Constitutional Court*, E. EUR. CONST. REV., Fall 1993/Winter 1994, at 32; Special Report: *Retroactivity Law Overturned in Hungary*, E. EUR. CONST. REV., Spring 1992, at 7, 7-8.

4. Rosenfeld, *Modern Constitutionalism*, *supra* note 1, at 3.

ensure a working constitutional democracy, or how it might ultimately contribute to the legitimacy of constitutional democracy.

Although it is widely believed the rule of law and constitutional democracy go hand-in-hand, closer scrutiny reveals that constitutionalism and democracy might not always be in harmony,⁵ resulting in a clash between the rule of law and democracy. Additionally, the proper role and scope of the rule of law within constitutionalism is itself ambiguous inasmuch as the rule of law may spill over to the other two essential features of constitutionalism, rather than figuring exclusively as one of the three. Indeed, a written constitution may have the force of law,⁶ and thus its provisions limiting the powers of government and those devoted to the protection of fundamental rights may become part and parcel of the rule of law regime instituted by the relevant constitutional regime. Moreover, the rule of law may encompass the entire field coming within the sweep of constitutionalism⁷ or it may only play a limited role in the maintenance of a prescribed constitutional order.⁸

Compounding the above difficulties is the fact that there is no consensus on what “the rule of law” stands for, even if it is fairly clear what it stands against. An important part of the problem is that “the rule of law” is an “essentially contestable concept,” with both descriptive and prescriptive content over which there is a lack of widespread agreement.⁹ Like the concepts of “liberty” or “equality,” the descriptive meaning of “the rule of law” is dependent on the prescriptive meaning one ascribes to it; in the context of complex contemporary politics there likely will be vigorous disagreements concerning the relevant prescriptive standards at

5. This is manifest by the famous “counter-majoritarian” difficulty discussed below. See *infra*, text accompanying note 30. Although this difficulty is most often considered in the context of judicial interpretation of constitutional rights, it can also be raised in connection with at least some such rights themselves.

6. See, e.g., *Marbury v. Madison*, 5 U.S. 137, 176–77 (1803) (treating the Constitution as legally enforceable and as the highest law of the land).

7. This would occur if the Constitution defined the nature and scope of governmental powers and human rights and if these were implemented through laws or judicially interpreted and elaborated as legal norms.

8. This would be the case if the Constitution established a division of powers but left it to the political process to implement it, cf. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 547–557 (1985) (indicating that disputes concerning the boundaries between federal and state powers in the United States should be left to the national legislature, as state interests are incorporated in the very composition of that legislature), or if it singled out a set of fundamental rights for special protection, leaving their actual implementation to the discretion of the political branches of government as opposed to the judiciary.

9. See Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 1, 7 (1997).

stake.¹⁰ Consistent with this, the rule of law has come to mean different things to various legal traditions, as evinced by the contrasts between Anglo-American “rule of law,” German *Rechtsstaat*, and French *État de droit*.¹¹ Even within a single tradition, it is not clear whether the rule of law ought to be largely, if not exclusively, procedural or substantive or whether it should be primarily concerned with predictability or fairness. Finally, at least in the context of constitutional democracy, the rule of law appears to rest on a paradox. In terms of the institutional framework necessary for constitutional democracy, and of implementation of the will of the majority through law, the rule of law seems to be decidedly on the side of the state and often against the citizen.¹² In contrast, in connection with protection of fundamental constitutional rights, the rule of law seems to be on the side of the citizen, at least to the extent that constitutional law can be invoked by citizens against laws and policies of the state.

In order to determine whether, and how, the rule of law might contribute to establishing the legitimacy of constitutional democracy in a contemporary pluralistic society, it is necessary to tackle the above questions as well as certain key preliminary issues relating to the very concepts of “rule of law,” “legitimacy,” and “pluralistic society.” In Section II, I shall briefly deal with these preliminary issues and then concentrate on the essential jurisprudential characteristics of the respective conceptions of the rule of law in three different legal traditions. In Section III, I will discuss the German conception of the *Rechtsstaat*; in Section IV, the French notion of the *État de droit*; and, in Section V, the Anglo-American common law based elaboration of the idea of “the rule of law.” In Section VI, I will explore the conditions, which the rule of law must fulfill, to legitimate constitutional democracy in a pluralistic society. I will focus particularly on the contrast between procedural and substantive safeguards and on the divide between law and politics, with special reference to the tendency by proponents of Critical Legal Studies (CLS) to

10. While it is important for analytic purposes to keep the prescriptive and descriptive aspects of essentially contestable concepts apart, no formulation of such concepts can be cogent unless it encompasses both prescriptive and descriptive elements. For example, it is impossible to determine in the abstract whether mechanical application of rigid legal rules amounts to implementation of “the rule of law.” If the relevant prescriptive objective is to insure predictability, then the answer could well be in the affirmative. If, however, the main prescriptive aim were to insure fairness, then mechanical adherence to rigid rules would most likely fail to live up to the requirements of the rule of law.

11. For an account of the differences among these traditions, see discussion *infra* Parts III.–V.

12. This seems to be the case whenever a citizen is coerced to abide by laws which he or she deems unjust or oppressive, notwithstanding that such laws were approved by duly elected legislative majorities. For further exploration of this issue, see *infra*, text accompanying notes 30–41.

collapse law into politics. In Section VII, I will examine how the rule of law, particularly in common law jurisdictions, might reconcile the need for predictability with the need for fairness. Finally, after concluding that it is impossible for the rule of law to satisfy the conditions requisite to the legitimation of constitutional democracy, I will focus in Section VIII on what role the rule of law might nonetheless play in the quest for such legitimation.

II. BACKGROUND PRESUPPOSITIONS: PLURALISM, LEGITIMACY AS CONSENT, AND THE MINIMUM CONDITIONS FOR THE RULE OF LAW

The belief that constitutional democracy under the rule of law is desirable does not occur in a vacuum. Constitutional democracy is virtually indispensable when contrasted with the totalitarian or authoritarian regimes that it replaced in the second half of the twentieth century. Indeed, these regimes ignored, violated, or abused the rule of law, and those subjected to them clearly suffered. It does not necessarily follow from this, however, that constitutional democracy under the rule of law is always indispensable or the best alternative. In some cases, constitutional democracy could be superfluous or even undesirable. For example, in a close knit homogeneous society that is deeply religious and ruled by revered leaders who are widely believed to have direct access to divine commands, a theocracy would plainly seem more appropriate than a constitutional democracy. In such a society, instructions and directions imparted by the religious leaders would be paramount, leaving little, if any, room for the rule of law.

In contrast, in heterogeneous societies with various competing conceptions of the good, constitutional democracy and adherence to the rule of law may well be indispensable to achieving political cohesion with minimum oppression.¹³ Such heterogeneous societies, moreover, can be characterized as pluralistic-in-fact.¹⁴ A society is pluralistic-in-fact if it is

13. This is provided that the societies in question possess, or are within striking distance of, the means necessary to sustain a working constitutional democracy. See LINZ *supra* note 2, at 7–11 (identifying five arenas of “consolidated democracy,” to wit: 1) civil society; 2) a relatively autonomous political society; 3) implementation of the rule of law; 4) a viable state bureaucracy; and 5) an “institutionalized economic society”).

14. For a more extended discussion of “pluralism-in-fact” and how it differs from “pluralism-as-norm,” see MICHEL ROSENFELD, JUST INTERPRETATIONS: LAW BETWEEN ETHICS AND POLITICS 200–03 (1998) [hereinafter JUST INTERPRETATIONS].

divided along ethnic, religious, linguistic, cultural, or ideological lines, or, in other words, if it is comprised of different groups who do not share the same values or conceptions of the good. Even a homogeneous society with an individualistic conception of the good, in which every person is viewed as entitled to pursue his or her own individual good, would qualify as being pluralistic-in-fact.¹⁵ In short, a society is pluralistic-in-fact if it is pluralistic either at the group level or the individual level. Consistent with this, all Western democracies, and for that matter most contemporary nation-states, qualify as pluralistic-in-fact.

Because people in pluralistic-in-fact societies do not share the same values or interests, the legitimacy of their fundamental political institutions ultimately depends on some kind of consent among all those who are subjected to such institutions. There is a long-standing tradition that conceives institutional legitimacy and political justice in terms of consent. That tradition is the one established by social contract theory as articulated in the philosophies of Hobbes, Locke, Rousseau, Kant,¹⁶ and, more recently, Rawls.¹⁷ In the broadest terms, under social contract theory, the legitimacy of government depends on the consent of the governed. There is, however, no agreement among social contract theorists as to what constitutes adequate consent. For some, such as Locke, it seems to be the actual consent of the governed,¹⁸ while for others, such as Rawls, a hypothetical consent on the basic institutions of society suffices.¹⁹ Furthermore, consent is also the basis for legitimacy in theories that do not, strictly speaking, fall within the social contract paradigm but which nonetheless bear great affinity with it, such as Habermas' consensus-based discourse theory of the justification of law.²⁰

15. More precisely, such a society would not be pluralistic at the group level, but would qualify as pluralistic at the individual level to the extent that pursuit of individual self-interest was deemed normatively acceptable or desirable. Accordingly, such a society would be pluralistic-in-fact as contrasted with a homogeneous society in which individuals are normatively required to sacrifice private interests to the common good.

16. For a comparison of the similarities and differences among the respective social contract theories espoused by these philosophers, see Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769 (1985) [hereinafter Rosenfeld, *Contract and Justice*].

17. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

18. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* ¶¶ 98–102 (J. Gough ed., 1976).

19. RAWLS, *supra* note 17, at 11–13.

20. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 118–31 (William Rehg trans., 1996). For an analysis of Habermas' theory as the heir to social contract theory, see Michel Rosenfeld, *Can Rights, Democracy, and Justice Be Reconciled Through Discourse Theory? Reflections on Habermas's*

Leaving aside differences among various consent-based theories, legitimation based on consent appears to be the optimal, if not the exclusive, means of normative justification for both constitutional democracy and the rule of law in societies that are pluralistic-in-fact. Notwithstanding its unmistakable attractiveness when contrasted with authoritarian or totalitarian regimes, constitutional democracy itself can be oppressive since it generally imposes at least two kinds of coercion. To the extent it is democratic, constitutional democracy implements the will of political majorities and coerces political minorities to contribute to the realization of majority objectives with which minorities may strongly disagree.²¹ On the other hand, to the extent that constitutional democracy affords protection to certain fundamental rights and certain vindications of such rights frustrate the ability of majorities to fulfill certain objectives which they consider paramount, the enforcement of constitutional rights would seem to lead to a significant amount of coercion.²²

For its part, the rule of law itself is coercive inasmuch as citizens are subjected to laws with which they disagree or which they find oppressive. Also, the above-mentioned types of coercion associated with constitutional democracy are likely to be imposed largely through implementation of the rule of law. Specifically, infra-constitutional laws justify state-backed coercion of citizens, whereas constitutional laws allow citizens to challenge state-backed infra-constitutional laws and may upset the pursuit of the good of the promoters of successfully challenged infra-constitutional laws.

Consent to constitutional democracy and the rule of law may not eliminate coercion, but it would legitimate it. Presumably, the consent in question would be, in all relevant respects, akin to consent in contract.²³ In a valid legal contract, uncoerced agreement between the parties at the time of making the contract legitimates subsequent enforcement of such contract even against a party who has come to regret his or her original agreement. Thus, although someone who has changed his or her mind after having

Proceduralist Paradigm of Law, in HABERMAS ON LAW AND DEMOCRACY: CRITICAL EXCHANGES 82 (Michel Rosenfeld & Andrew Arato eds., 1998) [hereinafter Rosenfeld, *Rights Democracy*].

21. Although not all policies designed to placate the majority need to be coercive from the standpoint of political minorities, many of them undoubtedly are. To cite but two strong examples, a citizen may certainly feel coerced if he or she must serve in the military to fight a war which he or she strongly opposes or if he or she must contribute a hefty sum to pay a tax earmarked to finance policies which he or she deems in square contradiction with the dictates of his or her conception of the good.

22. For example, striking down a widely supported antipornography law as violative of freedom of expression rights may well frustrate decency and moral objectives considered by their proponents as vital to the preservation of their way of life.

23. For a discussion of the similarities and differences between legal contract and social contract, see Rosenfeld, *Contract and Justice*, *supra* note 16.

entered into a valid contract may feel that enforcement of such contract is coercive, such coercion would still be legitimate and would derive in all relevant respects from valid consent rather than being merely oppressive. Similarly, if constitutional democracy and the rule of law can be genuinely legitimated on the basis of some plausible notion of consent, the mere fact they may also be coercive would not necessarily negate their legitimacy.

What is crucial in contract is that the consent be *ex ante*—before the legally binding transaction is set in motion. When would-be contractors know what to expect when the contract goes forward, and they nonetheless choose to go ahead with it, then subsequent enforcement of such contract against them is both fair and consistent with respecting their freedom and autonomy. Assuming consent would analogously validate constitutional democracy and the rule of law would play an important role in making the consequences of *ex ante* commitment predictable, the citizenry's consent to the rule of law would be a key factor in the legitimation—not only of the rule of law regime at stake, but also of the constitutional democracy associated with it.

Before determining what the rule of law is or what its potential may be, it is important to note briefly what it is not, by elucidating its minimum requirements.²⁴ The “rule of law” is often contrasted to the “rule of men.”²⁵ In some cases, the “rule of men” (or, as we might say today, “the rule of individual persons”) generally connotes unrestrained and potentially arbitrary personal rule by an unconstrained and perhaps unpredictable ruler. For present purposes, however, even rule through law amounts to the “rule of men,” if the law can be changed unilaterally and arbitrarily, if it is largely ignored, or if the ruler and his or her associates consistently remain above the law. At a minimum, therefore, the rule of law requires fairly generalized rule through law; a substantial amount of legal predictability (through generally applicable, published, and largely prospective laws); a significant separation between the legislative and the adjudicative function; and widespread adherence to the principle that no one is above the law. Consistent with this, any legal regime which meets these minimal requirements will be considered to satisfy the prescriptions of the rule of law in the “narrow sense.”

24. See Fallon, *supra* note 9, at 1 (noting “[t]he Rule of Law is a much celebrated, historic ideal, the precise meaning of which may be less clear today than ever before”).

25. See, e.g., *Marbury*, 5 U.S. at 163 (1803) (contrasting a “government of laws” to a government of men).

The rule of law in the narrow sense may be preferable to the rule of men,²⁶ but it is insufficient for purposes of satisfying the minimum requirements of a legitimate constitutional democracy. Indeed, the rule of law in the narrow sense need not be just or even democratic as it is entirely compatible with legal regimes predicated on slavery, apartheid, or countless other oppressive and dehumanizing practices and policies grounded in law, shaped by law, and carried out through law.²⁷ Accordingly, for the rule of law to measure up to the requirements of a legitimate constitutional democracy, it must be more than the rule of law in the narrow sense.

To become legitimate, the rule of law would seem to need democratic accountability, procedural fairness, and even perhaps substantive grounding. However, satisfying these requirements may be necessary without being sufficient to produce legitimacy. Democratic laws may be oppressive to minorities, procedural fairness may be consistent with a significant measure of substantive inequity, and the substantive values vindicated by any particular instantiation of the rule of law may be rejected by a sizeable portion of the polity, particularly in pluralist settings marked by clashing conceptions of the good.

As already noted, a further difficulty stems from the split within the rule of law in a constitutional democracy. Even if we assume that, as shields against ordinary laws, constitutional rights command greater support among the citizenry than most ordinary laws, there would still be constitutional rights opposed by some of the citizens. For example, for those Americans who favor state aid to parochial schools, the Supreme Court's interpretation of the Establishment Clause as forbidding such aid²⁸ might well seem as oppressive as the state prohibition against

26. It is certainly conceivable that the members of a polity would be better off under the unfettered rule of a benevolent monarch deeply committed to ruling in a just and compassionate manner. Nevertheless, as a general rule, it would seem preferable to be subjected to a publicly implemented and largely predictable legal regime than to be at the mercy of the whim of a single ruler or of a collective leadership bound by no law.

27. *Dred Scott* furnishes a particularly apt illustration of this point as the Supreme Court managed to enshrine a legally grounded property right of a slave owner in his slave as a constitutional right in the course of resolving a conflict between state law and federal law. *Dred Scott v. Sanford*, 60 U.S. 393, 452 (1857) (federal law providing for emancipation of slave brought by his master to federal territory held unconstitutional as deprivation of master's state-created property right in his slave without the "due process of law" guaranteed by the Fifth Amendment).

28. See *Everson v. Board of Education*, 330 U.S. 1, 15–16 (1947) (holding that state cannot finance parochial schools). More recent decisions, however, have upheld certain indirect or incidental state aid to parochial schools. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 212–14 (1997) (public school teachers may impart remedial education to disadvantaged parochial school students).

contraceptives did to those who challenged it as violative of their constitutional privacy rights.²⁹ Consistent with this, in a constitutional democracy, all laws are prone to being considered advantageous or acceptable by some and oppressive or coercive by others.

The fact that all laws, whether constitutional or ordinary, would be approved by some but rejected by others seems to erect a formidable barrier to the legitimation of the rule of law in a constitutional democracy. It may be objected, however, that the lack of full consent is less daunting than it seems, for it appears ultimately reducible to the familiar conflict between majoritarian laws and antimajoritarian constitutional constraints much debated in American constitutional circles.³⁰ While this debate has been quite vehement at times,³¹ it seems to boil down to a conflict over how broadly or narrowly antimajoritarian constitutional constraints ought to be construed without questioning their inherent legitimacy. So long as some constitutional constraints are legitimate, it would seem majoritarian lawmaking is as well. In other words, if there is a consensus concerning certain fundamental constitutional constraints and a shared commitment to democracy, then mere legislative setbacks or even the subjection to certain unfair, yet constitutional laws should not pose a serious challenge to the legitimacy of the prevailing rule of law regime.³²

As long as the proper measure of legitimacy is the consent of each and every citizen³³ then the above objection ultimately fails. Even if there were a consensus on some constitutional constraints, it seems highly implausible that in any pluralist constitutional democracy there would be unanimity on a sufficient core of constitutional fundamentals to directly or indirectly legitimate the rule of law all the way down. There is certainly no such unanimity in the United States, as evinced by deep splits over key

29. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

30. The conflict over the “counter-majoritarian problem” has generated an immense literature. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

31. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990) (attacking the Supreme Court for failure to remain faithful to the “original understanding” of the text of the Constitution).

32. Cf. JOHN RAWLS, *POLITICAL LIBERALISM* 11, 237–40 (1993) (framing political justice in terms of the “basic structure” of society and “constitutional essentials”).

33. I restrict the test of legitimacy to citizens rather than persons to avoid certain theoretical issues relating to immigrants and would be immigrants. Of course, if the test of legitimacy fails for citizens within the polity, it would seem, a fortiori, to fail for those excluded from representation.

constitutional issues including federalism,³⁴ abortion,³⁵ affirmative action,³⁶ equality for women,³⁷ homosexuals,³⁸ and the relationship between state and religion.³⁹ And there seems to be even less agreement in other constitutional democracies divided along ethnic, linguistic, or religious differences, such as Canada,⁴⁰ or Spain.⁴¹

It follows from these considerations that actual unanimous consent for any meaningful constitutional constraints, let alone for any rule of law regime, seems highly implausible. Actual consent, however, is unnecessary. It is arguably sufficient for purposes of assessing the legitimacy of a rule of law regime to determine whether acceptance of the latter would be reasonably consistent with the diverse agendas of all concerned. Accordingly, I propose using a test fashioned after Habermas' criterion for the legitimacy of law. According to Habermas, the legitimacy of law can be established dialogically through communicative action among persons who recognize one another as equals and who agree to accept as legitimate only those laws to which they would all consent, both

34. See, e.g., *United States v. Lopez*, 514 U.S. 549, 552 (1995) (restricting scope of federal commerce power in a 5-4 decision).

35. See, e.g., LAWRENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (2d ed. 1992).

36. See MICHEL ROSENFELD, *AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY* (1991).

37. See, e.g., Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 13 (1987) (arguing Supreme Court adjudication of sex discrimination cases posits men's experience as the "norm" against which women are measured).

38. See *Bowers v. Hardwick*, 478 U.S. 186, 196-97, 199 (1986) (upholding criminalization of consensual sex among homosexual adults in a 5-4 decision).

39. See, e.g., *Agostini v. Felton* 521 U.S. 203 (1997) (repudiating previous limitations on state assistance to parochial schools in a 5-4 decision); *Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990) (divided court narrows scope of protection of religious liberty). It may be objected that notwithstanding these splits, Americans generally agree that there ought to be divided government and liberty and equality for all. Assuming that this is true, such consensus would remain at such an abstract level as to preclude any meaningful legitimation of the rule of law. For example, so long as adherence to "equality for all" is not deemed inconsistent with criminalizing homosexual sex, it seems reasonable for homosexuals to challenge the legitimacy of a rule of law regime that deprives them of fundamental equality and privacy rights accorded to their fellow heterosexual citizens.

40. Quebec has thus far refused to accept the legitimacy of the 1982 Canadian Constitution and has come close to moving towards secession. See Jacques Parizeau, *The Case for a Sovereign Quebec*, FOREIGN POLICY, Summer 1995, at 69. Thus, in 1995, a provincial referendum on Quebec sovereignty failed to endorse secession by a very slim margin. Rogers Worthington, *50.5%-49.5% Unity Wins in Quebec*, CHI. TRIB., Oct. 31, 1995, at 1.

41. See, e.g., Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 393 (1995) (observing Spain's 1978 Constitution was made in the context of Basque terrorism); Charles E. Ehrlich, *Ethno-cultural Minorities and Federal Constitutionalism: Is Spain Instructive?*, 24 S. ILL. U. L.J. 291, 305 (2000) (noting Basque nationalists chose in substance to stay out of process of constitution-making).

to enact as autonomous legislators and to follow as law-abiding citizens.⁴² This test allows for reconstruction on the basis of a counterfactual⁴³ in order to establish the legitimacy of law and is used by Habermas to elaborate and defend his “proceduralist paradigm of law.”⁴⁴ As I have discussed elsewhere, however, I do not share Habermas’ belief that law can be legitimated on purely procedural grounds.⁴⁵ I therefore propose to adapt Habermas’ test to account for this key difference. More specifically, I intend to rely on two modifications which somewhat weaken the conditions of legitimacy envisaged by Habermas: 1) I will consider the counterfactual requirement of self-legislation, coupled with willing submission to law, to be satisfied if it can be used to legitimate a rule of law regime taken as a whole without separately legitimating individual laws within that regime and 2) I will construe the requirement of consent more loosely so as to include within it a criterion of reasonableness based on lack of coercion, coupled with the meeting of certain conditions, which make it reasonable to endorse a particular rule of law regime consistent with one’s substantive aims.

Although these proposed modifications make the requirements of legitimacy weaker than those endorsed by Habermas, it is by no means obvious that any contemporary rule of law regime would actually be able to measure up even to the lesser of these criteria. Because of this, I will not seek to justify the adoption of a weaker test before determining what kind of rule of law regime could satisfy it. Moreover, before tackling this latter

42. See Jürgen Habermas, *Paradigms of Law*, in HABERMAS ON LAW AND DEMOCRACY: CRITICAL EXCHANGES 13, 19–21 (Michel Rosenfeld and Andrew Arato eds., 1998) [hereinafter Habermas, *Paradigms*].

43. A “counterfactual” or “contrary-to-fact conditional” is a hypothetical assertion of the type “if . . . then . . .” often used in science and logical argumentation. See R.S. Walters, *Contrary-to-Fact Conditional*, in THE ENCYCLOPEDIA OF PHILOSOPHY 212 (Paul Edwards et al. eds., 1967). In the context of Habermas’ theory:

The use of counterfactuals serves to demarcate a gap between the reconstructed picture and the prevailing practices. That gap, in turn, provides a space for either a critique or a vindication of the status quo. For example, the image of a pristine market economy with evenly matched competitors, perfect information, and no transaction costs is a counterfactual, which can either be used to critique existing markets as self-legitimizing mechanisms or to support such real-life markets because of their greater proximity to the relevant counterfactual than to any plausible alternative. Accordingly, reconstructive theory can either turn into critical theory or . . . to a considered and systematic vindication of the status quo. . . . Habermas’s reconstructive theory of law alternates between a critical theory and a means to reach a reflective equilibrium, but its persuasive force stems mainly from its critical bite.

Michel Rosenfeld, *Law as Discourse: Bridging the Gap Between Democracy and Rights* (book review), 108 HARV. L. REV. 1163, 1166 (1995) (citations omitted).

44. See Habermas, *Paradigms*, *supra* note 42.

45. Rosenfeld, *Rights Democracy*, *supra* note 20, at 82.

task, it would seem useful to get a better handle on different traditions relating to the rule of law. Accordingly, I first turn briefly to these traditions, then attempt to determine whether any rule of law regime is likely to meet the test I have set above, and finally assess whether a legitimate rule of law regime is possible or merely conceivable as a useful counterfactual.

III. THE GERMAN *RECHTSSTAAT* AS STATE RULE THROUGH LAW

Any attempt to put more flesh and bones on the concept of the rule of law should be mindful that diverse conceptions of the rule of law have taken root in different traditions. A brief comparison among these traditions will allow for a better grasp of certain key nuances concerning the rule of law and thus make it easier to appreciate its scope and limitations, with a view to testing its legitimacy in the context of a pluralist constitutional democracy. Accordingly, I shall focus on the salient differences among the three major traditions that have given shape to the rule of law, namely the German, French, and Anglo-American traditions.

The German *Rechtsstaat*, the French *État de droit*, and the corresponding British and American conceptions all endorse the rule of law in the narrow sense but otherwise diverge significantly from one another.⁴⁶ Moreover, some of these traditions are more ancient than others, and all of them have evolved over the years, though some of them have done so more than others. Since my primary focus is conceptual and directed to issues of legitimacy in pluralist settings, I shall only refer to the history and evolution of these traditions, with an eye to gaining further insights into the potential, limitations, and multiple dimensions of the rule of law.

The *Rechtsstaat* is often treated as the German equivalent to the concept of the rule of law in the Anglo-American tradition.⁴⁷ Both concepts share some important elements in common. Chief among these is the relationship between the state and the institutionalization of a legal regime or, in other words, the state's duty to wield its power through laws in accordance with fundamental principles of legality—including consistent implementation of publicly disseminated, generally applicable rules giving citizens notice regarding what conduct is subject to legal sanctions, coupled

46. The rule of law in the narrow sense has a much more ancient pedigree than the traditions being considered as it dates back at least as far as Aristotle. See *POLITICS* BK. III, 15–16.

47. See, e.g., Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 967–71 (1997).

with fair procedural safeguards. Beyond that, however, the two concepts differ significantly, particularly in terms of their understanding of the relationship between the state and the law. Whereas the American conception of the rule of law is rooted in a somewhat antagonistic relationship between the state and the rule of law—which gives prominence to the above-noted paradox between the law as dependent on, and independent from, the state⁴⁸—its German counterpart is squarely predicated on a veritable symbiosis between the law and the state. In the broadest terms, in the *Rechtsstaat*, law becomes inextricably tied to the state as the only legitimate channel through which the state can wield its power. Accordingly, “state rule through law” would be a much better approximation in English for “*Rechtsstaat*” than “rule of law.”

If any state rule through law would do, then the *Rechtsstaat* would boil down to little more than the rule of law in the narrow sense. In actuality, though, the concept has significantly evolved since its implantation in the nineteenth century; the *Rechtsstaat* has always stood for much more than the rule of law in the narrow sense. The *Rechtsstaat*, which had its intellectual origins in Kant’s theory,⁴⁹ stood in the first half of the nineteenth century for rational state rule encompassing universal protection of formal rights for every individual within the ambit of a unified legal order, crafted by legislation and administered through a separate and independent process of adjudication. In contrast to the American notion of separation of powers, so long as legislation was kept separate from adjudication, the nineteenth century *Rechtsstaat* was equally compatible with a government (as opposed to a *staat*) that was monarchic as with one that was democratic.⁵⁰

As it evolved from its Kantian roots toward more positivistic configurations in Bismarck’s late nineteenth century Germany, the *Rechtsstaat* became increasingly tied to issues of form rather than substance.⁵¹ What binds together both the Kantian and the positivistic conceptions of the *Rechtsstaat*, however, is the rejection of older notions that anchored the state’s legitimacy in the pursuit and implementation of

48. See *supra* text accompanying notes 11–12.

49. See HANS REISS, KANT’S POLITICAL WRITINGS 11 (1991).

50. See DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 36 (2d ed. 1997).

51. See Rainer Grote, *Rule of Law, Rechtsstaat and État de Droit*, in CONSTITUTIONALISM, UNIVERSALISM AND DEMOCRACY: A COMPARATIVE ANALYSIS 269, 278–81 (Christian Starck ed., 1999).

transcendental religious or ethical values.⁵² Accordingly, the *Rechtsstaat* opened the door to a state rule—through law that could function properly without having to rely on a value system derived from any particular religion or transcendental conception of ethics. In other words, the *Rechtsstaat* made possible the systematic deployment of a legal regime poised to accommodate a plurality of conceptions of the good.⁵³

The severance of the *Rechtsstaat* from the external constraints of transcendental religion or ethics further specifies what state rule through law is not, without revealing what it ought to be or whether it could ever altogether escape from the grip of contested religious or ethical values which might stubbornly linger within it. To better appreciate the potential for positive contribution of the nineteenth century *Rechtsstaat*, it is necessary to compare its Kantian and its positivist dimension and to examine how these might be reconciled.

For Kant, a legal regime is legitimate if it is grounded in the right. Acknowledging that citizens have different interests and competing ideas about the pursuit of happiness, Kant recognizes that nothing like an actual consent of the entire citizenry could ever validate any piece of legislation.⁵⁴ Consistent with this, legitimacy cannot be established at the level of interests or of the good, but only at that of the just and the right—that is, by categorically treating all citizens as free and equal and as ends in themselves. In other words, a law can be legitimate only if it is reasonable for every citizen to accept it as being right and just. Pursuant to this criterion, the legislator is obligated, in Kant's own words:

to frame his laws in such a way that they could have been produced by the united will of a whole nation, and to regard each subject in so far as he can claim citizenship, as if he had consented within the general will. This is the test of rightfulness of every public law.⁵⁵

Kant's test thus sets a counterfactual against which the rightness of law is to be measured. Regardless of how citizens actually feel or whether they would have voted for a law, the key question is whether it is proper for citizens—conceived as free and equal and as treating one another as ends in

52. *Id.* at 279.

53. Significantly, this is precisely what the anti-pluralist Carl Schmitt reproached to the late nineteenth century conception of the *Rechtsstaat*. See Carl Schmitt, *The Liberal Rule of Law, in WEIMAR: A JURISPRUDENCE OF CRISIS* 294, 297–99 (Arthur J. Jacobson & Bernhard Schlink eds., 2000).

54. See Immanuel Kant, *On the Common Saying: "This May Be True in Theory, But It Does Not Apply in Practice,"* in *KANT'S POLITICAL WRITINGS* 61, 80 (1991) [hereinafter Kant].

55. *Id.* at 79.

themselves—to have enacted the law in question as legislators and to have willingly accepted to be bound by it as citizens. If the answer is in the affirmative, then the law is legitimate.

As Kant's counterfactual test does away with the consideration of interests or of the good, it raises the question of whether the just and the right can be found *beyond* the realm of interests or whether it remains altogether *beside* it. In other words, is satisfaction of the counterfactual dependent on there being a realm of justice compatible with all conflicting interests and all competing conceptions of justice (a very strong requirement), or is it possible to satisfy the counterfactual regardless of what interests or conceptions of the good may be involved (a seemingly weak requirement)?

A close look at Kant's argument reveals that his conception of the just and the right lies both beyond and beside the realm of interests. More precisely, the right ascends beyond the good in connection with the fundamental rights and freedoms of the individual, but remains beside it when it comes to the criterion of self-legislation. As a consequence, Kant's counterfactual criterion of self-legislation ultimately seems extremely weak. Under the test of self-legislation, as Kant explains, if a law is:

such that a whole people could not *possibly* agree to it (for example if it is stated that a certain class of subjects must be privileged as a hereditary ruling class), it is unjust; but if it is at least possible that a people could agree to it, it is our duty to consider the law as just, even if the people is at present in such a position or attitude of mind that it would probably refuse its consent if it were consulted.⁵⁶

Kant's test for self-legislation thus boils down to a requirement of formal equality before the law. So long as laws are equally applied to all, they must be deemed legitimate regardless of their content. When placed in its Enlightenment context, this test is by no means trivial, as it delegitimizes all vestiges of status-based legislation typical of the *Ancien Régime*. In today's world, where feudal hierarchy has been widely banished from constitutional democracy, however, Kant's test of self-legislation rings rather hollow. This can be illustrated, moreover, through Kant's own example. Kant argues that if a proportional tax is imposed on the entire citizenry in order to finance an unpopular war, this would meet the test of self-legislation for it would be possible for all to accept the tax if

56. *Id.* (emphasis in the original).

they supported the war.⁵⁷ If the tax were imposed only on part of the citizenry, on the other hand, those singled out for that burden would have good reason not to accept it voluntarily even if they enthusiastically supported the war. While all this may be true, it seems largely beside the point. Without any meaningful consent for the war—whether directly or indirectly through endorsement of the decisionmaking process responsible for the war policy—it is difficult to conceive the tax as a plausible product of self-legislation.⁵⁸

Fundamental rights and freedoms seem to rest on more solid ground than self-legislation in so far as they can be legitimated beyond the realm of interests. Such legitimation, moreover, may depend on these rights being beyond interests in the sense of remaining consistent with all conceivable differences in interests. Otherwise, they could be beyond interests by stacking up against them, and thus, imposing boundaries on the legitimate pursuit of interests.

The key right for Kant is the right to individual autonomy,⁵⁹ which he envisages as requiring freedom, equality, and the right to own property.⁶⁰ Also, in organized society, preservation of the individual's autonomy depends on others treating that individual as an end in him or herself rather than merely as a means.

If Kantian autonomy requires treating every individual *only* as an end, then the criterion of legitimacy for law is clear, but legitimate law is impossible. If, on the other hand, Kantian autonomy may be satisfied by treating every individual as more than a mere means—for example, through implementation of some version of the rights to liberty, equality, and property which would not foreclose all treatment as means—then law is certainly possible but could never be more than partially legitimated.⁶¹

57. *Id.*

58. Arguably, confronted with an unpopular war, citizens could still agree that it ought to be financed to avoid disaster and that the resulting burden ought to fall equally on all rather than being disparate. Nevertheless, the latter agreement would fail the weak consent test set out above.

59. Kant, *supra* note 54, at 77–78.

60. *Id.* at 74–79.

61. It may seem that those difficulties might be avoided by charging legislators with the duty to treat citizens as ends without extending that duty to citizens in their interactions with fellow citizens. Thus, laws could cast persons as ends regardless of the positions espoused by legal actors. This possibility must be rejected, however, for at least two crucial reasons. First, consistent with Kantian autonomy, for any legislation to be normatively justified, it must in some sense qualify as self-legislation, thus invalidating any normative distinction between the legislator and those subjected to legitimate legal norms. And, second, the legislator cannot, in the last analysis, remain above contested (or contestable) interests. Accordingly, given that in a complex society it is virtually impossible to remain self-sufficient in the quest to satisfy one's interests, all legal norms requiring citizens to act to

To illustrate, consider the case of employment law. Every complex contemporary society committed to the rule of law needs to adopt legal standards to govern the employment relationship. Both employers and employees, however, typically relate to one another as means toward the achievement of particular economic objectives. Accordingly, no law pertaining to employment could altogether forbid (or avoid legitimating) treating another as a means, with the consequence that it would be impossible to come up with a legitimate employment law so long as the right is construed to require treating people *exclusively* as ends. Conversely, even if there were a consensus concerning the requirements for the individual to maintain an acceptable measure of autonomy while nonetheless being treated by others as a means, the scope of treatment as a means would effectively have to be determined in terms of clashing interests. Consistent with this, there would seem to be no compelling reasons for any loser in such a struggle over interests to accept unfavorable legal outcomes as legitimate. In short, if autonomy is the source of law's legitimacy, how can that which lies beyond autonomy in any way contribute to such legitimacy? Returning to the employment law example, if respect for liberty, equality, and the right to own property is deemed sufficient to sustain the necessary measure of autonomy, then any employment law consistent with that would be presumptively legitimate. If more than one such law would be consistent with the above mentioned rights, however, and one of the laws would better serve the interests of employers and another law would better serve those of employees, then, at least in part, these laws would depend on choices among interests and to that extent could not be deemed, strictly speaking, legitimate.⁶²

I have thus far assumed that the fundamental rights to liberty, equality, and property essential to the Kantian conception remain beyond the realm of interests—either because they are compatible with all interests or because they can bracket out all interests. But of course this need not be so. By emphasizing negative liberty, formal equality, and private property,⁶³ Kant endorses particular rights (or particular versions of certain rights), which can be attacked as prone to favoring certain interests over

refrain from certain actions cannot avoid enlisting some individuals as means in the pursuit of interests held by others.

62. It would of course be different if the test of legitimacy were limited to requiring compliance with the above-mentioned rights without any reference to the requirement to treat persons as ends and without reference to interests. In the latter case, interest biases might well have no impact on legitimacy, but such legitimacy would not be truly Kantian in nature.

63. See Kant, *supra* note 54, at 74.

others. Thus, while Kant's rights may well suit the interests of libertarians, they seem ill equipped to promote those of egalitarians. And if this is true, these rights do not really rise above interests.

A *Rechtsstaat* rooted in the Kantian conception would, in addition to complying with the rule of law in the narrow sense, require the state to adhere to equality before the law and to grant citizens (negative) liberty, formal equality, and (bourgeois) property rights. Consistent with the above discussion, such *Rechtsstaat* can only be plausibly viewed as rising beyond interests from the perspective of the Enlightenment looking back at the *Ancien Régime*. Once the *Ancien Régime* completely vanishes from the horizon, however, the Kantian *Rechtsstaat* becomes inevitably mired in the realm of conflicting interests, and therefore, cannot provide sufficient backing to the legitimacy of law. In other words, the Kantian *Rechtsstaat* rises above all the interests it encompasses in its confrontation with what it stands against but has no way of doing so in its quest for what it should stand for. Similarly, the Kantian *Rechtsstaat* remains compatible with the ideal of treating its citizens exclusively as ends so long as it is pitted against pre-Enlightenment legal regimes relying on transcendental values. Once these transcendental values have completely lost their hold, however, the ideal of treating citizens exclusively as ends can only serve as a reminder that establishing law's legitimacy above interests has become impossible. Accordingly, either post-Enlightenment legal legitimacy is impossible or it is only legitimate to the extent that the exclusion of certain interests can be justified. Thus, post-Enlightenment legal legitimacy's very possibility depends on finding an acceptable justification for endorsing certain interests and a conception (or several conceptions) of the good, while rejecting others.

In light of these theoretical observations, it is not surprising that the historically grounded early nineteenth century *Rechtsstaat* has given way to the much different substantively grounded post-World War II *Rechtsstaat* associated with the current legal-constitutional regime in Germany.⁶⁴ Before focusing on the latter, however, it is necessary to consider the late nineteenth-century positivistic *Rechtstaat* and the crisis that led to the demise of the Weimar Republic in order to place the German experience in proper theoretical perspective.

From a historical standpoint, the shift from a Kantian to a positivistic *Rechtsstaat* was traceable to the failure of the liberal revolution of 1848 in

64. See Grote, *supra* note 51, at 285–88.

Germany.⁶⁵ As a consequence of this failure, there followed a de-emphasis of fundamental rights as constitutional principles, coupled with the emergence of a conception of the *Rechtsstaat* as primarily formal in nature.⁶⁶ According to this conception, the *Rechtsstaat* was not concerned with the content or purpose of the law of the state, but only with the methods employed by the state to foster its realization.⁶⁷ This, moreover, tended to reduce state rule—through law to a principle of legality.⁶⁸

Placed in the context of the rise of the bourgeoisie, the Kantian *Rechtsstaat* incorporates two separate elements: one formal and the other substantive. From a formal standpoint, the Kantian *Rechtsstaat* incorporates the categorical imperative and requires law to promote individual autonomy by treating all persons as ends rather than means. From a substantive standpoint, on the other hand, the Kantian *Rechtsstaat* promotes equal (negative) rights to liberty and property, which clearly lend support to bourgeois values as against those that had been entrenched in the *Ancien Régime*, but also—perhaps much less obviously, except in hindsight—against those of the propertyless, or of those who, in spite of their newly minted rights still depend on others for their very survival.

Unlike in neighboring France, there was no bourgeois revolution in Germany during Kant's lifetime, thus casting the substantive vision emanating from the Kantian *Rechtsstaat* as a pure ideal with counterfactual implications. Germany did have its bourgeois revolution in 1848, but it was defeated, and this, together with the subsequent military successes of the Prussian monarchy, left the bourgeoisie rather powerless. This prompted it to seek limits on the powers of the *Reich*, hence settling on the positivistic *Rechtsstaat*.⁶⁹

From the standpoint of the positivistic *Rechtsstaat*, the *Reich* was conceived of as a legal person, rather than as a league of princes.⁷⁰ Moreover:

The positivist theory of the law of the state viewed state institutions above all from the viewpoint of limits. The law making power of the Reichstag was limited by the Bundesrat, but at the same time the power

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 281.

69. See Arthur J. Jacobson & Bernhard Schlink, *Introduction: Constitutional Crisis, in WEIMAR: A JURISPRUDENCE OF CRISIS 5–6* (Arthur J. Jacobson & Bernhard Schlink eds., 2000).

70. *Id.* at 6.

of the monarchic administration to interfere with the freedom and property of citizens was limited by the requirement of statutory authorization.⁷¹

In other words, the positivistic *Rechtsstaat* affords protections through the institutional framework of state rule through law and through imposition of the requirement that the state act through promulgation and implementation of laws, rather than through mere deployment of the will of the monarch. Although in practice it may be poised to advance bourgeois economic interests, as distinguished from their political interests,⁷² in theory it lacks both the formal and substantive tendencies of its Kantian counterpart.

Taken out of context, the positivistic *Rechtsstaat* might be regarded as marking a regression to the rule of law in the narrow sense. When viewed in proper historical perspective as set against the Kantian *Rechtsstaat* as an ideal rather than reality, however, the focus on legality acquires a somewhat different meaning. Indeed, particularly given the rise of the administrative state, the positivistic *Rechtsstaat's* requirement of legality potentially endows state rule through law with a much needed measure of rationality and predictability, by facilitating stabilization of the expectations of legal actors confronted with an ever more complex social and institutional setting.⁷³ To be sure, law's predictability in a complex social universe is no guarantee of its legitimacy, but it does make for an important step in that direction. Thus, at least in some important fields of contemporary law, the content of legal norms is less important than their stability. For example, in the realm of private contractual relationships among commercial firms of roughly comparable bargaining power, knowing there are stable, relevant applicable legal norms, is in most cases, far more important than what the features of such norms may happen to be. Indeed, if the parties to a contractual arrangement are unhappy about any of the applicable legal rules, they can contract around them. Accordingly, if in a sales contract, the law provides that the seller bears the risk of loss of goods prior to delivery to the buyer, the parties know what to expect, and the seller can either get insurance to counter the risk of such loss or attempt

71. *Id.*

72. *See id.*

73. For Niklas Luhmann, stabilizing expectations in an ever more complex world is the paramount function of contemporary law. Niklas Luhmann, *The Unity of the Legal System*, in *AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY* (Gunther Tuebner ed., 1988); Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 *CARDOZO L. REV.* 1419 (1992).

to persuade the buyer (e.g., by offering the latter otherwise more favorable terms) to assume contractually the risk of loss prior to delivery.⁷⁴

In at least certain fields of law, then, the predictability associated with formal legality is efficient if not inherently equitable. Moreover, by stabilizing expectations, such formal legality makes for greater control over one's interests in a complex social setting rife with a vast array of administrative regulation. Formal legality would certainly not live up to the rigorous demands of Kantian autonomy, but it may well contribute to the legitimacy of contemporary legal regimes to the extent that it equally endows all legal actors with rational means to coordinate their pursuit of self-interest. Before pursuing this any further, however, it is necessary to examine briefly the evolution of the concept of the *Rechtsstaat* during the Weimar Republic and the crisis that led to its demise.

Constitutional protection of fundamental rights, which had been coveted by the 1848 revolutionaries, finally came to Germany after the country's defeat in World War I. As noted by Carl Schmitt, however, the new constitutional rights received in defeat did not garner the enthusiasm which they would have generated in 1848.⁷⁵ Moreover, the new Weimar Constitution was mired in crisis and short-lived. The new liberal rule of law may have suited the bourgeoisie, but—at least in Schmitt's view—could not integrate the working class within the unity of the state.⁷⁶ Schmitt's own proposed solution was to abandon liberalism, to forswear pluralism, and to turn to the people as a homogenous whole to take over the political destiny of the German nation-state.⁷⁷

For Schmitt, politics is anchored in the distinction between friend and foe, and bourgeois liberalism can only serve to detract from what is essential.⁷⁸ From the standpoint of legitimating constitutional democracy for a pluralist polity, however, the principal lesson to be drawn from the Weimar experience is that supplementing the positivistic *Rechtsstaat* with liberal bourgeois constitutional rights may leave out a significant number

74. Even if the law imposing the burden on the seller were rigid and it were impossible, strictly speaking, to contract around it, so long as expectations remained stable, the parties could still adjust their exchange by taking the seller's burden into account when determining the sale price.

75. See Schmitt, *supra* note 53, at 295.

76. *Id.* at 297.

77. *Id.* at 298–300.

78. See Volker Neumann, *Carl Schmitt: Introduction*, in *WEIMAR: A JURISPRUDENCE OF CRISIS* 280, 283 (Arthur J. Jacobson & Bernard Schlink eds., 2000).

of members of the polity, thus, falling far short of the minimum level of consent required for legitimacy.

In the end, the Kantian ideal of autonomy falls short both from a formal and from a substantive viewpoint. From a formal standpoint, it remains too abstract and from a substantive standpoint, consistent with the Weimar experience, it is insufficiently universal. Positivist rule through law, on the other hand, makes for increased predictability, which is particularly important as social and legal relationships become more complex but provides no assurances that laws will be fair. Against this background, and emerging on the heels of Germany's total defeat at the end of World War II, the new *Rechtsstaat* seeks to reconcile the need for predictability with the quest for autonomy through commitment to substantive values, and, in particular, through entrenchment of respect for human dignity as the paramount constitutional value.

Set against the horrors of the Nazi era, the contemporary German *Rechtsstaat*, shaped by its new constitution, the 1949 Basic Law, subordinates positive legality to entrenched substantive principles and values.⁷⁹ Chief among the latter is human dignity, which is enshrined as an unamenable constitutional value in Article I of the Basic Law, and which has been interpreted as the paramount value in the German constitutional order in numerous decisions of the German Constitutional Court.⁸⁰ More generally, today's *Rechtsstaat* has become inextricably tied to constitutional democracy framed by fundamental substantive values, and its legality has become subjected to a set of substantive norms embodied in constitutional justice.⁸¹

Although today's *Rechtsstaat* in some sense incorporates elements of both its Kantian and positivistic counterparts, it is in key respects different from its predecessors and thus raises novel questions regarding law's legitimacy. Like its Kantian counterpart, today's *Rechtsstaat* enshrines fundamental rights above the realm of ordinary laws, although these rights are substantive rather than formal and differ significantly in content from their Kantian predecessors. On the other hand, like its positivistic predecessor, today's *Rechtsstaat* institutionalizes legality, but it is a legality that is not merely dependent on consistency and predictability, but also contingent on constitutional conformity and on the realization of constitutionally recognized substantive goals. This, in turn, tends to

79. See Grote, *supra* note 51, at 285.

80. *Id.* at 286 n.71.

81. See Kommers, *supra* note 50, at 36–37.

constitutionalize all politics and to convert the *Rechtsstaat* into a *Verfassungsstaat* (i.e., a state rule through the constitution) as some German scholars have argued.⁸² Finally, even beyond constitutionalization as such, today's *Rechtsstaat* judicializes realms, such as the promotion of welfare, which were clearly relegated to politics by its nineteenth century predecessors. Thus, the Basic Law commands the German states—the *Länder*—to promote the *sozialer Rechtsstaat* or *sozialstaat* (i.e., the social welfare state through law) as well as democracy and republicanism.⁸³

Whereas the constitutionalization of politics and the state's obligation to promote the social welfare of all seems unobjectionable, if not indispensable, from the standpoint of erasing all vestiges of the legacy of Nazism, they raise serious legitimacy issues for established and unthreatened constitutional democracy. To be sure, commitment to human dignity taken in the abstract should command universal approval, but this should not necessarily extend to diverse and often conflicting concrete manifestations of the concept.⁸⁴ For example, does human dignity require forbidding or permitting abortion? Assisted suicide? Does it call for pervasive social welfare legislation or does it render it demeaning?

As constitutionalization based on substantive values becomes more pervasive, the less it is likely to command widespread support. Over-constitutionalization forces some in the polity to become subordinate to the values and conceptions of the good of others and thus threatens to delegitimize the *Verfassungsstaat*.⁸⁵ In the last analysis, over-constitutionalization gives rise to a very similar problem to that produced by strict Kantian autonomy. In the latter case, legitimate law is bound to alienate one from one's own interests as the right must remain above all interests; in the former, one always risks alienation from one's own interests to the extent that the constitution enshrines conflicting interests. In a pluralist polity, this means a sizeable portion of the citizenry will

82. See, e.g., Ulrich Karpen, *Rule of Law*, in *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 169, 173 (Ulrich Karpen ed., 1988) (defining the *Verfassungsstaat* as a state which "means to organize politics and evaluate goals by applying, executing the constitution").

83. See GERMAN BASIC LAW, art. 28, para. 1.

84. For a similar argument concerning human rights, see Michel Rosenfeld, *Can Human Rights Bridge the Gap Between Universalism and Cultural Relativism?*, 30 *COLUM. HUM. RTS. L. REV.* 249 (1999).

85. For a critique of over-constitutionalization in Germany by a German constitutional scholar, see Bernhard Schlink, *German Constitutional Culture in Transition*, in *CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY* (Michel Rosenfeld ed., 1994).

remain significantly alienated from the dictates emanating from the prevailing substantively grounded legal-constitutional regime.

IV. THE FRENCH *ÉTAT DE DROIT* AS A MEANS TO VINDICATE FUNDAMENTAL RIGHTS THROUGH LAW

The French *État de droit* is much more recent than the German *Rechtsstaat* and was originally derived from the latter.⁸⁶ However, even though the French term, “*État de droit*,” is a literal translation of the German “*Rechtsstaat*,” the French adapted and transformed the concept they found in nineteenth century German legal thought so thoroughly that the French expression came to acquire a completely different meaning from that connoted by the positivistic *Rechtsstaat*.⁸⁷ Indeed, in its current meaning as understood in French legal theory and as institutionalized in the contemporary French constitutional order, “*État de droit*” does not mean “state rule through law,” but rather “constitutional state as legal guarantor of fundamental rights” (against infringements stemming from law made by parliament).⁸⁸

The French *État de droit* has come to supplement and, in an important sense, limit the “*État Légal*,” which may be roughly translated as “democratic state rule through law.” The *Etat Légal* is what comes closest in France to the positivistic *Rechtsstaat*, with the key difference being that the French concept is inextricably linked to parliamentary sovereignty and parliamentary democracy. Accordingly, whereas the positivistic *Rechtsstaat*'s primary function is to set institutional limitations on the uses of governmental powers by the monarch against the people, the *État de droit* embodies the democratic will of the French nation as transformed into law by the parliament.⁸⁹

The concept of *État de droit* was first articulated in the aftermath of World War I in the works of Carré de Malberg⁹⁰ became institutionalized within the French constitutional system after World War II.⁹¹ As already noted “*État de droit*,” unlike “rule of law” or “*Rechtsstaat*,” does not refer

86. See Jacques Chevallier, *L'ÉTAT DE DROIT* 11 (3d ed. 1999).

87. *Id.* at 11, 22–31.

88. See *id.* Just as its German or Anglo-American counterparts, the French conception of *État de droit* is dynamic and highly contested. Given the present aim of identifying essential characteristics for purposes of conceptual analysis and comparison, however, no attempt will be made to account for most nuances or matters of dispute. See MARIE JOËLLE REDOR, *DE L'ÉTAT LÉGAL À L'ÉTAT DE DROIT: L'ÉVOLUTION DES CONCEPTIONS DE LA DOCTRINE PUBLICISTE FRANÇAISE* (1992).

89. See CHEVALLIER, *supra* note 86, at 18.

90. CARRÉ DE MALBERG, 1 *CONTRIBUTION À LA THÉORIE GÉNÉRALE DE L'ÉTAT* 488 (1920).

91. See Grote, *supra* note 51, at 292–94.

to law as a whole, but rather to fundamental rights as having the force of law. In other words, the *État de droit* is the state-backed legal regime shaped by fundamental liberal rights which places constraints on the *État légal*.⁹² As Carré de Malberg emphasized, the *État de droit* could not be fully realized until the adoption of constitutional review of parliamentary laws,⁹³ a development that took place in France in 1971 when the Constitutional Council for the first time invalidated a law of parliament for infringement of a fundamental right enshrined in the 1789 Declaration of the Rights of Man.⁹⁴

France's recourse to the *État de droit* as a check on the laws issuing from parliamentary democracy is a stunning development in a culture long persuaded that parliamentary sovereignty would best express the nation's will and at the same time adequately protect its citizens' fundamental rights. Moreover, not only was France's commitment to parliamentary sovereignty solidly entrenched, but it also had deep theoretical roots in the political philosophy of Jean-Jacques Rousseau.

According to Rousseau, the conflict between clashing individual interests, on the one hand, and the common good of the polity, on the other, could be resolved through pursuit of democratic self-government. In Rousseau's conception, however, democracy is not mere majority rule with the inevitable consequence that political minorities are compelled to obey laws imposed against their will. Instead, democracy requires implementation of the general will through the efforts of the entire citizenry, working to overcome the disparate demands arising from the realm of clashing private interests in order to embrace as their own what is good for society as a whole.⁹⁵

Pursuant to Rousseau's analysis, by partaking in the legal expression of the general will, every citizen engages in self-legislation. Conversely, as a person with private interests, each member of the polity must voluntarily restrain his or her particular interests in order to pave the way for the laws embodying the general will, thus freely consenting to become bound by such laws.

92. See CARRÉ DE MALBERG, *supra* note 90, at 490.

93. *Id.* at 492.

94. See Cons. Const., July 16, 1971, D. 1972, 685, note J. Rivero (parliamentary law held unconstitutional as violation of fundamental right to freedom of association).

95. See JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 14–18 (Charles Frankel ed., 1947).

The key to Rousseau's democracy, oriented towards the general will, is self-restraint. Such self-restraint, however, is not the consequence of some fear of adversity, but rather that of a free assumption of responsibility. For Rousseau, each individual is both a citizen and a private person or bourgeois. As a bourgeois, each individual pursues private interests which often clash with those of others. As a citizen, on the other hand, each citizen is part of the sovereign charged with ruling society pursuant to the dictates of the general will. Accordingly, the two perspectives of the governors and the governed co-exist within each member of the polity. Because freedom cannot be realized without self-government, every individual must resolve the conflict between the two perspectives so as to be able to participate in government, while continuing to attend to as many of his or her private interests as possible (without compromising any duties as governor) in his or her capacity as a member of the governed.

If there were room for fulfillment of both the general will and part of the objectives issuing from private wills, then the need for self-restraint and the requisite sacrifices regarding self-interest might well be outweighed by the benefits of increased participation in democratic lawmaking and enhancement in the scope of self-determination. If, however, adherence to the general will requires complete suppression of private interests, then Rousseauian legitimation of law would remain unpersuasive, as it is difficult to see why someone would give up nearly everything one holds dear to take an active role in producing laws poised to frustrate one's most cherished objectives.⁹⁶

Rousseau himself sheds little light on how recourse to the general will might impact the balance between private and collective interests. Indeed, as used by Rousseau, the notion of the general will remains somewhat mysterious and not altogether consistent. The general will must be distinguished from individual or majority will, and Rousseau conceives it as the sum of the differences between all the individual wills or as the "agreement of all interests," which "is produced by opposition to that of each."⁹⁷

Notwithstanding these difficulties, two important points emerge from consideration of Rousseau's general will. First, unlike Kant, Rousseau

96. If, to attain the general will, the interests of the private person must completely give way to the collective duties of the citizen, then the ideal of self-government as envisioned by Rousseau might well be a precursor of totalitarianism. See ROGER MASTERS, *THE POLITICAL PHILOSOPHY OF ROUSSEAU* 315 (1968).

97. ROUSSEAU, *supra* note 95, at 26 n.2.

does not rely on the distinction between interests and the right when dealing with law's legitimacy. For Rousseau, law is legitimate if it is an expression of the general will that emerges as a consequence of a dynamic process and accounts for all relevant interests. Second, self-government has intrinsic value so that, at least to a certain extent, a trade-off that would enhance self-government at the expense of the pursuit of self-interest, should not adversely affect the legitimacy of law.

There is a strong affinity between Rousseau's theory and the French conception of the *État légal*. Indeed, there is an obvious congruity between Rousseau's vision of all the citizenry joining together to govern and the French Revolution's conviction that the democratic fate of the nation would be best served by a single nationwide legislature entrusted with the transformation of the will of the people into law. This was set against an *Ancien Régime* marked by absolute rule in favor of those privileged within the prevailing feudal hierarchy. In contrast, the representatives of the people acting after the repeal of feudal privileges could easily be expected to legislate in the common interests of all, particularly to the extent that bourgeois interests were projected as being universal. Consistent with this, all laws of Parliament, regardless of their outcome, were perceived as expressions of the general will. Today, however, there seems to be no inherent reason for believing that parliamentary democracy will necessarily give voice to the common good—hence the need to balance the *État légal* with the protections afforded by the *État de droit*.

Given the strong influences of Rousseau's ideas, the constitutional tradition emanating from the French Revolution conceived of the limitations of government powers required by constitutionalism in terms of parliamentary sovereignty—that is, in terms of democracy itself.⁹⁸ Moreover, parliamentary sovereignty, and the *État légal* associated with it, guaranteed implementation of the rule of law at least in the narrow sense. Finally, the protection of fundamental rights was guaranteed by the 1789 Declaration, but such protection was political rather than legal. It is precisely because of this lack of legal protection that the *État légal* had to be supplemented by the *État de droit*.

98. Strictly speaking, parliamentary sovereignty arguably amounts to no limitation on the powers of government. When placed in proper context, however, it does constitute a limitation, both in terms of accountability to the people and of having to act through laws. Moreover, these limitations become all the more important when contrasted to the absolute powers of the French king.

V. THE ANGLO-AMERICAN COMMON LAW
AND THE PARADOXES OF THE RULE OF LAW

One of the factors that reinforced France's commitment to the *État légal* was the manifest distrust of judges, rooted in the negative role performed by judges during the *Ancien Régime*.⁹⁹ Although the British, like the French, have a long tradition of parliamentary sovereignty, the British have developed a positive attitude towards judicial power, which has enabled them to cast the judge as a protector of the citizenry rather than as the enemy of the people.¹⁰⁰ Unlike the United States, the United Kingdom does not have a written constitution, and its judges thus do not have as clear a mandate as their American counterparts to provide a check against legislative powers. Nevertheless, the Anglo-American tradition, relying on the common law, has developed a strong sense of the rule of law. And as we have already seen and will now further investigate, unlike their continental counterparts, the Anglo-American concept of the rule of law is not exclusively dependent on the state as such, but rather functions as a buffer between the interests of the state and those of its citizens.

In its American version, the rule of law is grounded on a written constitution designed to provide legal expression to preexisting, inalienable fundamental rights. These rights are deeply rooted in a Lockean vision of natural rights as belonging to the individual and as preexisting and transcending both the social contract and civil society.¹⁰¹ In accordance with this vision, the individual agrees to the social contract and civil society in order to secure better coordination in the enforcement of his or her rights. This, in turn, imposes two essential duties on the state—created pursuant to the social contract: the negative duty to refrain from interfering with its citizen's enjoyment of their inalienable rights and the positive duty to deter or punish private infringements of fellow citizens' rights through the provision of police protection and the enforcement of private contracts.¹⁰² Strictly speaking, the latter state duty is positive only in a derivative sense, as its goal is not to confer any right on the individual, but rather to insure that others are prevented from harming or destroying already existing rights. Under the vision in question, therefore, the *raison*

99. See Grote, *supra* note 51, at 283.

100. *Id.* at 273–76.

101. For an extended discussion of Locke's contractarianism in comparison to that of Hobbes, Rousseau, and Kant, see Michel Rosenfeld, *Contract and Justice*, *supra* note 16.

102. This much scaled-down state derived from the Lockean vision is what Robert Nozick has termed the "minimal (night-watchman) state." See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26–27 (1974).

d'être of the state is to safeguard its citizens' negative rights through self-restraint and through restraint of would-be rights infringers.

In the context of an idealized minimal state almost exclusively concerned with better securing preexisting natural rights, the rule of law would by and large consist of the deployment and enforcement of procedural safeguards. This presupposes that the legitimacy of natural rights would remain beyond dispute and that effective protection of such rights would guarantee the welfare of society either because it would allow citizens to be self-sufficient or because it would enable them to remedy any lack of self-sufficiency through private contracts. In other words, if natural rights were universally accepted and sufficient to allow everyone to fulfill his or her welfare needs, then legal standards could be automatically set, and no room would be left for politics.¹⁰³ Accordingly, the rule of law would boil down to the deployment and maintenance of procedural safeguards, which mediate between right holders, the state, and potential or actual rights infringers. Depending on the circumstances, right holder and state may be on the same side (i.e., when the state acts to protect a right holder against third parties or provides the means for a right holder to obtain legal redress for private infringements) or on opposite sides (i.e., when the state exceeds its legitimate authority and threatens to (or does) infringe on the right holder's entitlement because of a failure of self-restraint or because of excessive zeal in the protection of another right holder's entitlement).

It becomes clear from this rough outline how the rule of law can be invoked against the state. As already mentioned, this raises a paradox. Indeed, though the state may be morally obligated to yield whenever it threatens natural rights, so long as it retains a monopoly in lawmaking and law enforcement, nothing short of revolution would seem capable of prompting it to desist from a deliberate course of natural rights infringement.¹⁰⁴ As will become apparent, however, the paradox in question is least troubling in the context of the Anglo-American rule of law tradition embedded in the common law. On the other hand, the common law itself gives rise to more serious paradoxes that pose far greater threats

103. Politics is understood here "as encompassing setting objectives for the polity and devising means designed to further such objectives." JUST INTERPRETATIONS, *supra* note 14, at 75. Since in the ideal minimal state society each individual, endowed with inalienable natural rights, sets his or her own objectives and realizes them with the cooperation of others through private market transactions, the economic realm presumably obviates any need for politics.

104. Cf. LOCKE, *supra* note 18, ¶ 222 (asserting that it is within the people's right to rebel against a government that violates their fundamental rights).

within the Anglo-American tradition. Two of these paradoxes raise serious questions about the existence and viability of the rule of law: first the one produced by the tension between the need for legal certainty and predictability and the common law's experimental and incremental approach; and second, that generated as a consequence of the clash between the need for binding and transparent criteria of judicial application of relevant legal norms and the great latitude enjoyed by common law judges prone to blurring the distinction between law making and judicial interpretation.

Of these paradoxes, the first seems to be the least troubling. Indeed, the conception of the rule of law, as being at once dependent on and independent from the state, becomes much more plausible once one realizes the unique position of judges and of the judicial system in the Anglo-American tradition. Going back to feudal England, legal norms have traditionally issued from multiple sources and the power of adjudication has remained divided among different and often competing institutional actors.¹⁰⁵ Thus, the statutory law made by Parliament has existed side by side with the judge-made common law, and courts of law were supplemented by courts of equity.¹⁰⁶ Moreover, the responsibilities entrusted to the judicial function have been apportioned between judge and jury, the jury being an institution brought to England by William the Conqueror in the eleventh century and widely used as a check on the monarchy's judges, by the seventeenth century.¹⁰⁷

Inasmuch as sources of law and judicial actors could be set against one another, parts of the state apparatus could be mobilized against others. Consistent with this, although all law ultimately depended on state backing, mobilization against others made it possible to have the rule of law enforced against the state. The United States not only carried forward this English tradition, but also enshrined it in its Constitution through a system of "checks and balances" and a sharp division between judicial power and its executive and legislative counterparts.¹⁰⁸ Thus, federal constitutional norms can be invoked to invalidate inconsistent legislation emanating from one of the states¹⁰⁹ and, by setting the judicial branch as independent from,

105. See, e.g., 2 FREDERICK POLLOCK & FREDERIC MAITLAND, *THE HISTORY OF ENGLISH LAW* 578-97 (2d. ed. 1923).

106. See JAMES HAZARD, *CIVIL PROCEDURE* 14-15 (1985).

107. See JACK H. FRIENDENTHAL, MARY KAY KANE, & ARTHUR R. MILLER, *CIVIL PROCEDURE* 472 (1985).

108. See U.S. CONST. art. I-III.

109. See, e.g., *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (striking down Kansas law segregating public schools as unconstitutional under the Equal Protection Clause).

and equal to, the legislative branch and the executive branch, the federal Constitution enables judges to invalidate laws enacted by the Congress.¹¹⁰

The remaining two paradoxes, in contrast, seem much more troubling. Indeed, to the extent that the common law is always changing, predictability is problematic, and it seems difficult to conceive of the rule of law in a setting in which citizens may be unable to discover *ex ante* the consequences of their acts. Furthermore, so long as the line between judicial interpretation and judicial lawmaking remains blurred, there seems to be no cogent way to draw a plausible distinction between the rule of law and politics. These difficulties may be surmounted if the lack of predictability associated with the common law could be tempered by procedural safeguards, or if the dynamics of the common law system could foster predictability in ways that are not dependent on rules and if the realm of judicial intervention, broad though it may be, could be ultimately constrained by principle.

VI. COMMON LAW, THE RULE OF LAW, CONSTITUTIONAL
DEMOCRACY, AND POLITICS:
PROCEDURE, SUBSTANCE, AND THE CHALLENGE FROM
CRITICAL LEGAL STUDIES

In its purest form (which is but a counterfactual ideal), the common law is a case-by-case judge-made law that evolves through elaboration of precedents by means of a process of accretion, driven by a logic of induction. Set in the context of an adversary system, each party to a controversy argues his or her position to a judge, who must decide the matter after hearing all the evidence and all the arguments advanced by the contestants. The first judge ever confronted with the task of adjudicating such a controversy would presumably only have his or her own experience, common sense, and his or her understanding of justice and fairness to draw upon to reach a verdict. In all subsequent cases, however, the judge is supposed to take relevant precedents into account and to resolve the matter at hand in a manner consistent with such prior judicial determinations. In such a system, legal rules are supposed to emerge gradually by stringing together a sufficient number of successive precedents to circumscribe a distinct path. But unless all existing precedents compel a determinate outcome, which is often not the case, the common law approach cannot

110. The Supreme Court's power to invalidate an unconstitutional law enacted by the U.S. Congress was firmly established in its landmark decision in *Marbury v. Madison*, 5 U.S. 137 (1803).

guarantee predictability. Indeed, if precedents can be equally reconciled in a way that leads to imposing or denying liability in the case under consideration, then it seems impossible for the parties to eventual litigation to know *ex ante* the legal consequences of their intended conduct. Consistent with this, the legal rule applied in a case, as distinguished from the result in that case, cannot be known until subsequent judicial decisions in future cases have further specified its relevant contours.

To illustrate the workings of the common law approach, consider the following example involving a legal rule that cannot be grasped until it becomes further elaborated in a future judicial opinion. A landowner brings a lawsuit against a neighbor because the latter's cat has entered upon plaintiff's land causing damage for which the landowner seeks to be compensated. Moreover, the only relevant precedent involves a case holding that the owner of a cow is liable to his neighbor for the damage caused to the latter's property by the cow, following its unauthorized entry upon the property. Under those circumstances, the judge sitting in the case concerning the cat can infer at least two different rules from the precedent involving the cow. The first rule is that the owner of a large animal is liable for any damage caused by the animal following unauthorized entry upon the neighbor's property. The alternate rule is that an owner is liable for any such damage caused by any of his or her domestic animals. Since a cat is a small domestic animal, the plaintiff will lose the case if the judge infers the first rule from the precedent, but will win if the judge infers the second rule instead.

Suppose further that the judge in the case of the cat rules in favor of the plaintiff after concluding that the situation involving the cat is in all relevant respects analogous to that regarding the cow, but the judge leaves unclear the basis for the analogy drawn between the case of the cow and that of the cat. Under those circumstances, it will be left to another judge to infer which legal rule might cover all three cases consistent with the results in the respective cases of the cow and the cat. Thus, the judge before whom the third case will be brought may decide, for example, that the rule to be inferred concerns all of an owner's domestic animals or that it instead covers all animals, whether domestic or not, which usually live on the owner's property. The important point, however, is that no matter which of these two alternative legal rules is eventually chosen, the legal rule that accounts for the result in the case of the cat cannot become fully explicit until its further articulation in the course of the judicial resolution of subsequent cases.

The inherent lack of predictability associated with the common law can be somewhat, but not fully, alleviated through constitutional provisions and statutory laws. Many key constitutional provisions, such as the “due process” and the “equal protection” guarantees contained in the American Constitution¹¹¹ are stated generally and at a high level of abstraction. This allows for a wide range of plausible interpretations, and common law trained judges, who have dealt with such constitutional provisions, have widely differed in their interpretations, making these provisions nearly as unpredictable as constantly evolving common law standards.¹¹²

Statutes are usually less general and less abstract than many constitutional provisions, but nonetheless defy predictability. Indeed, as common law techniques are brought to bear on statutory interpretation, the latter may well approximate the unpredictability of its constitutional counterpart. For example, statutory language prohibiting employment discrimination against any individual on account of his or her race led to a 5-4 U.S. Supreme Court decision, with the majority holding that the statute sanctioned the use of affirmative action and the dissenters vehemently maintaining that the individual’s right against discrimination clearly precluded the legitimacy of affirmative action.¹¹³

Even if one concedes that common law unpredictability permeates the entire American legal system, this does not necessarily preclude a successful deployment of the rule of law, so long as the latter is conceived of primarily in procedural rather than substantive terms. A procedurally grounded rule of law would revolve around three essential components: the rule of law in the narrow sense; the prevalence and maintenance of fundamental due process guarantees; and institutionalization of the adversary system of justice as a means to channel conflicts towards legal resolution rather than towards other possible outcomes.

The rule of law in the narrow sense is firmly established in the United States and can be traced back to the Supreme Court’s landmark decision in *Marbury v. Madison*.¹¹⁴ Thus, even if one considers common law trained judges unpredictable or at times arbitrary, the rule of law in the narrow

111. See U.S. CONST. amend. XIV (providing in relevant part that no person “shall be deprived of life, liberty or property without due process of law” or of “the equal protection of the laws”).

112. Compare, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896) (holding racial apartheid does not violate equal protection guarantees) with *Brown*, 347 U.S. at 495 (holding racial apartheid in public schools violates equal protection guarantees).

113. See *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

114. 5 U.S. 137.

sense does insure some checks on the exercise of the power of the state in the name of the law. Furthermore, to the extent that judicial decisions must be made public and the reasons for such decisions revealed in published opinions, the likelihood of blatant judicial abuses seems rather remote. In short, the rule of law in the narrow sense appears to insure a significant amount of legality and the promotion of legal norms that do not stray too far from the well of commonly accepted values.¹¹⁵

Fundamental due process guarantees have been enshrined in the U. S. Constitution since the adoption of the Bill of Rights in 1791.¹¹⁶ It has been further argued that the entire Bill of Rights and even the Constitution as a whole is overwhelmingly process oriented.¹¹⁷ According to this view, the function of the Constitution and of judicial review is to provide the necessary legal basis for a well-functioning democracy. Consistent with this, besides protecting democracy from its traditional enemies, the Constitution is meant to insulate the democratically generated legal order against majoritarian excesses and pathologies. In this context, process based guarantees become part and parcel of the rule of law through imposition of procedural constraints on the generation and application of majority-based legal rules.

While this view need not go hand in hand with Lockean presuppositions, it does in fact fit particularly well with such presuppositions. Focus on this fit, moreover, is particularly useful because it highlights a very serious problem with conceptions of the Constitution as overwhelmingly process based, which, in turn, undermines the importance of the nexus between procedural safeguards and the rule of law. This problem is best highlighted through a brief consideration of the controversy surrounding the Due Process Clause.¹¹⁸

115. One may object that this last statement does not properly account for certain important, but very divisive, constitutional decisions by the Supreme Court, such as those involving abortion or flag burning. *See* *Roe v. Wade*, 410 U.S. 113 (1973); *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990). Nonetheless, the essential values relied upon by the Court in deciding these cases were widely shared, as most Americans cherish the right to privacy relied upon in the abortion decision and the freedom of speech right involved in the flag burning cases. Arguably, therefore, the bitter divisions were not over the values involved but rather over their proper contours or applications.

116. *See* U.S. CONST. amend. V (affording due process rights against the federal government). Such rights, however, were not accorded against the states until the conclusion of the Civil War. *See* U.S. CONST. amend. XIV (1868).

117. ELY *supra* note 30.

118. *See* U.S. CONST. amend. V (due process protection against the federal government); U.S. CONST. amend. XIV (against state governments).

This controversy centers on whether due process should be understood as conferring purely procedural rights or whether it also includes a “substantive” component. The U.S. Supreme Court has gone back and forth on this issue without reaching any definitive or unanimous solution. In one of its most criticized decisions, *Lochner v. New York*, the Court embraced substantive due process and constitutionalized private property and freedom of contract.¹¹⁹ The *Lochner* doctrine enshrined laissez-faire, and for approximately thirty years led the Court to strike down state economic and social laws, such as minimum wage maximum hours laws, designed to promote the general welfare and which were often supported by sizeable democratic majorities. Moreover, although the *Lochner* doctrine was repudiated during the New Deal,¹²⁰ substantive due process has been reinvigorated in more recent times and used to constitutionalize privacy and personal liberty rights rather than property and economic liberty rights.¹²¹

The justification for substantive due process is that process-based and procedural rights can be persuasively justified only if they are understood as part of a set of fundamental norms inextricably tied to certain crucial substantive values. But to the extent that these substantive values are not universally embraced within the polity, as amply demonstrated by the critics of *Lochner* or those of the decision in *Roe v. Wade*, the substance/process dichotomy cannot be legitimately used to vindicate the rule of law in the context of significant unpredictability concerning legal outcomes. More generally, this criticism can be extended beyond due process itself, as critics of Ely’s process-based theory of the U.S. Constitution have convincingly demonstrated.¹²²

The third component of a procedurally-grounded rule of law is the adversary system of justice. The adversary system blends naturally with the common law approach and complements the rule of law in the narrow sense and in the notion that no one is above the law. Ideally, the adversary system allows each contending party to argue his or her case to an open-

119. *Lochner v. New York*, 198 U.S. 45 (1905).

120. *See Nebbia v. New York*, 291 U.S. 502 (1934); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

121. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 481–83 (1965) (marital privacy rights); *Roe v. Wade*, 410 U.S. 113, 152–54 (1973) (abortion rights).

122. *See* Lawrence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980) (arguing that not only are many of the provisions of the Bill of Rights substantive in nature, but also that those that are explicitly procedural cannot be cogently separated from their substantive underpinnings).

mind and disinterested judge who will reach a decision only after having heard and properly weighed all the relevant evidence presented as well as after having duly considered the conflicting interpretations of relevant legal precedents advanced by each of the contenders.¹²³ Because of his or her passive role during the trial and because of his or her obligation to remain open-minded until all the arguments and proofs are in, the judge looms as disinterested and impartial. At the very least, therefore, such a judge promotes the rule of law by reaching an unbiased (in the sense that he or she has no reason to favor any party before the court over any other), legally-grounded, and procedurally fair decision that, by and large, should make dispute resolution through law preferable to other alternatives for a vast majority of the citizenry.

In sum, two of the three essential components of a procedurally grounded rule of law do not appear to pose any insurmountable obstacle. These are the rule of law in the narrow sense and the adversary system. The other component, however, has proven much more problematic, as process-based guarantees are seemingly inextricably tied to contestable substantive norms. In other words, since different substantive commitments often lead to different procedural constraints, process-based guarantees may not only be arbitrary, but also unpredictable.

The problems confronting the project of relying on a heavily procedurally-oriented rule of law would greatly diminish in importance if it were possible to draw a cogent and principled line between the law and politics of common law adjudication. Indeed, if procedural fairness could be guaranteed without the need to appeal to any contestable substantive norms,¹²⁴ then procedural regularity and predictability would suffice to buttress the rule of law. Everyone would enjoy basic legal guarantees against the government and fellow citizens and would be assured that the arena left to political competition would operate under fair and orderly, generally applicable rules. In the absence of fair, universally acceptable, pure procedural legal safeguards, however, the rule of law would have to depend on the implementation of substantive law. But if the latter remains thoroughly political in its creation, interpretation, and application, then law would seem bound to collapse into politics. In short, all law would be but politics by another name.

123. See GEOFFREY C. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 120–23 (1978).

124. For an extended argument against such possibility, see Michel Rosenfeld, *A Pluralist Critique of Contractarian Proceduralism*, 11 *RATIO JURIS* 291 (1998).

That law is ultimately politics is a position elaborated by the Critical Legal Studies (“CLS”) movement.¹²⁵ The core of the CLS critique is that common law judges are ultimately unconstrained by the legal materials that they must interpret, and therefore their decisions are political. Typically, the constitutional, statutory, and common law materials with which judges must deal are made up of widely overlapping rules and exceptions, conflicting principles and standards, and open-ended directives susceptible to contradictory interpretations. Accordingly, judges always have a choice among various plausible alternatives with differing political consequences. Because of this, the judicial decision is as political as the legislative or executive one. But it is couched in legal rather than political terms, which often allows it to conceal its politics, thus frequently escaping the adverse reactions that typically confront controversial legislative enactments or executive policies.

If, as CLS contends, law is indeterminate and judicial decisions are both unpredictable and political, then the only significant difference between a rule of law regime and one that is not relates to how politics are actually conducted and implemented. This difference is by no means trivial, as a one person dictatorship without any pretense to state adherence to law seems clearly less desirable than a state in which politics are apportioned among three distinct branches of government. Nonetheless, so long as the rule of law cannot rise above politics at all, the benefits it might yield would seem meager indeed.

CLS’s critique has focused mainly on the United States, where in the critics’ eyes, the business interests of advanced capitalism are largely dominant. Accordingly, judge-made law may be reducible to politics, but not *all* politics. Indeed, in CLS’s view, American judges are predominantly issued from, and sympathetic to, the ruling elite, and are thus prone to making use of the inherent indeterminacy of law to produce outcomes that benefit dominant interests.

If CLS is right about this, however, it undermines its own position, at least in part. If judges’ conclusions can be generally expected to be consistent with dominant pro-business interests, then though law may be indeterminate and political, it would still be predictable—at least in those

125. The CLS literature is both vast and diverse. See e.g., DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE)* (1997); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 *STAN. L. REV.* 591 (1981); Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 *BUFF. L. REV.* 205 (1979); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 *HARV. L. REV.* 561 (1983).

cases in which representatives of the dominant elite are pitted against adversaries with incompatible interests or ideologies. Consistent with this, judges would be constrained not by the legal rules they must apply nor by the intent of the legislator, but by the dictates of their own ideology. And, particularly in a common law system where judges elaborate the law piecemeal by stringing together precedents, a commonly shared ideology may infuse judicial interpretation and law-making with a sufficient set of directives (about which judges may be in part conscious, in part unconscious, or both) to yield outcomes which, if not altogether predictable, would nevertheless fall within a fairly narrow range of expectations. As we shall see below, this insight derived from CLS's critique can be extricated from their own conclusions and used to buttress a conception of a working rule of law regime relying on a common law type of adjudication.

Another critique of CLS accepts the insight that all law, including judge-made law, is political, but rejects the conclusion that all law is but politics. This latter critique zeroes in on CLS's negative assessment of rights and is particularly telling and stinging because it has been articulated by proponents of critical race theory rather than by mainstream or conservative critics who might easily be cast as spokespersons for the dominant elite.¹²⁶ In a nutshell, CLS's critique echoes the Marxist conclusion that liberal rights, which purport to be universal in scope and equally applicable to all, are in practice thinly veiled prescriptions designed to advance bourgeois interests.¹²⁷ In the eyes of critical race theorists, however, rights may be skewed in favor of the powerful but have nonetheless allowed oppressed racial minorities to experience significant progress. In other words, taking into account the changes that occurred since the Supreme Court decreed apartheid unconstitutional in 1954, African-Americans in the United States are at least somewhat better off as a consequence of the expansion civil rights than they would have been without their deployment.

Two important conclusions emerge from establishing the possibility of the rule of law. First, even if law is but politics, that does not mean it is necessarily unpredictable. Second, even if all law is political, that does not foreclose the possibility it contains some residue rising above *mere* politics.

126. See Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (arguing against CLS's "trashing" of rights).

127. For one of the most systematic CLS critiques of rights along these lines see Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

These conclusions may seem relatively modest, but they provide a solid launching pad for the elaboration of a cogent conception of the rule of law in a contemporary constitutional democracy steeped in the common law.

VII. THE COMMON LAW AND THE TENSION BETWEEN PREDICTABILITY AND FAIRNESS

If we return to the ideal of the common law in its pristine form and recall the example concerning various trespassing animals discussed above,¹²⁸ we can see that the common law proceeds in a way that is in some sense diametrically opposed to the way civil law is supposed to be implemented in the context of the *Rechtsstaat* or the *État légal*. In the civil law setting, the judge is supposed to apply a previously enacted law to a set of facts in a deductive process modeled on the syllogism. The legal rule figures as the major premise; the facts of the case, as the minor premise; and the syllogistically derived judicial decision as the conclusion. In contrast, the common law not only involves an inductive process, but also a future-oriented act of lawmaking grounded in the very process of adjudicating a present dispute concerning past acts. Referring to the earlier example of the trespassing cow,¹²⁹ no rule appraising the parties involved of likely legal consequences existed at the time of the act giving rise to the litigation—the rule (although still incomplete) being announced only at the moment of adjudication. On the other hand, the very act of adjudication constitutes an announcement to all cow owners of how similar cases will be adjudicated in the future. Consistent with this, moreover, the conscientious common law judge should be at least equally concerned, if not more so, with the future effect of his or her ruling than with achieving backward-looking justice in the dispute at hand. To the extent this is so, the common law, in contrast to the civil law, involves both an act of (judicial) legislation and an act of adjudication that is not sufficiently constrained by any preexisting rule.

Consistent with these observations, one must conclude that a pure common law system leads to the very opposite of the rule of law, were it not predictable in its own way, as suggested by the examination of CLS's critique. Ideally, the common law would be significantly predictable—not because it is the handmaiden of the dominant elite's ideology, but because it is grounded in a common well of values, a widely shared sense of justice

128. See *supra* pp. 1340–41.

129. See *supra* pp. 1340–41.

and fairness, and dedication to elaborating a pragmatically-oriented, empirically-based working legal order that insures stability through steadfast adherence to core principles. In other words, the common law can be compatible with the rule of law so long as it can satisfy well settled expectations at the level of values and principles, even if not at the level of particular outcomes. Furthermore, as the common law evolves and precedents accumulate, presumably fluctuations between expectations and outcomes tend to narrow. In the last analysis, the civil law cannot, in practice, remain a perfect deductive syllogistic system, as rules proliferate, become riddled with exceptions, and are not entirely consistent with one another. Under such circumstances, in an increasing number of complex cases, the actual outcomes of judicial adjudication cannot be fully predicted. Accordingly, though they proceed differently, in the real world common law and civil law would seem poised to converge, at least in terms of predictability.

Stabilizing expectations in an increasingly complex world is one of the paramount functions of contemporary law.¹³⁰ Upon first impression it would seem that a regime of fairly rigid civil law-type rules would be far preferable for this purpose than a set of evolving common law standards, or loosely construed statutory provisions interpreted in accordance with broad common law canons. Upon further consideration, however, common law methodology may be better attuned to the dual task of stabilizing expectations and meeting evolving needs in a rapidly changing economic environment. Indeed, so long as the interests of legislators, judges, and private parties converge, expectations may be kept relatively stable, even in the face of frequent adaptation to novel conditions. While prediction of actual outcomes may be more difficult, confidence in the maintenance of accepted standards concurrently with adaptation to rapidly evolving needs may well provide the best possible means of stabilizing expectations in the politics at the forefront of economic development.

Thus, the convergence of interests decried by CLS can furnish a key element of stability to any rule of law project grounded in the common law. But this stability cannot extend to those situations in which divergence rather than convergence becomes the norm. In the latter case, the rule of law must turn to protection of fundamental rights for sustenance. In periods when the scope of fundamental rights is in flux,¹³¹ focus on rights

130. See *supra* text accompanying note 73.

131. For example, the Supreme Court greatly expanded the scope and breath of fundamental constitutional rights during the period in which Earl Warren was Chief Justice (1953–1969). See

may generate a significant degree of unpredictability. On the other hand, as the core fundamental rights tend to become universal in nature and scope, through transnational norms such as those enshrined in the United Nation's Human Rights covenants or the European Convention on Human Rights, the protection of fundamental rights seems poised to become more predictable. To the extent the requirements imposed by the protection of fundamental rights and those necessitated by the stabilization of expectations become fairly stable, even the conflicts among the two might become largely predictable.

In any pluralist society with diverging conceptions of the good, there may be as wide a lack of consensus concerning what ought to count as a fundamental right, as regarding what would constitute a fair means to stabilize legal expectations. The more disagreement there is on both of those issues, the more existing legal norms are likely to be perceived as a function of politics rather than the institutionalization of the rule of law. More generally, in terms of perception, the rule of law seems to go hand in hand with a relatively high level of integration among diverse perspectives, while the rule of politics seems tied to significant fragmentation within the polity. It is worth noting, however, that the perceptions in question have little to do, strictly speaking, with whether legal outcomes are in fact unpredictable. It may be that in a badly fragmented society, most citizens are alienated from the law but can nonetheless predict legal outcomes or even consider them as inevitable as they are unfair. In contrast, in a polity rapidly moving towards greater integration, it may be that widely supported, constantly evolving fundamental rights upset expectations but promote greater fairness and legitimacy. In short, if the rule of law depends on fairness, it should be open to a large measure of unpredictability. If on the other hand, it is based above all on predictability, it should be compatible with widespread unfairness.

In the last analysis, the Anglo-American conception of the rule of law seems capable of integrating a certain number of formal elements, a workable amount of predictability, a certain sense of fairness, and certain contextual elements, such as relative integration as opposed to unbridgeable fragmentation, and a cultural predilection for a procedurally-based array of individual rights available against the state and legislative majorities. Moreover, this conception of the rule of law depends on the maintenance of a division of labor between law and politics, but not on one

that purges law of all politics. Instead, the division in question is a contextual one that is triggered by a shift in perspective.

As I have argued at greater length elsewhere,¹³² the distinction between law and politics turns on whether some past occurrence can be reconstructed in terms of the application of standards that (upon reconstruction) plausibly cast the eventual result as *ex ante* just and predictable. If such reconstruction is possible, then the decision institutes legal justice and is compatible with the rule of law. Otherwise, the decision may promote political justice, but cannot transcend the realm of politics. Ultimately, the distinction between law and politics reflects, above all, a difference in perspective. From law's perspective, and hence from that of the rule of law, "legal argument and legal discourse occupy the foreground, with political arguments and values receding to the background. Consistent with this, insurmountable ruptures in legal discourse and irreparable breakdowns in legal argumentation signal a failure to come within the ambit of justice according to law."¹³³ From the perspective of politics, in contrast, political concerns and values come to the forefront and law recedes to the background. Political decisions may be cast in the discourse of law, but so long as their political elements remain predominant and upset logic and continuity, they cannot qualify as genuinely legal, or as properly falling within the ambit of law. A division of labor between political and legal decisions is certainly compatible with the rule of law, but not one in which all decisions legal in form turn out to be political in perspective.

VIII. CONCLUSION: CONSTITUTIONAL DEMOCRACY AND THE LIMITS OF THE RULE OF LAW

The American legal system, based on a written constitution and a well-entrenched common law approach, can certainly satisfy the requirements of a rule of law regime, notwithstanding the fact that it raises certain paradoxes and is often prone to blur the divide between law and politics. Because it is apparently more flexible than its civil law counterparts, the American system seems better suited to deploy a coherent rule of law regime, provided that there is a high degree of consensus on core values and objectives, on a sense of fairness, and on an essential bundle of constitutional rights. Conversely, in the context of a serious breakdown of consensus, the American system seems less suited to

132. See JUST INTERPRETATIONS, *supra* note 14, at 74–83.

133. *Id.* at 82–83.

maintain a rule of law regime than a traditional civil law system based on a more rigid conception of legality.¹³⁴

At least under certain propitious circumstances, therefore, the rule of law can promote both predictability and fairness; this seems equally possible in an Anglo-American common law setting as in a continental civil law system. Beyond that, however, it is not clear whether the link between the rule of law and predictability and the rule of law and fairness is an intrinsic or an extrinsic one. In other words, does the rule of law in certain circumstances make for predictability and fairness? Does it merely coincide with them?

Consistent with the modified Habermasian consensus-based criterion of legitimacy,¹³⁵ predictability is crucial for the purpose of assessing the normative weight attributable to *ex ante* acquiescence. Fairness, on the other hand, breaks down into a subjective and an objective component. If a citizen implicitly or explicitly endorses a law or legal regime, the latter can be considered subjectively fair. Conversely, if in the absence of such endorsement, it would be reasonable for such a citizen to endorse a law or legal regime, then the latter can be said to be objectively fair.¹³⁶

In accordance with the modified Habermasian criterion of legitimacy elaborated above, existence of an extrinsic link between the rule of law and fairness would only seem possible in the context of a broad consensus on extra-legal norms and values, or in other words, in the case of a strong convergence of conceptions of the good.¹³⁷

134. Indeed, a fairly rigid civil law system based on a deductive reasoning model would be more prone to predictability than a common law system in the hands of judges divided by ideology, political aim, and judicial philosophy. Moreover, under such circumstances, a common law regime would probably not be widely perceived as promoting fairness. It should be emphasized, however, that contemporary civil law constitutional regimes are far less likely to differ sharply from common law regimes than their more traditional predecessors. *See, e.g.,* Dominique Rousseau, *The Constitutional Judge: Master or Slave of the Constitution?*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY: THEORETICAL PERSPECTIVES 261 (Michel Rosenfeld ed., 1994) (discussing role of constitutional judge in France); Jacobson & Schlink, *supra* note 85, at 197 (discussing broad powers of German Constitutional Court).

135. *See supra* text accompanying notes 42–45.

136. In other words, subjective fairness is measured from a participant's perspective while objective fairness is determined from an observer's perspective that properly accounts for the relevant participants' conceptions of the good.

137. Under such circumstances, the law's (subjective) fairness would derive from the substantive vision behind it, and its predictability may be sufficiently grounded on an expectation of fair and orderly outcomes, regardless of whether a legal contest could be confidently predicted prior to adjudication.

In a pluralist society with competing conceptions of the good, however, it is difficult to imagine the prevalence of a solid, extrinsic link between the rule of law and both predictability and fairness. Indeed, given significant divergences stemming from competing conceptions of the good, it seems inevitable that particular laws and even legal regimes taken as a whole would be bound to promote certain contested interests or conceptions of the good at the expense of others. Accordingly, in the context of a pluralist society, satisfaction of the modified Habermasian criterion of legitimacy would seem dependent on forgoing an intrinsic link between the rule of law and both predictability and fairness.

The rule of law as developed in each of the three traditions examined ultimately falls short from the standpoint of establishing the requisite intrinsic link. The *Rechtsstaat* fails to secure the requisite intrinsic link in all three of its versions. The Kantian *Rechtsstaat* aspires to rise above the realm of interests but ends up being either impossible or biased. The positivistic *Rechtsstaat*, on the other hand, pins its hopes on strict adherence to the principle of legality and thus promotes predictability but gives no assurance of fairness. Finally, the contemporary *Rechtsstaat*, or *Verfassungsstaat*, aims at fairness through constitutionalization of substantive norms and values, such as human dignity, but fails to promote consensus in as much as it endorses certain contested values at the expense of others.

The French Rousseauian *État légal* and the *État de droit* also fail to satisfy the requisite intrinsic link, and thus fall short of the modified Habermasian criterion of legitimacy. The *État légal* and its mission to promote the general will can certainly *contribute* to the satisfaction of the above criterion through promotion of democratic self-government, which may lend legitimacy to a number of legal norms operating at the infra-constitutional level. To the extent that the general will remains too abstract or shrouded in mystery, however, and that self-government by itself cannot guarantee fairness, the *État légal* standing alone cannot be relied upon to produce the required legitimacy. This was understood by the proponents of the *État de droit*, but supplementing the *État légal* with the *État de droit* does not solve the problem of legitimacy inasmuch as the resulting constitutional regime is no more inherently capable than its American or German counterparts to overcome reliance on either insufficient formalistic criteria, such as those based on Kantian or Lockean conceptions of rights, or on contested substantive values such as those embedded in the German Basic Law.

Finally, in the absence of a consensus concerning a sufficient core of common values, the American common law-based and constitutionally-shaped rule of law regime cannot alone guarantee maintenance of an intrinsic link between implementation of the rule of law and both predictability and fairness.

There can be little question that in the absence of commitment to legality, fundamental rights guarantees, and genuine opportunities for citizen participation in the political process, satisfaction of the modified Habermasian criterion of legitimacy would be altogether impossible. Accordingly, adherence to the rule of law in one of the three traditions considered above emerges as a necessary but insufficient means to legitimacy. As we have seen in the course of examining these three rule of law regimes, moreover, each of them is much more readily justified in terms of what it stands against, rather than in terms of what it purports to stand for. The challenge, therefore, is to find a rule law regime that can be used to counter the tendency of existing liberal democratic constitutional rule of law regimes to frustrate recognition and accommodation of identity related claims in multicultural and multiethnic polities. What this regime might look like is difficult to say, but it is clear that it would have to involve more than procedural safeguards and traditional liberal rights.

It seems clear that the gains brought about by the implementation of the rule of law regimes should not be squandered. It is an open question, however, what the next step should be. To the extent that the regimes in question seem insufficient to properly accommodate a plurality of conceptions of the good, the most important task would be to devise a better means to accommodate pluralism. It is unclear how much of this could be accomplished through transformation of the rule of law and how much through establishment of institutions and practices beyond the rule of law. But given the failure of the rule of law to secure the requisite internal links between law and predictability and between law and fairness, it seems reasonable to assume that at least some of the necessary changes will have to take place beyond the realm of law.

