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Introduction: Symposium on Paul Gowder, The Rule of Law in the Real World

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**INTRODUCTION:
SYMPOSIUM ON PAUL GOWDER, *THE RULE OF LAW IN THE
REAL WORLD***

MATTHEW LISTER*

The rule of law is an example of what has been called an “essentially contested concept.” These are concepts where the conditions of their proper application are subject to deep, arguably intractable, dispute among people who are otherwise able to apply the terms.¹ A wide number of authors have offered accounts of the rule of law, and yet none have been able to garner general support.² This might make us worry about the usefulness of further work on the topic. However, as shown in the papers making up this book symposium, Paul Gowder, in his recent book, *The Rule of Law in the Real World*, offers us both a novel account of the rule of law and a fruitful application of the account. While each of the commenters take issue with one or another aspect of Gowder’s account, all agree that it makes a significant contribution to our understanding of the rule of law and offers fresh insight for further analysis. In what follows I will briefly set out the core elements of Gowder’s account and then note the primary issues or questions raised by the contributors to the symposium.

Gowder contends that the rule of law is made up, at its core, of three notions: regularity, publicity, and generality.³ Regularity implies that the power of the state must always and only be used when this is authorized by good faith interpretations of existing, specific rules. Publicity demands that the rules that

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1. For a helpful introduction to the idea of “essentially contested concepts,” and further citations, see Lawrence B. Solum, *Legal Theory Lexicon 028: Concepts and Conceptions*, http://solum.typepad.com/legal_theory_lexicon/2004/03/legal_theory_le_1.html [https://perma.cc/2VT4-4D2S] (last updated June 12, 2016).

2. See, e.g., JOHN FINNIS, *NATURAL LAW & NATURAL RIGHTS* 270–90 (Paul Craig ed., 2d ed. 2011); LON L. FULLER, *THE MORALITY OF LAW* 30–94 (rev. ed. 1969); DAVID LYONS, *ETHICS AND THE RULE OF LAW* (1984); Jeremy Waldron, *The Rule of Law as a Theater of Debate*, in *ARGUING ABOUT LAW* 212–28 (Aileen Kavanagh & John Oberdiek eds., 2009); Colleen Murphy, *Lon Fuller and the Moral Value of the Rule of Law*, 24 *LAW & PHIL.* 239 (2005); Robin West, *Re-Imagining Justice: Progressive Interpretations of Formal Equality, Rights, and the Rule of Law*, Georgetown Public Law Research Paper No. 12-074 (2003), <https://ssrn.com/abstract=2083806> [https://perma.cc/2TV8-H4U8].

3. The information in this paragraph and the next two paragraphs is supported in PAUL GOWDER, *THE RULE OF LAW IN THE REAL WORLD* (2016).

guide official behavior are accessible to the general public. Together, these two ideas form the “weak” version or account of the rule of law. A state that meets these requirements will be better than one that does not in that it will typically refrain from treating its subjects with hubris—behaving as if its officials were superior to those ruled—and from subjecting the citizens to terror—making the citizens fear the power of the state and behave submissively to it.

To move from the weak to the full or strong version of the rule of law, we must introduce the notion of generality. This requires not only the substantial fulfillment of the principles of regularity and publicity, but also that no irrelevant or arbitrary distinctions are drawn between individuals. This, Gowder contends, leads us away from a merely formal to a substantial notion of the rule of law. This in turn implies that legal distinctions must be backed by “public reasons”—the reasons for applying a law to a particular person must be such that they could, at least in principle, count as reasons to the person being subjected to the law.

Gowder derives important substantial conclusions from these claims. The rule of law, he argues, does not, as many have claimed, require any particular set of social institutions, but can be instantiated in as diverse institutions as the mass juries of ancient Athens, or the informal norms of the British parliamentary system, as well as the more commonly discussed U.S. system of a written constitution and independent courts with the power of judicial review. Furthermore, the rule of law is a scaler or comparative notion on this account—it does not apply in an “all or nothing” way, but in a “more or less” way. This substantial notion of the rule of law allows citizens to see themselves as social equals, and provides a way for them to coordinate so as to ensure that the powerful within society do not use the power of the state merely to enrich and empower themselves.

All of the contributors to the book symposium agree that Gowder has provided a highly insightful and important account, but each take issue with different aspects of the argument. Colleen Murphy, in her contribution, starts by raising two questions in relation to Gowder’s generality requirement: first, can generality ground the degree of equality that Gowder desires, and secondly, does generality imply a closer connection to liberal democracy than Gowder suggests.⁴ Murphy worries that it is more controversial than Gowder suggests to say that the generality principle implies an egalitarian condition. If this is so, more substantive argument may be needed for the egalitarian aspects of the rule of law, making it more controversial. On the other hand, Murphy worries that the rule of law may be less adaptable to nondemocratic forms of government than Gowder suggests, especially if we include a significant egalitarian element. Won’t those excluded from participating in government, Murphy asks, see themselves as treated as less than equals? If so, then there may be a conflict

4. The information in this paragraph is supported in Colleen Murphy, *The Rule of Law, Democracy, and Obedience to Law*, 62 ST. LOUIS U. L.J. 293 (2018).

between Gowder's egalitarian generality condition and his claim that the rule of law has only indirect connections with democracy. Finally, Murphy raises concerns about Gowder's account of the relationship between the rule of law and a duty on the part of citizens to obey the law. On Gowder's account, the rule of law is primarily a constraint on rulers or authorities. However, Murphy argues, a full account of the role of law needs to account not only for constraint on officials, but the role of citizens in respecting and obeying the law, for both aspects are needed if society is to be ruled by law.

Robin West agrees that Gowder's substantive generality account, with its strong egalitarian implications, is revisionary, but finds the account attractive for that reason.⁵ While more formal accounts of the rule of law have tended to be highly conservative, arguably making attempts to deal with significant inequality problematic, Gowder's account, she notes, provides grounds for addressing inequality. West worries, however, that while Gowder had provided a strong conceptual argument this may not line up well with the way that the idea of the rule of law has functioned and developed over time. In a related worry, West questions whether Gowder's equality concern is properly tied to the notion of generality at all. Why not apply equality principles directly? If it is equality that matters, trying to get there through generality is likely to lead us astray, she argues.

West next raises a concern about how private power is dealt with in Gowder's account. Many types of harms done to individuals, West notes, are not perpetuated by the state, but rather by private individuals. Is this an offense against the rule of law? On Gowder's account, she contends, it is hard to see how it would be, since the rule of law serves primarily to restrain officials. However, if we see the rule of law as imposing positive obligations on the state to protect its citizens from arbitrary and discriminatory uses of power, whatever their source, we can see the lack of protection for some citizens by the state as itself a violation of the rule of law. If this is correct, West argues, then the rule of law may impose more positive obligations on the state than Gowder countenances.

Chad Flanders starts his critique by noting that Gowder's account of the rule of law is more substantial than most, and asks if this is a virtue.⁶ There is reason to favor a simple account, one that fits more closely with what Gowder calls the "weak" version of the rule of law, Flanders argues. The "simple" account stops with regularity and publicity, and does not include generality. This is a virtue, Flanders argues, because accounts of generality will almost inevitably be

5. The information in this paragraph and the next paragraph is supported in Robin West, *Paul Gowder's Rule of Law*, 62 ST. LOUIS U. L.J. 303 (2018).

6. The information in this paragraph and the next paragraph is supported in Chad Flanders, *Keeping the Rule of Law Simple: Comments on Gowder*, *The Rule of Law in the Real World*, 62 ST. LOUIS U. L.J. 313 (2018).

controversial, making it much harder to know whether the rule of law applies or not. And, if we want to be able to use claims about the rule of law to make judgments about the behavior of states, it will be useful if there is agreement. Flanders worries that, by including generality—and with it equality—in the rule of law, that Gowder is trying to make the concept do more work than it can bear. This is not to doubt that generality and equality are good things, but simply to question whether they are properly part of the rule of law.

Flanders next provides pressure on Gowder's account by raising two issues not significantly discussed in the book: mass incarceration and immigration. Both issues seem to pose problems for the rule of law, but exactly how to fit them into the account is problematic. In both cases, we are faced with policies that seem to have much that could be said against them, but it is unclear how they connect with the rule of law. It is not implausible that there are problems in a society that imprisons as many people as the United States does, and that seems to allow arbitrary features of people to be relevant to immigration decisions. But, can the rule of law help us here? As Flanders points out, in both cases, we might worry that a more consistent—that is, a more regular—application of the law would lead to worse overall policy, with more imprisonment and more deportations. Both cases raise worries, then, about the normative work that can be done by the rule of law.

Matthew Lister, in his contribution, picks up the question of immigration again, and asks whether the rule of law can exist “at the border.”⁷ Lister notes that, traditionally, regulation of borders and admission to countries have been treated as largely law-free zones, ones where nearly unbound legal and administrative discretion has been the rule. The border is not only an unusually lawless zone, Lister claims, but one that would seem to pose a particular problem for Gowder's account. On Gowder's account, the rule of law is instituted when “members of a political community” or “citizens” are able to coordinate together to constrain the actions of officials or powerful elites. But, state action at the border involves the use of power against people who are not citizens and often not even members of the society using the power. Does this imply that, on Gowder's account, the rule of law cannot apply at the border?

Lister argues that, on Gowder's account, there are two ways in which we might try to extend the rule of law to the border. The first is to look at concrete connections that current citizens or members of the political community have with noncitizens. Just as the interests of current citizens give them strong reasons to coordinate to establish the rule of law in their own community, so may the interests of current members in connections with nonmembers give them reason to work to extend the rule of law to the border. These interests can include family

7. The information in this paragraph is supported in Matthew Lister, *Can the Rule of Law Apply at the Border? A Commentary on Paul Gowder's The Rule of Law in the Real World*, 62 ST. LOUIS U. L.J. 323 (2018).

ties, other forms of personal relationships, offers of employment, intellectual connections, and others. Some of these connections already serve to give greater legal protections, including protections from arbitrary decision-making, to some noncitizens, and the general trend, Lister argues, can and should be further strengthened.

The second method for extending the rule of law to the border involves appealing to certain universal norms so as to build a sense of community that stretches beyond borders. While these norms are not as robust or well established as domestic law, and therefore are unlikely to extend all of the protections of the rule of law to all people at the border, they can, Lister argues, be a basis for working against the worst arbitrary actions by border officials. Lister finishes his contribution by considering the vexed dispute about providing “amnesty” for unauthorized immigrants in the United States and other countries. He argues that Gowder’s account of the amnesty provided to supporters of the oligarchic coups in ancient Athens provides a model for thinking about when and how amnesties for unauthorized migrants can be done without offending the rule of law, thereby making them more palatable to current citizens.

The symposium ends with Gowder’s replies and responses to the commenters. Despite the remaining disagreement between Gowder and the commenters, it is clear that the book has made major theoretical and practical advances in our understanding of the rule of law, and will pay careful study.

