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THE PRINCIPLES OF THE RULE OF LAW

Robert S. Summers*

I. INTRODUCTION

The principles of the rule of law, as recognized in developed Western systems, generally include the familiar requirements that law be rule-like so far as appropriate, that it be clear, that it be public, and that it generally be prospective. I will now identify and clarify the

* McRoberts Research Professor of Law, Cornell Law School. This Essay is a substantially revised version of part of a chapter in a book on form and the law that I am writing. I presented an earlier version as a lecture at the Autonomous University of Madrid on January 19, 1998, and I wish to thank, in particular, Professors Francisco LaPorta and Alphonse Ruiz Miguel for their helpful comments. The lecture has now been published in Spanish: Robert S. Summers, Forma, Imperio de la ley, Imperio del buen Derecho, in YEARBOOK OF THE FACULTY OF LAW OF THE AUTONOMOUS UNIVERSITY OF MADRID 183 (Francisco LaPorta ed., 1998). I am indebted to my administrative assistant, Mrs. Pam Finnigan, and to my research assistants, Ms. Shelley Detwiller and Mr. Darian Ibrahim, for extensive help in the preparation of this Essay.

1 The literature on the rule of law is vast and includes many books and hundreds of essays. I do not here attempt to canvas this literature.

2 I will not systematically consider here the criteria and the evidence by which a scholar might determine whether a given system actually recognizes a given principle of the rule of law. Plainly, one criterion would be how far the actual law of the system is consistent with the principle in question. Another would be whether the system explicitly incorporates the principle in question into its constitutional or related law. Still another would be how far the system specifically seeks to secure the principle not only through explicit incorporation, but also through implementive devices and other means. A further criterion would be whether departures from the principle are met with serious criticism within the system. One of the additional criteria would be whether the principle is rationally classified as a principle of the rule of law by scholars. A given principle might, in light of the foregoing criteria and the corresponding evidence, only qualify partially as a principle of the rule of law in a given system. Indeed, a given principle might possibly qualify only conceptually as a principle of the rule of law—as a principle constitutive of what is a law-like use of law to order human relations, and yet the principle might not itself be recognized within any given system. I claim that all the principles I treat as principles of the rule of law qualify conceptually. I also claim that almost all the principles I treat as principles of the rule of law are recognized by the foregoing criteria and corresponding evidence, at least to some degree, in almost all developed Western systems. I do not, however, attempt to defend this latter claim here. See also infra note 5.
general nature and formal character of such principles. I will also
treat their general functions, including the ends and values they serve.
This is an especially appropriate topic for inclusion in a collection of
essays honoring Kent Greenawalt, America’s leading legal theorist.
For many years, it has been my privilege to learn from his work, and to
know him. It is in a special spirit of gratitude and friendship that I
dedicate this Essay to him.

The principles of the rule of law differ from principles of ordi-
nary “first order” law. Principles of ordinary first order law apply di-
rectly to determine legal relations between immediate addressees of
such law. In our own system, principles of such first order include,
merely to cite two examples, the moral principle that “no person shall
profit from his own wrong,” 3 and the quite different type of principle
that “a transferee of property takes no better title than the transferor
had.” 4 Unlike such “first order” principles, the principles of the rule
of law are what might be called “second order” principles. That is,
they are about first order law, including not only its principles, but
also its rules, decrees, and other law. Principles of the rule of law are
about first order law in the sense that they are general norms that
direct and constrain how first order law is to be created and imple-
mented. They are also about first order law in the sense that they
specify its general shape or configuration. When the creation and im-
plementation of a first order principle or rule or other such law con-
forms to these second order norms, the requirements of the rule of
law are met. Individual principles of the rule of law have a far wider
scope of application than individual first order law. Indeed, prin-ci-

ciples of the rule of law apply across all the basic operations of a legal
system in their full “breadth,” and also apply to these operations in
their full “length,” and so are truly systemic in scope. The second
order principles of the rule of law are also in their own content for-
mal. As applied, they indirectly serve the basic substantive policies,
principles, and other values incorporated in first order principles,
rules, decrees, and other such law. At the same time, the principles of

3 For discussion of this principle in the American system, see, for example,
HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 68–94 (William N. Es-

kridge, Jr. & Philip P. Frickey eds., 1994).

4 This is a quite different type of principle in the sense that it is rather more
legal in nature and less obviously rooted in moral notions. There are many such
principles in the first order law of Western systems. For discussion of the foregoing
principle in one context in the American system, see JAMES J. WHITE & ROBERT S.
SUMMERS, UNIFORM COMMERCIAL CODE 53 (4th ed. 1995). The principle itself is of
ancient origin, as its Latin formulation signifies: Nemo dat qui non habet.
the rule of law, as applied, serve fundamental political values and general legal values.

II. The Principles of the Rule of Law

I will now identify what I consider to be the leading second order principles of the rule of law, all of which I also claim are recognized to some extent in developed Western systems of law.5 What follows is, I think, a relatively comprehensive inventory of the second order principles governing how first order law is to be made and implemented and specifying what shape or configuration it is to take, if it is to conform to the rule of law. In my inventory, I do not include specific legal devices for implementing each such principle in the set. The principles of the rule of law consist of the following:

(1) that all forms of law be duly authorized, and thus conform to established criteria of validity;

(2) that the accepted criteria for determining the validity of law generally be clear and readily applicable, and include criteria for the resolution of any conflicts between otherwise valid forms of law;

(3) that state-made law on a given subject be uniform within state boundaries, and, so far as feasible and appropriate, take the preceptive form of general and definite rules applicable to classes of persons, acts, circumstances, etc., and also be applicable to officials and citizens alike, as appropriate;

(4) that all forms of law be appropriately clear and determinate in meaning;

(5) that state-made law, and other law as appropriate, be in some written form, and be promulgated, published, or otherwise be made accessible to its addressees;

(6) that law, and changes in law, generally be prospective rather than retroactive (see also (13) and (14));

(7) that the behavioral requirements of a law be within the capacity of its addressees to comply;

(8) that the law on a subject, once made and put into effect, not be changed so frequently that its addressees cannot readily

5 See supra note 2. This, however, is not a claim I undertake to defend here. Indeed, a systematic defense would require a whole book, if not a multi-volume treatise. For considerable evidence, with which I am closely conversant, that supports the claim as to some of the principles, see Patrick S. Atiyah & Robert S. Summers, Form and Substance in Anglo-American Law (1987); Interpreting Precedents—A Comparative Study (D. Neil MacCormick & Robert S. Summers eds., 1997); Interpreting Statutes—A Comparative Study (D. Neil MacCormick & Robert S. Summers eds., 1991).
conform their conduct to it, or that long term planning cannot be feasible;

(9) that purported changes in the law be made by duly authorized institutions, officials, or persons, and in accordance with known procedures as appropriate;

(10) that a form of law be interpreted or otherwise applied in accord with an appropriate, uniform (for that type of law), and determinate interpretive or other relevant applicational methodology, itself a methodology duly respectful of the experssional form and content of that type of law;

(11) that any possible remedy, sanction, nullification, or other adverse consequence of failure to comply with a form of law be known or knowable in advance of the relevant occasions for action or decision under that law;

(12) that in cases of dispute, a politically independent and impartial system of courts and administrative tribunals exist and have power, (a) to determine the validity of the law in dispute, (b) to resolve issues of fact, all in accord with relevant procedural and substantive law, and (c) to apply the valid law in accord with an appropriate interpretive or other applicational methodology;

(13) that when an interpretive or other applicational methodology does not authorize an outcome under antecedent law, yet a court or a tribunal is urged (sometimes in the guise of such methodology) to modify or otherwise depart from law to achieve such an outcome, courts or tribunals shall have only quite limited and exceptional power thus to modify or otherwise depart from antecedent statute, precedent, or other law, so that the legal conclusions and any reasons for action or decision on the part of the law's addressees which would otherwise arise under valid law, duly interpreted or applied, generally remain peremptory for the law's addressees, including courts and other tribunals;

(14) that any exceptional power of courts or other tribunals to modify or depart from antecedent law at point of application be a power that, so far as feasible, is itself explicitly specified and duly circumscribed in rules, so that this is a power the exercise of which is itself law-governed;

(15) that a party who is the victim of a crime, or of a regulatory violation, or of a tort, or of a breach of contract, or of wrongful denial of a public benefit, or of wrongful administrative action, or of other alleged legal wrong shall be entitled to instigate criminal prosecution insofar as appropriate (with any required official concurrence) or to seek other appropriate redress, before an independent and impartial court or other tri-
bunal with power to compel the alleged wrongdoer or official to answer for such wrong;

(16) that, except for minor matters, no significant sanction, remedy, or other adverse legal consequence shall be imposed on a party, against his or her will, for an alleged crime, or regulatory violation, or tort, or breach of contract, or administrative wrong, or any other alleged legal wrong, without that party having advance notice thereof and a fair opportunity to contest the legality and the factual basis of any such projected adverse effect before an independent and impartial court or other similar tribunal;

(17) that a private party who fails to prevail before such court or tribunal pursuant to (15) and (16) above, whether an alleged victim or an alleged wrongdoer, shall have the opportunity to seek at least one level of appellate review, in a court, as a check against legal error;

(18) that the system and its institutions and processes be generally accessible, that is, (a) that there be a recognized, organized, and independent legal profession legally empowered and willing to provide legal advice, and to advocate causes before courts, other tribunals, and other institutions as appropriate, and (b) that at least where a party is accused of a significant crime or similar violation, denies wrongdoing, and is without financial means to pay costs of defense, such party shall be entitled to have defense provided by the state.

The foregoing account does not include mere devices for implementation of such principles. Not everything that tends to secure the rule of law is itself a principle of the rule of law. For example, the constitutional separation and division of powers in many systems tends to secure against official behavior contrary to the rule of law, but I do not here classify it as an affirmative principle of the rule of law. Provision for periodic transfer of power from one set of elected officials to a set of newly elected officials also tends to secure against lawless despotism, but this provision, again, is not itself a principle of the rule of law, even though whatever secures against despotism also tends strongly to secure the rule of law. A provision of a bill of rights entrenching freedom to criticize the government tends to secure against lawless rule, but this freedom is not itself a principle of the rule of law. Rather, all the foregoing are merely examples of what I call devices that, among other things, implement the rule of law. Of course, at the borders, there can be no sharp lines between such devices and the principles of the rule of law.

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6 This is not to demean these devices in any way. Indeed, from other perspectives, these devices themselves have primacy.
Developed Western legal systems actually differ considerably in the specific devices they use to implement the second order principles of the rule of law. For example, the United States Constitution has been interpreted to provide that certain unduly vague statutes are simply invalid. Few other countries so provide. Some systems provide highly trained drafters of legislation; others do not. Some systems have elaborate periods of apprenticeship for prospective judges; others do not. Some systems have bills of rights, parts of which purport to implement equality before the law and certain other principles of the rule of law; others do not. Some systems provide for extensive judicial review of administrative action; others do not. And so on. It would not be surprising to find that there are many more variations among systems in the devices utilized to secure principles of the rule of law than in the core principles themselves.\textsuperscript{7}

Do the second order principles of the rule of law apply only to the creation and implementation of first order law by the state, or do they also apply to first order law created by private parties? Such first order law includes contracts, certain property arrangements, and more. Most of the principles of the rule of law, as formulated here, also apply, with appropriate modifications, to privately created law.

Does just any departure from any of the foregoing principles always seriously threaten the rule of law? Not at all. Exceptional departures from some of the principles of the rule of law may even be justified. A particular retroactive statute may be justified, for example. Moreover, not all judicial departures, even from the explicit text of a statute, seriously threaten the rule of law. Thus, a judicial modification that makes a statute clearer in a fashion consistent with the text may even be justified. Also, sometimes a law cannot be made definite, but must in some respect or respects be left vague, given its subject matter. At the same time, as Lon L. Fuller once stressed,\textsuperscript{8} complete noncompliance with any one principle of the rule of law would signify that the system is not properly called a legal system. Thus, there is no scope for a balancing act that could rescue such a "system." For example, a total abandonment of all rules could not be rescued by the formal adoption of all the moral principles possibly relevant to any legal matter. Nor, for example, could total abandonment of a generally accepted interpretive methodology be rescued by the substitution of

\textsuperscript{7} One test of whether $X$ should be classed as a principle rather than as an implementive device is whether $X$ is definitive in some way of what counts as a law-like use of law. Another test is whether, if $X$ is subtracted completely, we could have what would count as a system of law at all.

totally wise and judicious men and women on the bench, acting ad hoc. And so on. This is not to say, however, that conformity to the principles of the rule of law is sharply on-off. Conformity is a matter of degree, and some systems conform less fully than others.

Not all of the foregoing principles of the rule of law are fully recognized in the positive law of all developed Western systems as binding second order principles of the rule of law. Of course, a principle may be recognized by different means in different systems. One system may embody a principle in a constitutional provision, while another leaves the matter entirely to judge-made law. Or one system may recognize a principle directly and explicitly, while another merely adopts a device that, in effect, tends to secure a principle and so recognizes it only indirectly and implicitly. Or one system may provide real "teeth" for enforcing a principle, while another does not. And there are other variations.

III. How Principles of the Rule of Law Are "Systemic" in Scope

As I have indicated, the second order principles of the rule of law are systemic in scope. That is, they apply across all of the basic types of operations of a legal system and so to the full breadth of all such operations. Thus, the principles direct and constrain the creation and implementation of law across the full breadth of the five basic operational techniques through which any legal system operates. These techniques are as follows:9

(1) the penal technique in which legislatures prohibit criminal conduct; police, prosecutors, courts, and punitive and correctional officials deter would-be criminals; and actual criminals are caught and punished;

(2) the grievance-remedial technique in which courts and legislatures define remediable grievances such as harm due to negligence and intentional torts, and courts provide reparation for grievances, thereby also influencing people not to cause such grievances in the first place;

(3) the administrative-regulatory technique in which administrative officials (a) lay down standards in advance regulating conduct such as television programming, food manufacturing, building construction, public transportation, etc., (b) take other regulatory steps such as licensing and periodic inspections which are designed to secure compliance with those standards, and (c)

impose sanctions on actual violators (which may require judicial action, too);

(4) the public-benefit conferral technique in which legislatures and public bureaucracies (a) define substantive governmental benefits to be conferred such as education, public roadways, welfare, etc., (b) confer or distribute these benefits, and (c) secure the necessary material means therefor, mainly through taxation;

(5) the private-arrangement technique in which private parties enter legally recognized types of consensual arrangements such as marriages, contracts, property arrangements, employment relations, corporate and other enterprises, associations, and more, all with general law and institutional legal constructs facilitating the realization of the aims of such arrangements in various ways.

The penal technique, then, is merely one of the basic operational techniques through which first order law is created and implemented. The principles of the rule of law apply, not only to shape and constrain the creation and implementation of first order law in the penal technique, but also in all the other four operational techniques.

Furthermore, the operation of each technique may be analyzed in terms of a typical linear progression within it beginning with the creation of the relevant law followed by its due implementation. Thus, in the penal technique, a legislative body usually creates a criminal prohibition at the first stage of this linear progression. Such newly created law is, at the next stage, promulgated and published. Thereafter, at the next stage in the operation of the penal technique, most lay citizens voluntarily abide by the prohibition. At least a few may violate it, however, and police and prosecutors then at a further stage may charge and convict violators in courts, and courts may impose punishment, with still other institutions coming into play at a later punitive or correctional stage.

At the initial law-making stage of the overall linear progression within the penal technique, various second order principles of the rule of law apply to direct and constrain the form and content of the first order criminal prohibitions that are adopted. For example, certain principles favor use of the rule-form; others require that the prohibitions be clear and prospective. Some principles require that a criminal prohibition be promulgated and publicized. Still other principles require due process for those charged with crime, and so on, through the various stages of the linear progression. A similar general account is true, with modifications as appropriate, with respect to all the other four basic operational techniques whereby law is created and implemented.
Thus, principles of the rule of law apply not only across all five of the law’s basic operational techniques, and so to their full breadth, but also apply to the full length of the linear progressions within each of the five basic operational techniques for creating and implementing law. That is, principles of the rule of law apply within each basic operational technique to direct and constrain action at each stage of the technique’s linear progression, from initial creation of the law to its ultimate implementation or enforcement. At any given time within a developed Western society, countless law-creating and law-implementing activities are occurring at all stages of such linear progressions within all of law’s five basic techniques.

It is true that some of the principles of the rule of law apply, in the main, only to one stage of a typical linear progression. For example, the principle requiring due process cannot arise until a dispute has arisen and potential adverse official action is in the offing. But at least one principle, and sometimes several, applies at each major stage of a linear progression. Moreover, some principles are continuous in applicability or in relevant effect throughout the entire sequence of stages in the linear progression. This is true, for example, of the principle requiring that law be authoritative and so valid. Thus, the effect of initial validity of a newly created rule carries forward throughout the linear progression. (This is a normative, rather than a causal, consequence of initial validity.) The principle requiring clarity and determinateness, and the principle requiring prospectivity of law have a kind of continuous applicability as well. Further, different devices may come into play at different successive stages to secure the same principle. For example, clarity may be secured at the drafting stage. It may also be secured later through judicial modification of a vague rule. And so on.

Thus, the principles of the rule of law apply across the full breadth of law’s five basic techniques of operation, and also apply to the full length of the linear progressions within each basic technique, from initial creation to ultimate implementation or enforcement. Of course, the principles of the rule of law do not apply in exactly the same ways, or exactly to the same extent within each operational technique. For example, it is a serious violation of the rule of law for a legislature to adopt an ambiguous criminal statute. It is not, however, a similarly serious violation of the rule of law, as such, that two private parties happen to make a contract that is vague. Of course, this may impair the effectiveness of a court in resolving a dispute and so make the rule of law somewhat less viable in this regard.

The second order principles of the rule of law, then, direct and constrain how the legal system is to operate, at all stages within each
of its five basic operational techniques. The directives and constraints of the principles of the rule of law are not, however, merely instrumental means to the ends and values to be served by first order law. That is, these principles are not merely principles securing efficacious use of first order law. If that were so, then a violation of one or more of these second order principles would merely signify that the legal system would then be less effective as a means to the ends and values that first order law is to serve.

The violation of principles of the rule of law may, if significant enough, not only signify that the first order use of law in question is or will be ineffective or less effective. Of equal, if not of even greater import, such violation may also signify that a given first order use of law is not really law-like. A rule that is quite unclear in its meaning, for example, is not really law-like. A secret law that is not made public is not really law-like. In the absence of quite special circumstances, a retroactive statute is not really law-like. And so on. In all such instances, not only is the efficacy of law sacrificed; the very conceptual claim that this use of first order law is a fully law-like use of law is also at risk and may even have to be forfeited. This is plainly true with respect to purported individual uses of law.

What should we say if violations of principles of the rules of law were to occur, not merely individually here and there, but on a major scale across all five of the law’s operational techniques, and were to extend to the full length of the linear progressions within each technique? Should we say, with Fuller,\textsuperscript{10} that such a “system” is not really a system of law at all? Certainly any massive violation would strain our very concept of a legal system, for it would not be congruent with our very concept of the minimal essential form of a legal system. We would certainly say that the whole system is, at the least, less truly a system of law and, at the most, we would say the system is not a system of law at all. It just is characteristic of a true system of law that, overall, it operates substantially in accord with principles of the rule of law. A system of law is not, conceptually, merely a system that includes first order rules and other first order law having the type of substantive content that purports to order human relations. A system of law is, conceptually, a system that actually operates in its breadth and length in law-like ways. That is, it generally operates in accord with second order principles of the rule of law. It follows that it is logically possible that a system of law could even have first order bodies of law the contents of which were in themselves just, right, and good in subject-matter, yet the system itself not be a true system of law because of its general

\textsuperscript{10} See supra note 8.
failure to operate sufficiently in accord with second order principles of the rule of law. For example, the laws in question all might be indefinite, retrospective, secret, and generally inaccessible to the citizenry, yet still sprung on citizens at despotic whim.

In a later section, I will demonstrate that violation of second order principles of the rule of law may not only bespeak ineffectiveness of first order law, and not only call into question the conceptual credentials of such first order law as law, but disserve fundamental political values and general legal values as well.

IV. How Principles of the Rule of Law Are Formal

Each principle of the rule of law is affirmatively "formal" in one or more of four ways: methodologically, procedurally, accommodatively, and authorizationally. Many principles are methodologically formal. That is, many have to do with the manner or way in which law is created and brought to bear, with how that very law itself is to take shape, and with what that shape is. The requirements of rule-like shape, of clarity, and of prospectivity, are illustrative of such methodological requirements. "Of or pertaining to method" is just one major meaning of "formal" in our language.11 Some principles of the rule of law are procedurally formal. That is, they pertain to the very law-making and law-applying processes by which specific forms of first order law are created or implemented or both. The most prominent of these principles, of course, is the "due process" requirement. "Of or pertaining to procedure" is also one major meaning of "formal" in our language.12

Further, all of the second order principles of the rule of law are "formal" in the sense that they have extensive generality of scope and so are not dependent for their applicability on any particular substantive content in the first order law to which they apply. Indeed, they apply to first order law having highly variable substantive content. For example, the same principle of the rule of law, a principle requiring due definiteness, can even be satisfied by two first order rules of law having quite different substantive content yet which are addressed to the very same issue. Moreover, two legal systems can fully satisfy all of the second order principles of the rule of law, even though those two systems have first order law with quite different substantive content.

11 See 6 OXFORD ENGLISH DICTIONARY 79, def. I.10 (2d ed. 1989). Definition I.10 defines form as "manner, method, way, fashion [of doing anything]." Id.
12 See 6 id. at 79, def. I.11.a. Definition I.11.a defines "form" as "a set, customary, or prescribed way of doing anything; a set method of procedure according to rule (e.g., at law); formal procedure." Id.
In these ways, we may say that the principles of the rule of law are *accommodatively formal*, another concept of the "formal" recognized in our language.\textsuperscript{13}

Several major principles of the rule of law are also *authorizationally formal*. That is, they confer or limit authority and so pertain to validity. This is true, for example, of those principles requiring that the law be validly created, and if changed or modified, validly so. This is also true of those principles requiring that judges and other officials exercise their powers in accord with law. If they exceed their powers, their actions will be invalidated, at least on appeal. "Of or pertaining to validity" just is another recognized meaning of "formal" in our language.\textsuperscript{14}

The principles of the rule of law, then, are affirmatively "formal" in four senses: methodologically, procedurally, accommodatively, and authorizationally. These senses are all "affirmatively" formal in that each signifies a positive feature or features actually present, as distinguished from merely lacking or failing to express an opposed attribute. Thus, these senses do not take on their meanings, and so depend for their meanings on a contrast with the other side of some dichotomy. Whatever is formal in any one of the four foregoing senses affirmatively exists apart from, and can be positively characterized independently of, any relation of contrast or negation that it may have with an opposite.

Beyond the foregoing affirmative senses of "formal," the principles of the rule of law are, however, also *contrastively formal*. That is, the word "formal" does also take on two special meanings here by way of two basic contrasts with opposites or contraries. The first such meaning derives from the contrast between the content of second order principles of the rule of law and the content of those many first order rules and other law which have substantive content. While the principles of the rule of law presuppose first order rules and other law which have substantive content. While the principles of the rule of law presuppose first order rules and other law having substantive content, these second order principles do not themselves have such content and so are contrastively formal in this way. That is, they are formal in their content in the sense that this content is nonsubstantive. They have no substantive content by way of moral, economic, or social policy or principle.

\textsuperscript{13} The name "accommodatively" is my own. The concept of "form" it names is not. \textit{See} 6 id. at 79, def. I.7. Definition I.7 defines "form" as "[a] model, type, pattern ... " \textit{Id.; cf.} 6 id. at 82, def. A.1.d. Definition A.1.d defines "formal" as "[c]oncerned with the form, as distinguished from the matter, of reasoning." \textit{Id.}

\textsuperscript{14} \textit{See} 6 id. at 82, def. 5. Definition 5 defines "formal" as "[d]one or made with the forms recognized as ensuring validity." \textit{Id.}
The second basic contrastive meaning here is that between the operations of a system in which officials act in accord with principles of the rule of law, and the operations of a system in which officials merely act ad hoc, solely in light of their own personal views of the overall merits of any issue that arises. The relevant contrastive meaning here is sometimes expressed in terms of a distinction between the rule of law on the one hand, and a "rule of men" or persons on the other, with the rule of law thus being contrastively formal.

The principles of the rule of law are also a major source of the formality of important features of the first order law that the system creates and implements. For example, these principles exert pressure for law in the form of rules and for definiteness, clarity, and prospectivity in those rules. Moreover, the principles of the rule of law are a major source of the formality of basic legal institutions and related constructs. For example, these principles require that courts be independent of other political bodies, and so dictate a separation of judicial from other power. This separation is structurally formal, for it deals with the relation between parts within the whole system.15

In sum, in affirmative terms, the principles of the rule of law are "formal" in one or more of four senses: methodologically, procedurally, accommodatively, or authorizationally. The principles of the rule of law are also "formal" contrastively in two senses. That is, unlike most first order law, principles of the rule of law do not themselves have any substantive content. Unlike a mere "rule of men" or "persons," principles of the rule of law require that persons create and implement law in accord with these very principles.

V. Formal Principles of the Rule of Law as Special Means to Distinctive Ends and Values

The main functions of the principles of the rule of law are threefold. The formal, second order, principles of the rule of law are indirectly instrumental in serving the substantive policies and principles embodied in first order law. Formal principles of the rule of law also define what constitutes law-like form in the content of first order law, as well as law-like creation and implementation of such law. Beyond these two major forms of significance, adherence to formal principles of the rule of law also distinctively serves fundamental political values and general legal values. Here, I can only indicate some of the major ways this is true. Among the foremost fundamental political values so served are the legitimacy of governmental action, the freedom and

15 See 6 id. at 78, def. I.5. Definition I.5.a defines "form" as "[t]he particular character, nature, structure, or constitution of a thing . . . ." Id.
dignity of citizen self-direction under limited government, and procedural and certain other forms of justice and fairness.

The principles of the rule of law requiring that first order law be duly authorized and so valid, and that any change in that law be so authorized, plainly serve the legitimacy of civic authority. Still further principles of the rule of law serve legitimacy other than through compliance with the powers, procedures, and promulgative requirements for valid law-making. These other sources of legitimacy are perhaps best understood if we imagine violations of principles of the rule of law besides those explicitly conferring authority. Imagine, for example, that although a proposed law is duly adopted and promulgated, this law is quite unclear and indeterminate in its meaning, yet officials still seek to apply it against a citizen. Or, although valid and clear and determinate, officials interpret and apply this law quite inconsistently with the meaning it would have in light of the generally accepted methodology of interpretation. Now, such erosions of the rule of law are not merely unjust and unfair to those who must attempt to conform their conduct to the laws and thus objectionable in themselves. They are also unlaw-like and so delegitimize the whole process. Legitimacy is forfeited not only when the relevant steps for making valid law are not followed. Legitimacy is also lost when almost any of the other principles of the rule of law are violated. Legitimacy requires that valid law be fit for implementation and be implemented in law-like ways. This, of course, is not to say there are no further sources of legitimacy or lack thereof. For example, a law evil in content lacks legitimacy too, for it fails to serve human interests, the most fundamental rationale for having law at all.

As I have said, violations of principles of the rule of law, such as those requiring clarity of law and requiring its objective and consistent implementation pursuant to a reliable interpretive or applicational methodology, are not only delegitimizing overall, but objectionable in themselves. One reason why they are objectionable in themselves is that they deny citizens a fair and just opportunity to conform their conduct to the requirements of the law. A citizen, faced with a quite unclear law, or faced with, and retroactively at that, an interpretation that diverges sharply from the dictates of accepted interpretive method, simply has no fair and just opportunity to conform to the requirements of the law. A citizen, faced with a quite unclear law, or faced with, and retroactively at that, an interpretation that diverges sharply from the dictates of accepted interpretive method, simply has no fair and just opportunity to conform to the requirements of the law. This is fundamentally unfair and unjust in itself. Further, a law is unjust in itself if it is over-general or under-general and thus unjustifiably fails to treat like cases alike. The principle calling for appropriate generality of rule is thus a principle of the rule of law as well.
Denial of due process in event of a dispute is still another type of violation of the rule of law, one that is not only deligitimizing but also objectionable in itself. Denial of due process denies the citizen procedural justice. It either denies the citizen fair notice, or a fair chance to defend, or both. Due process is denied, as well, if the substantive law is quite unclear. In such circumstances, the defending party has no fair opportunity to prepare a defense or other response and so cannot have due process. A party in this position cannot determine the meaning of the law to be applied, cannot know what arguments and evidence will be relevant in the process, and so cannot effectively respond.

Violations of principles of the rule of law disserve not only legitimacy, justice, and fairness; they also disserve freedom, and they disserve free and dignified citizen self-direction under law. For example, a regime that operates not mainly through general rules but largely through official orders and decrees treats the citizen as someone to be ordered around as a mere object of commands—as one who has no capacity to determine and conform to rights and duties arising under clear and known general rules.

Principles of the rule of law, in constraining officials, can secure freedom, depending on the content of the law. Let us assume that the substantive content of first order law protects a basic freedom such as the freedom of movement within the society. Now, the principles of the rule of law generally require that such law be in the form of clear and definite rules. And let us assume that we have such first order law. As the great German jurist, Rudolf von Jhering, emphasized, having the law in the form of clear and definite rules is, itself, a bulwark against official interference with individual freedom. The very fact that freedom of movement, for example, is cast in the form of clear and definite rules makes it more difficult for officials to invade this freedom, for they know their conduct will be measured against determinate rules, and this measurement will reveal any interference with individual freedom.

The principles of the rule of law also secure the freedom and dignity of citizen self-direction under limited government. This is plainly true when the first order law being applied is one which itself explicitly limits governmental power in some way. Beyond this, a clear and definite rule of first order law itself, objectively interpreted and applied, implicitly limits government. For example, a law requiring citizens to drive no faster than sixty-five miles an hour also limits the power of police to arrest citizens driving under sixty-five. Thus citizens

are generally left, in light of the law, to enjoy the freedom and dignity of citizen self-direction, insofar as they drive under sixty-five. If, however, the speed limit law is indefinite, as for example, in a rule that reads "drive reasonably," a policeman may choose to interfere at almost any speed at which the driver is driving. Such indeterminateness thus undermines limited government and thereby also interferes, in this further way, with the freedom and dignity of citizen self-direction.

Adherence to the principles of the rule of law also serves important general legal values. The category of general legal values is large and complex, and there is no sharp line between some of these values and such fundamental political values as legitimacy, justice, and freedom heretofore discussed. General legal values include general rationality of approach in the creation and implementation of law, "learnability" of the law, predictability as to how the law will be applied, equality before the law for those similarly situated, freedom from official arbitrariness, ease of administration, dispute avoidance, facilitation of dispute settlement, and more. A single violation of principles of the rule of law can disserve several general legal values all at once. Unclarity, lack of publicity, and retrospectivity, for example, grossly impair or destroy the "learnability" of the law, predictability of the law, equality before the law, and freedom from official arbitrariness in the administration of law.

I will first briefly consider the general legal value of rationality of approach in the administration of law. There is often scope for reasoned argument with respect to the general range of application of law, with respect to its proper interpretation or application, with respect to what the relevant facts really were or are, and more. Adherence to principles of the rule of law can effectively channel such argumentation and thus serve the general legal value of rationality in the administration of law. For example, a well-formed methodology of statutory interpretation channels the exercise of reason into the construction and articulation of instances of those general types of arguments that are themselves authorized by the accepted general methodology of interpretation. For example, most such methodologies in developed Western systems recognize the argument from standard ordinary meanings of the statutory words as the leading type of interpretive argument.17 When a dispute arises over the interpretation of a word or words in a particular statute, both litigants will usually strive to construct arguments that appeal to relevant, standard,

ordinary meanings. In this way, the litigants duly instantiate this general mode of argument, thereby bringing one form of reason to bear.

I have already explained that the second order principles of the rule of law are all formal in content and do not themselves require that first order law, for example, a statute adopted by a legislature, be good in its substantive content—that is, sound in policy, or in principle. It follows from this that it is possible for those who govern a legal system to adhere to the second order principles of the rule of law, yet the content of the first order law so created and implemented be bad or unsound. It is, however, my general view that adherence to many of the principles of the rule of law also tends to beget good substantive content in the law made, or at least not bad content. I will now indicate some of the ways in which this tendency can materialize through the deployment of a reasoned approach in which appropriate form is prominent.

One principle of the rule of law requires that law be validly made—that it be authoritative. This principle requires not only that the law-maker have power to make the law at hand, but also that the procedures for making valid law be followed. For example, for a legislature to make a valid statute, it must not only have power to do so but must also follow prescribed procedures, themselves formal. These procedures do not and cannot prescribe even part of the substantive content of the proposed first order law. Yet in developed Western societies, the content of these procedures is highly likely to require the legislature to find “legislative” facts relevant to the content of proposed law, to require the legislature to hold hearings on proposed laws at which arguments pro and con will be heard, to require the legislature to draft and revise the proposed law carefully, and to require the legislature to engage in deliberation and debate on draft bills and possible amendments, all before the statute is adopted.

In all these ways, the content of appropriately formal procedures brings rationality to bear in law-making processes on the substantive content of proposed laws. This also tends to contribute to good content. Some such formal procedures comprise part of the very definition of what a legislature is in developed Western societies. Without some such procedures, a legislature would not even be a “legislature.” Thus, the second order principle of the rule of law requiring that a first order statute be duly authorized by following appropriate formal procedures, and so be valid, is itself a principle that serves, not only the rule of law, but also tends to serve the rule of good law.

There are still other major ways in which adherence to principles of the rule of law tends to beget good substantive content in first order law, even though the principles of the rule of law are themselves
entirely formal and so do not themselves prescribe specific substantive content in the first order law being created. For example, one principle of the rule of law applicable to state-made law requires that the preceptive form of a law be that of a rule, so far as feasible and appropriate. A rule has various formal features: prescriptiveness, generality, definiteness, completeness, and internal structure. Consider generality and definiteness. The drafter who gives due attention to appropriate generality and definiteness will consider carefully what classes of persons, citizens, and circumstances the rule should apply to, and should not apply to, if the rule is to serve effectively as a means to the policies or principles at hand. For example, given the policies of safety, efficient traffic flow and freedom of movement, the content of the speed limit rule should be highly general in scope and highly definite. General legal values and fundamental political values also favor this high generality and definiteness. Such a speed limit rule treats like cases alike and so serves equality before the law. It also serves the freedom and dignity of citizen self-direction.

Another principle of the rule of law requires that any first order rule adopted as law be promulgated and publicized. Law-makers who wish to be free of public criticism and who wish to be re-elected will be likely to work even harder to make the content of the first order law they create as good as they can when they know that this content will be appropriately publicized. In sum, adherence to the principles of a formal rule of law can serve the rule of substantively good law, too. Appropriate form here tends to beget good substantive content.

It is not true, however, that appropriate form, for example, second order principles of the rule of law, always tends to beget good substantive content in first order law. A legislature may, for example, adopt a statute having bad policy content. A court may then refuse to modify the policy content of this statute precisely because of "rule of law" considerations. Thus, the court may reason that it has no lawful power to modify the statute. The court may also reason that if it so modifies the statute, similarly situated parties would be treated differently. Or the court may reason that if it so modifies the statute, this would upset the reliance of a party on the statute. Or the court may reason that if it so modifies the statute, this would inject general unpredictability into this branch of law. Here, rule of law principles

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18 These features are formal because they pertain to the essential character of rules. See 6 Oxford English Dictionary, supra note 11, at 78, def. I.5.a. Definition I.5.a defines "form" as "[t]he particular character, nature, structure, or constitution of a thing." Id. These features are also formal because they pertain to the shape or configuration of rules. See 6 id. at 78, def. I.1.a.
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leave bad substantive content intact. Here, appropriate form does not beget good substantive content, though it does serve other values, as above.

It is also true that a judicial modification of a statute could in some way serve the rule of law too, as where it would render an unclear statute much more determinate. This example shows that conflicts can arise as between principles of the rule of law too. Here the principle requiring clarity conflicts with the principle limiting judicial power to modify.

The substantive content of the law may be generally good, yet the law over-include or under-include in the particular case. Here, too, a court may be called on to decide whether to create an exception to the rule. Or the court may be called on to decide whether to extend the rule. Again, because of rule of law considerations, the court may decide not to create an exception or not to extend the statute. Here, too, the rule of law, for example appropriate form, would not beget good substantive content overall.

It is also familiar that adherence to principles of the rule of law may, in particular cases, also conflict with what is just and equitable as between two parties. Here, the court may refuse to invoke equity and may base this decision on rule of law considerations. There are still other types of cases posing conflicts between what principles of the rule of law may require and other values. Of course, in all such cases, a court may in the end choose to modify or depart from the law, and this may entail sacrifice of the values that adherence to the rule of law would serve. In some instances this may even be justified, on balance. When this occurs, we cannot say that appropriate form in principles of the rule of law contributes to good content, for it is these very principles that are sacrificed.

VI. SHOULD ALL OF THE PRINCIPLES OF THE RULE OF LAW BE FORMAL?

Should the principles of the rule of law be confined to formal principles, or should these principles be enlarged to include further basic principles requiring that the substantive content of the law be good, and still further principles specifying in some general way what that content should be? Even if it were possible for second order principles meaningfully to prescribe the substantive content of first order rules, there are several reasons to think it best to leave the principles of the rule of law exclusively formal.

First, there is reason to believe that a merely formal set of principles of the rule of law is more likely to command general social sup-
port in a society than is a hybrid aggregate that includes both formal and substantive principles. This is because a merely formal set is relatively neutral as between different substantive visions or ideologies, and so should command more extensive support from the right, the middle, and the left—that is, from all across the political spectrum. On the other hand, a hybrid aggregate that includes both formal and substantive principles is certain to be more controversial, especially if there are already divisions in the society, as is highly likely, over substantive principles. Indeed, in many societies there are sharp political divisions over major substantive issues such as how to organize the economy, how much free speech and press there should be, how much religious freedom, how much democracy, what kind of welfare state, and so on. Thus, the more the principles of the rule of law are formal—are "desubstantivized"—in such societies, the more likely these principles will be taken to be politically neutral as such, and so come to command general support from all segments of the political spectrum.

Second, a set of principles of the rule of law is most viable, not only when widely accepted, but also when departures from the set are immediately subjected to analysis and criticism in the society at large or at least among lawyers and citizens specifically aware of the departures. The more unified and coherent the principles of the rule of law, the more this analysis and criticism on behalf of the principles at stake can be sharply focused. The more sharply focused such argument and criticism, the more likely the principles will be taken seriously. A set of formal principles alone is necessarily more unified and coherent than a hybrid aggregate of formal and substantive principles. The set of formal principles treated here consists of principles that are broadly methodological and procedural. A hybrid aggregate of formal and substantive principles, however, would necessarily incorporate highly diverse subject matter. In the face of departures, arguments and criticisms on behalf of such an aggregate of formal and substantive principles "of the rule of law" would consist of arguments and criticisms on behalf of too many different things at once. This would likely confuse and deflect the force of criticisms and argument on behalf of those principles of the rule of law that are formal. In some systems, this would also aggravate a tendency to subordinate the formal to the substantive, yet as my foregoing examples demonstrate, it is by no means obvious that this subordination should always occur.

Third, the limited separation of formal principles of the rule of law from substantive politics, in argument and criticism about first order uses of law that I here advocate, would also facilitate the ready perception and clarification of actual conflicts between certain values
served by the rule of law and substantive values. This perception would facilitate the candid recognition that a choice of one over the other must sometimes be openly made and justified, as when a court is called upon to depart from a statute and declines to do so on formal rule of law grounds or, rather, chooses to depart on grounds that substantive policy or justice and equity in the particular case override rule of law values. If formal rule of law notions are kept distinct from substantive policy or other content, it will be harder to obscure the reality of a sacrifice of one to the other by saying that whatever is done in the end is all done on behalf of "principles of the rule of law." The possibility of sacrificing one to the other ought to be seen for what it is and confronted openly and directly.

VII. Conclusion

In conclusion, I will provide a brief inventory of the main formal, social, and legal conditions required for an efficacious rule of law within a society. Consider the following:

(1) the principles of the rule of law must be formal principles, and they should be appropriately embodied in positive law;
(2) the required legal institutions, legal devices, and sanctions and remedies for implementing the rule of law must exist;
(3) officials and other participants in the system must be "minded" to implement the principles of the rule of law, which means a society must take steps to see that procedures for the recruitment and retention of legislators, judges, and other officials are well designed to secure that these participants have the requisite attitudes to law and to law-like ways;
(4) the educational system must teach the principles of the rule of law and the values they serve;
(5) there must be a vigilant and free press and media willing to publicize the importance of principles of the rule of law, and willing to investigate and publicize alleged and actual violations of the principles;
(6) citizens adversely affected by violations of the rule of law must be legally empowered to seek redress, and be willing and able to do so;
(7) citizens who criticize violations and who seek redress must be protected from retaliation by officials and others;
(8) there must be a recognized, organized, and independent legal profession legally empowered and willing to advocate before courts violations of the principles of the rule of law;
(9) professors of law must study and organize the bodies of law that express and implement principles of the rule of law, and must be critical, not only of unjustified departures from principles of
the rule of law, but also of any anti-rule of law attitudes of officials, judges, legislators, the media, and the citizenry.