9-2014

The Rule of Law in Public Law

Jeremy Waldron  
NYU School of Law, jeremy.waldron@nyu.edu

Follow this and additional works at: https://lsr.nellco.org/nyu_plltwp

Part of the Administrative Law Commons, Constitutional Law Commons, Jurisprudence Commons, Law and Politics Commons, Legal History Commons, Legislation Commons, Public Law and Legal Theory Commons, and the Rule of Law Commons

Recommended Citation

https://lsr.nellco.org/nyu_plltwp/481

This Article is brought to you for free and open access by the New York University School of Law at NELLCO Legal Scholarship Repository. It has been accepted for inclusion in New York University Public Law and Legal Theory Working Papers by an authorized administrator of NELLCO Legal Scholarship Repository. For more information, please contact tracythompson@nellco.org.
Is the political ideal we call 'the rule of law' biased towards private law? There are definite tendencies in that direction and these tendencies make it difficult to develop an understanding of how the rule of law applies in the realm of public administration. The tendency towards private law also introduces an unwelcome ideological element, inasmuch as the rule of law can all too easily become associated with special respect for the rights of property-owners, employers, and investors in cases of conflict between these rights and the business of public administration.

Of course the business of public administration is not self-justifying. And the rule of law is not doing its proper normative work unless it disciplines and constrains the way that business is carried out. Still, we should consider the prospects for a normatively robust conception of the rule of law that does not minimize or deprecate the mission of public administration. That is what I shall undertake in this chapter.

1. A unified ideal?
The task of developing a conception of the rule of law that applies to public law in particular faces an immediate challenge from those who deny the importance of the traditional distinction between public and private law. Maybe there is no distinction. Maybe we should say that in the last analysis all law involves the operation of the state on society; all law is public law in some ultimate sense.¹ If so, then perhaps the rule of law should be conceived as an entirely general idea, prescribing the uniform application of a discipline of legality to state action across the board. After all, whether the state is operating in the field of public administration or whether it is resolving private disputes, we have to face the possibility that it might be

acting extra-legally, without reference to legal rules, principles, and procedures. We might say, normatively, that the point of the rule of law is to foreclose that possibility—again across the whole field. We might say that; but should we? When we subject the state’s operation in the field of public administration to the discipline of the rule of law, should we use exactly the principles we use when we apply the discipline of legality to the resolution of private disputes?

Philosophers of law have usually assumed that the rule of law is a unified ideal, albeit one that consists of a list of items (Lon Fuller’s eight principles of ‘the inner morality of law,’ for example). On the unified approach, one would begin an essay of this kind with a very general definition of the rule of law and then try to derive various aspects of its application to the specific case of the activity of the state and its agencies. So we might say something like the following. The rule of law comprises a requirement that people in positions of authority should exercise their power within a constraining framework of public norms. It also includes a requirement that there be general rules laid down to govern the conduct of ordinary people, rules whose public presence enables people to figure out what is required of them and what the legal consequences of their actions will be. And the rule of law insists on the role of courts, operating according to recognized standards of due process, and offering an impartial forum in which disputes can be resolved in an even-handed way.

So far as private law is concerned, these principles generate a demand for clearly defined rights of property and contract that can form a basis for stable expectations upheld and enforced by the courts. And so far as public administration is concerned, these same principles are supposed to generate limits on official discretion, a requirement of fair and consistent administration of existing rules by officials dealing with individual cases, and the establishment of procedures that allow people to challenge the legality of official action when it impacts adversely upon their interests.

All this seems fine as a preliminary understanding. But how far can we take these abstractions? A more elaborate understanding of the rule of law will inevitably reflect the jurist’s path to that abstraction. For example, the array of principles cited by Fuller seems to betray a preoccupation with the direct application of rules to the conduct of individuals, a preoccupation that is perhaps most at home in criminal law. It may be less obviously applicable to the constitutional or legislative regulation of administrative agencies. By contrast, an emphasis on legal certainty is likely to betray its private law origins: predictability matters most in areas of contract and property, where businessmen crave security of expectations and financiers need to be able to calculate what they can count on in the enterprises into which they have invested their funds.

In addition, we must bear in mind that the rule of law is a contested concept. It is likely that the direction from which one tries to reach a neutral conception of legality will be reflected in the way one deals with some of the contested issues. These include: debates about the distinction between the rule of law and the rule of men; the distinction between the rule of law and rule by law; instrumental versus non-instrumental understandings of legality; and debates about the inclusion of substantive as well as formal and procedural elements in the rule of law. This is not just academic contestation: the way one approaches these debates affects one’s view of judicial law-making, official discretion, and the respect due to regulatory legislation. It is likely to make some considerable difference to how one approaches these issues whether one begins from a public law or a private law standpoint.

2. Is the rule of law essentially a private law idea?
The quest for abstraction is one thing. It is another thing to associate the rule of law with private law and to say frankly that in public law the rule of law represents the normative dominance of private law considerations when public and private come into conflict.

---


4 See the discussion in, Jeremy Waldron, ‘Is the Rule of Law an Essentially Contested Concept (in Florida)?’ Law and Philosophy, 21 (2002), 137-164.
I have heard civil law formalists say that private law is the epitome of law and that what the rest of us call public law is a relatively marginal phenomenon. On this view, law as such takes the security of private rights very seriously: it consists of a formal structure in which disputes are resolved and in which private interests of various sorts are adjusted to one another while still preserving their fundamental character as rights. And the rule of law, on this account, represents a determination to uphold these private rights in every area of governance. Now, there is no reason to suppose that public administration in and of itself will be sensitive to private law concerns; indeed there is a standing danger that private law concerns will be side-lined. So—according to this view—the point of the rule of law as a normative ideal is to bring these concerns to the attention of officials and to insist that everything they do should be constrained by law in this sense.

Should we accept this? Public lawyers do have to come to terms with the interpenetration of private and public concerns. Much of the regulatory activity of the administrative state affects the content and exercise of private rights, in the public regulation of property for example or in the governance of employment relations. And the rule of law must have something to say about this. Still, although public administration needs to take proper account of private law rights, it is not necessarily the job of the rule of law in public law to make our administrators back down whenever a pre-existing right rears up in their path. The role of the rule of law is not just to be representative of private rights or to stand sentinel for the protection of private property rights in the face of public law regulation. Certainly, it is the job of the rule of law to be alert to the way in which individual rights, including property and contractual rights, may be affected by public regulation. Its job is to stand against any arbitrariness. But this not a way of protecting private law rights from the impact of public law as such; it is a way of protecting them from the arbitrariness of public law. So we need to develop a sense of the distinction between arbitrary and non-arbitrary state action that can be applied in this domain.

---

5 For example Boudewijn Sirks, “Civil Law and Common Law,” in his valedictory lecture on 14 July 2014 as Regius Professor of Civil Law at Oxford
3. Ideological manipulation of the rule-of-law ideal.
What I am criticizing here is quite a common view. Societies in which the rule of law is thought to flourish are supposed to be societies where rights of ownership are protected, contracts enforced, and a predictable environment established for enterprise and investment. And the idea that the rule of law must make sure that private rights are not side-lined helps explain the curious imbalance of some of the conceptions of the rule of law that we find in political economy. Consider, for example, the following account. According to James Wolfensohn, former President of the World Bank, the rule of law means that a government must ensure ... it has an effective system of property, contracts, labor, bankruptcy, commercial codes, personal rights law and other elements of a comprehensive legal system that are effectively, impartially, and cleanly administered by a well-functioning, impartial and honest judicial and legal system.6

What is missing from Wolfensohn's definition is any reference to public law—where law’s effectiveness includes compliance with legal regulations by business, industry, and commerce and the application and enforcement of such regulations by the agencies of the state. These regulations include health and safety requirements, limits on contracts (for example in labour markets), and environmental legislation affecting use of property. Respect for legislation and the enforcement of regulations—these aspects are deafening by their silence in Wolfensohn’s definition. Yet they are surely exactly the issues we need to address if we are to understand the relevance of the rule of law for public law.

Sometimes it is not just silence. Some ways of conceiving and measuring the rule of law are actively hostile to any sort of respect for regulation. An organization called the Center for Financial Stability offers a reading of the rule of law which measures as one key factor the ‘Burden of

______________________________

Government Regulation,’ a measure obtained by asking businesses: ‘How burdensome is it for businesses in your country to comply with governmental administrative requirements (e.g., permits, regulations, reporting)?’ If we take this seriously, it seems to follow that a society’s score on a Rule-of-Law index should be diminished by the effective enforcement or self-application of these requirements. On this approach, regulation of this kind is inherently subject to suspicion and the rule of law seems to require that such requirements be kept to a minimum.

The case that is made for this conception is sometimes quite cynical. The real aim, we are told, is to persuade governments to uphold substantive values such as property rights, investment values, and the principle of free markets. And since everyone happens to be in favor of ‘the rule of law’ at the moment, we might as well use the good vibrations associated with that phrase to drive home these points about markets and property. Indeed on this account, it might be better to forget the traditional rule-of-law principles (which, in the hands of someone like Fuller seem to presuppose a pro-legislation mentality) and just link the phrase ‘the rule of law’ with market values. That seems to be the strategy.

Economists are ingenuous about the advantages of this approach. Defending the use of rule-of-law indices like those of the Centre for Financial Stability, Harvard economics professor Robert Barro observes that ‘[t]he general idea of these indexes is to gauge the attractiveness of a country’s investment climate by considering the effectiveness of law enforcement, the sanctity of contracts, and the state of other influences on the security of property rights.’ ‘The attractiveness of a country’s investment climate’—Barro means its attractiveness to foreign investors.

---

7 See http://www.centerforfinancialstability.org/rli.php

8 See, for example, World Bank, ‘The Rule of Law as a Goal of Development Policy’ at http://www1.worldbank.org/publicsector/legal/ruleoflaw2.htm: ‘The main advantage of the substantive version of the rule of law is the explicit equation of the rule of law with something normatively good and desirable. The rule of law is good in this case because it is defined as such. This is appealing, first because the subjective judgment is made explicit rather than hidden in formal criteria, and, second, because the phrase “rule of law” has acquired such a strong positive connotation.’

And he believes 'the willingness of [such] customers to pay substantial amounts for this information is perhaps some testament to their validity.'

Is this an inappropriate perspective from which to develop an account of the rule of law to apply to public administration? The Barro perspective is that of an extractive and predatory investor, looking to the society and the interests of its members for what it can get out of them.\(^{10}\)

As such it is quite different from the perspective of someone who lives in the society and who cares about the quality of life among his or her fellow inhabitants. We should be wary of adopting any conception of the rule of law that is designed to push this latter perspective to one side.

### 4. A fresh start

What is needed is an understanding of the rule of law that is not opposed in principle to the mission of public administration and is not just the shadow of private or external concerns.

Some elements in a public law conception of the rule of law will be familiar. It will involve, in the first instance, an emphasis on rules in the governance of conduct. The familiar principles of Lon Fuller’s ‘inner morality of law’ specify that laws must be general, prospective, public, clear, consistent, practicable, and stable.\(^{11}\) These principles have obvious application in any domain where conduct is being legally regulated. A public law conception of the rule of law will also involve an emphasis on judicial procedures. The importance of such procedures has always been a key concern about public administration in the rule-of-law tradition. At the end of the nineteenth century, jurists like A.V. Dicey watched with dismay the replacement of what were previously judicial or quasi-judicial tribunals with more managerial boards and inspectorates.\(^{12}\) It is a fault of Fuller’s

---


\(^{11}\) Fuller, *The Morality of Law*, pp. 33-94.

analysis in *The Morality of Law* that the chapter in which he presents his ‘inner morality’ says so little about procedures. Analytic legal philosophers have tended to follow him in this (whether they are supporting or criticising his account). Elsewhere in his work, however, Fuller has placed more emphasis on the procedural aspect. And it is plain that both the formal and procedural sides will need to be emphasized in a conception of the rule of law that is fit for public law.

Notice, however, that Fuller’s account so far presupposes that one is already in the business of making law and ruling through law and legal tribunals. But as Fuller himself concedes, it may not be appropriate to use law or legal methods for every task of public administration.

As lawyers we have a natural inclination to ‘judicialize’ every function of government. Adjudication is a process with which we are familiar and which enables us to show to advantage our special talents. Yet we must face the plain truth that adjudication is an ineffective instrument for economic management and for governmental participation in the allocation of economic resources.

Something could be said along the same lines about the issuance and enforcement of rules. Officials may find they can be more effective using well-informed discretion rather than the mechanical application of rules. Rules may be too simple to take into account all the circumstances that ought to make a difference to the way particular situations are resolved. Laying down rules in advance, without knowing what kinds or combinations of circumstances will have to be faced, and applying those rules through rigid judicial procedures may not be what fair and effective administration requires.

Now, it is possible to interpret these possibilities as simple opposition to the rule of law. The rule of law, after all, is a controversial ideal, and there is controversy not only as to what it involves, but also as to whether we ought to be following any version of it at all. Some are happy

---


to dismiss it altogether as archaic legalism in favor of a more frankly managerial approach.

However, instead of abandoning the idea of law altogether, we might reconceive the rule of law so that it is more sensitive to the needs of administration. So, for example, we might insist on the use of promulgated rules and legalized due process in some areas but not others—in areas where something like a penalty is in the offing, but not in areas where interventions of a non-punitive kind are involved. Or one might imagine an array of cases, ranging from purely administrative decisions at one end, through cases that require a modicum of due process, all the way up to cases that represent in effect the full application of criminal law standards.

Something similar may be said about tribunals. In the view of A.V. Dicey, then rule of law required that ‘no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land.’ The phrase I have emphasized seems to preclude specialist administrative tribunals. But other apostles of the rule of law have been more accommodating in this regard. F.A. Hayek regarded Dicey’s condemnation of dedicated administrative tribunals as unfortunate. That dispute may seem obsolete today, but only because Anglo-American jurists have now been able to reconcile the two positions that Dicey thought incompatible: tribunals embodying dedicated specialist familiarity with some field of public administration along with the judicialized operation of such tribunals and a reasonably clear set of standards for them to apply.

In this connection, we may also want to say that the norms deployed in public administration can range from highly operationalized rules to general norms that have more the character of standards and require argument and judgment in their application. The kind of individual thoughtfulness sponsored by norms of this latter kind need not be regarded as incompatible in principle with the rule of law, provided one is alert to the kinds of cases in which their application might prove

---


arbitrary.¹⁷ (Cases in which there is reasonable congruence between the judgments of citizens and the judgments of officials are cases in which the use of standards is consistent with non-arbitrary administration; but if, on account of animus or asymmetries of expertise, there is no expectation of congruence, then rules are preferable.)¹⁸

So too with administrative discretion. It is natural to contrast official discretion with the application of rules, but there is a range of possibilities in between and some of the intermediate possibilities seem compatible with a moderate conception of the rule of law. Discretion need not be free-standing. It can be guided by standards or left unguided. It can be framed, authorized, and constrained by legislation. Earlier exercises of it can inform subsequent exercises. It can be subject or not subject to review. In each of these dimensions, the element of sheer human wilfulness can loom larger or smaller compared to the considerations of legality.¹⁹

5. The Role of Legislation

Inevitably, if law is to play any significant role at all, the landscape of public administration will be dominated by legislation and by rules made by agencies under the auspices of legislation, both of which will frame, authorize, guide, and constrain the official discretion that is needed for intelligent and effective governance.

We noted earlier that some conceptions count the burden of state regulation as something that tends to diminish the rule of law. But it is not the function of the rule of law to assess the substantive justifiability of particular measures, to say whether their benefits are worth the burdens they impose or whether the burdens and benefits are distributed equitably.


¹⁹ I am grateful to Peter Strauss for discussion of these matters.
The rule of law deals with the way we are governed, not with the justification of governmental measures.

Nevertheless, it is worth saying something general about this form of governance if only because certain rule-of-law theorists have condemned most forms of legislation as incompatible in principle with the rule of law.²⁰ They condemn it for its complicity with state power and its voluntarism: something becomes law on the basis of nothing but a political determination that the law should be thus-and-so. But these characterisations are tendentious. We might say—more favourably—that legislation involves the representatives of the community taking responsibility for the conditions under which members of the community live their lives and conduct their business. In most countries, legislation is organized democratically, and it is not accident that theorists of the rule of law who deprecate legislation also regard democracy and democratization as low priorities in nation-building. Economists like Robert Barro have suggested that we should strive to establish legal protections for property rights and markets first, before establishing democracy institutions. On this account, the function of the rule of law is to protect property, contracts, and markets from the depredations of democracy.²¹

Now it is true that the rule of law does not necessarily entail democracy. The two are distinguishable stars in the constellation of our political ideals. But this does not mean the rule of law should be understood as inherently hostile to democratic governance. The view that I am criticising seems to regard it as undesirable for the people of a country to act collectively through the medium of (what we would ordinarily call) law to pursue social justice, diminish inequality, or take control of the conditions of their social and economic life. That, I think, is not a healthy proposition to associate with the rule of law.

²⁰ In his later work, Friedrich Hayek contrasted law with legislation. He said that the legislative mentality is inherently managerial; it is oriented in the first instance to the organization of the state's own administrative apparatus; and its extension into the realm of public policy means an outward projection of that sort of managerial mentality into society at large. See F.A. Hayek, Law, Legislation and Liberty, Vol. 1: Rules and Order (University of Chicago Press, 1973), pp. 72-73 and 124-144.

6. Stability in public law

If the role of law in public administration means a legal environment dominated by legislation and if rule-of-law complaints about the voluntaristic and political character of these legal arrangements are rejected, then what becomes of the rule of law’s investment in stability and the security of expectations?

The rule of law has always been associated with the value of predictability in human affairs. The most important thing, we are told, that people need from the law that governs them is predictability in the conduct of their lives and businesses. Tom Bingham observed that ‘[n]o one would choose to do business, perhaps involving large sums of money, in a country where parties’ rights and obligations were undecided.’ That sounds like a private law concern, but a similar point is made insistently in the area of public law as well. It is, according to F.A. Hayek, a matter of freedom:

   government in all its actions [must be] bound by rules fixed and announced beforehand, rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.\(^{22}\)

One is free so far as the impact of government action is concerned not because one’s choices are completely untrammelled by regulation, but because one can predict when and how the state will intervene and work around, just as one works around the laws of nature.\(^{23}\)

The demand for stability is important but it cannot be absolute. The rule of law seeks as stable a set of legal arrangements as it is reasonable to expect in the circumstances. Law must not change so often that people lose the opportunity to come to terms with it and organize their lives around it. But ‘reasonableness’ here cannot be divorced from an awareness of the tasks of legislation and rule-making in a changing world. What counts as arbitrary or unreasonable must be predicated on an understanding of the inevitable rhythms of changing circumstances and political possibilities.


At any given time, a society faces its problems with a given heritage of customs, statutes, case law, and regulative arrangements. Now, however serviceable this array may have been in previous times, there is no guarantee it will continue to work in the future. New problems may emerge or be identified. As the society develops socially and economically, new frameworks and institutions may be necessary. Old ways of dealing with existing problems may prove limited or counterproductive in new circumstances. New ways may emerge for evaluating both problems and solutions and old ways may be contested. The balance of concern for different sections of the community may shift, posing difficult questions of equity. None of this is straightforward; much of it is contested; and all of it is important.

No society capable of self-government can remain passive or inert in face of these changes. And legislation—the deliberate alteration of a society’s rules and structures—is the proper way of responding to these developments. To its detractors, legislation may seem too much a matter of will, or of processes (like election and majority-decision) which combine wills to produce a politically contingent result, to deserve celebration under the auspices of a political ideal—the rule of law—whose purpose many understand to be the taming of will in politics.

But law is changeable. That is one of the ways we contrast law with morality, even positive morality. Morality changes over time, but it cannot be the subject of deliberate or intentional change. Setting up a legal system, however, establishes the possibility that changes may be made intentionally in the way that a society is ordered. It involves the union of primary rules of conduct, which may once have been immemorial, with secondary rules that empower a society to take responsibility for the primary order, adapting it flexibly to changing social conditions and keeping track of the changes that stand in the name of us all. That is what law essentially is and the principle we call the rule of law cannot in its essence be antagonistic to that.

This helps us understand why private law rights cannot be insulated from the impact of these changes. It is not reasonable to demand an extent

---

of legal stability that precludes such impact. Some of the changes that a society has to face up to legislatively will involve reconsideration of the overall effect on the environment of the private use of resources. From time to time this will involve some alteration in the content of property rights. Also societies may have inherited distributions of land and other resources that are massively inequitable and represent the residue of injustice that in other regards has been repudiated. The rule of law cannot impose obstacles to the responsible remediation of this.\textsuperscript{25} Similarly, contractual rights will accumulate in a way that defines the structure of markets and these too may need to be limited or regulated when a society confronts market failure, market crisis, or market inequity.

How one evaluates all this in regard to the rule of law will depend on one’s perspective. Considered purely as an investor, unconcerned with the side of conditions of human life in a given society, a person might be impervious to concerns of this kind expect that his private rights will secure and available for exploitation by him at any time on the same basis as they were when he acquired them. And from this point of view, it might seem that the function of the rule of law is to underpin such expectations with legal certainty. The point of view of a member of the society in question may be quite different. The responsible citizen knows that there is such a thing as a public agenda confronting a changing world with evolving ideas about what is need for the fair pursuit of the public good. He knows that these changes and the legislation they elicit are bound to affect the environment in which property rights are held and exercised, contracts enforced, and investments secured.

That matters like those I have mentioned may need collective attention from time to time is not an anomalous or socially destructive position; it is the ordinary wisdom of human affairs. No conception of governance, no conception of law or the rule of law that fails to leave room for changes and adjustments of this sort can possibly be tolerable. And it seems to me that any conception of the rule of law which denigrates the

very idea of such changes and which treats their enactment and application as an inherent derogation from the rule of law has to be wrong.

True—any particular proposal for change will have its opponents, and sometimes the opponents will be right. They may be right because a proposed environmental regulation proves unnecessary or hysterical, or because a given piece of social legislation represents nothing more than cynical rent-seeking by one faction exploiting another. But the opponents are not necessarily right, and certainly not right simply on the ground that once property rights have been established, any change or regulation is out of the question.

7. No more than rule *by* law?

Does all this amount to anything more than rule *by* law? I mentioned earlier that some commentators draw a distinction between the rule of law and rule *by* law. The one is supposed to lift law above politics. The other—rule by law—involves the instrumental use of legal forms and procedures as tools of political power. On this account, rule by law is a version of rule by men since it is comfortable with the highest authority being wholly unconstrained in the measures it lays down.

My own view is that this distinction between rule of law and rule by law is overblown, involving as it does a mythic quest for forms of law which come into existence and operate without any human agency.

But perhaps the more demanding idea of the rule of law is not altogether inapplicable. Perhaps, in certain pockets of public law, it can be used to consecrate a form of constitutionalism—the idea that the legislature as well as the state is subject to substantive constraints (constraints based on individual rights, for example) in its law-making. That is a possibility and the further the framers of the constitution are from us in time, the more this might seem like law itself ruling us. In fact, constitutional constraints are usually few and negative and mostly they


27 See, e.g., Francis Fukuyama, *The Origins of Political Order: From Prehuman Times to the French Revolution* (New York: Profile Books, 2011), p. 246: ‘The rule of law can be said to exist only where the preexisting body of law is sovereign over legislation.’
leave legislative and regulatory discretion untouched. And, anyway, even if we forget about the human framers, there is no getting away from the role of human judges in interpreting and applying these constraints. Does the empowerment of the judiciary represent the rule of law or the rule of men? Some think that a ruling counts as the rule of law provided it is done through the hierarchy and procedures of courts: short of the fantasy that the laws themselves might rear up and render their own objective decision, this is the most the rule of law could possibly entail. Others say that there is always a danger that activist judges will take advantage of the authority given to them to make themselves into the very despots whose rule the Rule of Law is supposed to supersede. The issue remains bitterly unsettled.

Beyond the rather meagre and contested constraints of the constitution, the rule of law in the public realm certainly opposes prerogative power and it supports the practice of judicial review of executive action. This certainly represents the subordination of the powerful to the rule of law: ‘Be you never so high, the law is above you.’ Still, this is almost always review on the basis of legislation, and it cannot be denied that the statutes appealed to in these reviews are themselves laid down in the first instance under the model of rule by law.

In any case, we should not accept the disparagement of rule by law that the contrast with the rule of law is supposed to suggest. Sometimes the phrase ‘rule by law’ is used to describe Singapore-style regimes, as though it were just a fig-leaf for authoritarian rulers. And the impression is given that rule by law serves only the instrumental purposes of the regime and that it cannot be understood as a political ideal that inures to

---


the benefit of those being governed. In fact an insistence on being ruled by rules and by legal procedures serves the interests of citizens at least as much as their rulers. By imposing a reasonable amount of stability, it lets people know where they stand, and as a mode of rule it treats with the dignity of responsible agents capable of self-applying the rules that are made for the community. There is always the possibility that these values might be neglected in public administration and it is the function of the rule of law in public law to see that they are taken seriously.

8. Constructing a conception
A final word about the methodology that has been used here. One has to feel a little self-conscious about constructing an understanding of the rule of law that is dedicated to governance in the public realm and that is intended to see off some dominant ideological conceptions that apparently have a problem with the very idea of public administration. Defenders of those conceptions will denounce what I have set out in this chapter as incompatible with what the rule of law really requires.

But there is no “really” here: there is no commanding exemplar, no canonical authority for conceiving of the rule of law one way rather than another. There is a heritage dating back to Aristotle of concern for legality and enthusiasm for the possibility that legal modes of rule may take the edge off human power. And there are various ways of interpreting that heritage in regard to the challenges of governance faced by every generation.32 I have argued that it is possible to construct a moderate understanding of the rule of law that takes seriously the mission of the modern administrative state. That understanding is built up out of the heritage of the rule-of-law tradition, but it reserves the right to think anew about what the rule of law requires in this particular environment. The grounds for criticizing other understandings as inadequate or ideological is not that they fail to embody what the rule of law objectively entails, but that they are predicated on perspectives and concerns that are quite inappropriate for good faith elaboration of this ideal—an ideal that is, after

all, supposed to serve the needs and promote the freedom and dignity of those who live in a given society and are engaged in the responsible endeavour of self-government.