THE RULE OF LAW

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The Rule of Law (ROL) phrase has been a slogan used for many political purposes. In this Article I will group into three categories all or at least most of the ideas that are currently sometimes associated with the ROL phrase. I will suggest that in the future we limit use of the phrase to the first category.

I have three basic reasons for this recommendation. First, and most simply, I want to promote meaningful communication, by limiting misunderstandings resulting from the many meanings given to the ROL phrase over the years.[1] Secondly, the ideas I group into my second and third categories of ROL meanings are important ideas but they are debatable ideas. It detracts from the quality of the debate for anybody to invoke an emotionally laden phrase like ROL. Invoking the phrase in support of a position is like asserting that persons with different views are opposed to justice. These debates should occur using more rational and less emotional terms. Thirdly, and probably most importantly, I believe there is now a substantial consensus about the merit of the core ideas contained in my first category of ROL meanings. I want to support and reinforce that consensus. It detracts from the moral force of saying that some practice falls short of the ROL to associate the phrase with the more debatable ideas contained in the second and third categories. In sum, I want both to promote rational debate about the ideas I associate with my two latter categories and protect and promote the moral force of the ROL phrase when applied to the ideas in my first category.

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1. "It would not be very difficult to show that the phrase 'the Rule of Law' has become meaningless thanks to ideological abuse and general over-use. It may well have become just another one of those self-congratulatory rhetorical devices that grace . . . public utterances . . . ." Judith Shklar, *Political Theory and The Rule of Law*, *in* ALLAN HUTCHINSON & PATRICK MONAHAN, POLITICAL THEORY AND THE RULE OF LAW 1 (1992). A similar view is expressed by Joseph Raz in JOSEPH RAZ, THE AUTHORITY OF LAW 210-11 (1979). As I do in this Article, Raz attempts to retain the usefulness of the Rule of Law phrase by limiting its meaning to what I have called its first meaning.

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I. ACCOUNTABILITY OF GOVERNMENT DECISIONS

The original meaning of the Rule of Law phrase in English law was that no individual should be "above" the law—meaning that governmental actions should be accountable to some set of predetermined standards. This was a big debate many centuries ago in England as the landed nobility tried to limit the absolute discretion of the King. Today, with respect to actions initiated by government, the ROL idea is usually manifested by judicial review. It means that government decisions must be transparent and accountable to predetermined standards applied by an independent body, probably a court. The ROL idea also encompasses the kind of government action that is taken, usually by courts, in response to complaints by one person that some action should be taken against another person (e.g., for breach of contract). The ROL idea requires action in accordance with predetermined standards in both public and private law.

The predetermined standards against which government action is to be measured are contained in constitutions, statutes, administrative regulations, and common law precedents. These standards are what we call "law." However, law does not totally determine all government decisions. It is hard to imagine a governmental system in which the Constitution did not accord vast discretion to the legislature in the formulation of legislation, and in which legislation did not allow for some discretion by the executive and the courts in its application and enforcement. The existence of discretion conflicts with an ideal that all decisions be accountable to law, yet discretion has come to be accepted as a necessary feature of modern government.

The Rule of Law ideal, therefore, has come to mean that government discretion must be bounded by standards that set effective limits on the exercise of that discretion. These limits both prohibit certain options in the exercise of discretion (prohibiting Congress from abridging free speech, for example) and require many decisionmakers to justify the exercise of discretion as reasonably related to predetermined goals or values. A critical issue is how much discretion must be limited by standards if the decisionmaking process is to be deemed consistent with the ROL ideal. Too much discretion negates the goal that government decisions be accountable to law.

Review of governmental action in accordance with predetermined standards contrasts with other forms of review that I would consider political, not legal. Elections are an example. Voters are not required to apply predetermined standards in assessing the work of legislatures. It is common in modern governments to separate legislative and executive functions and sometimes require review of one branch's actions by another. In some countries the executive can veto most actions of the legislature. Sometimes the executive must obtain the consent of the legislature even when acting within its delegated authority—when making certain appointments or

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declaring war, for example. It is increasingly common throughout the world for legislative bodies to conduct investigations about the application of the law by the executive, in a process commonly called legislative oversight. These checks and balances on unilateral action by one branch of government are often desirable in my view. But because the purpose of review is not to ascertain compliance with predetermined standards, it is not what I mean by the Rule of Law.

Some degree of a separation of powers is implied by the Rule of Law, on the other hand. To be law, rules must be predetermined. They are made *ex ante*—before the events to which the rules are to be applied occur. Law application, on the other hand, often occurs *ex post*—after occurrence of the events to which the law is applied. While it is possible for the same person or institution to perform both functions, in modern day societies there is normally a specialization of functions and hence a separation of powers. The law-making institutions, such as legislatures, normally have great discretion. Constitutions set some limits on permissible rule creation, but usually not many. Consequently, procedures for ensuring the political accountability of legislatures are common, and important. Law application, the special province of courts and the executive, is generally much more bounded by rules limiting discretion. As a result, accountability to law is a more effective check, and procedures for ensuring political accountability of law-appliers are less frequent, though hardly non-existent.

It follows from the distinction I have drawn between political and legal accountability that I would not require, in the name of the ROL, that legislative or executive officials be selected by democratic elections.[2] A dictatorship normally comes into power in some manner that abrogates a constitution, and hence in a manner inconsistent with the ROL. But once constituted, a dictatorship can act within the ROL, providing only that it announce its decrees before it seeks to enforce them, and permit substantially independent courts to ascertain whether the enforcement actions are within the bounds on discretion established by the decrees.

The ideal that governmental action should be accountable to preexisting standards is simply a goal. The effective implementation of this goal depends on many conditions in society in addition to recognition and acceptance of the ideal. For the most part issues about actualization of the ROL ideal are beyond the scope of this Article. But three conditions concerning implementation will be mentioned briefly because they are so essential to actualization that they are commonly associated with the ROL ideal itself.

One condition is transparency. If government decisions are to be measured against predetermined standards, we must know what those

2. This separation of the Rule of Law ideal from the democratic ideal has been suggested by other analysts. *See* JOSEPH RAZ, *supra* note 1, at 210-11; Allen Hutchinson & Patrick Monahan, *Democracy and the Rule of Law*, *in* ALLEN HUTCHISON & PATRICK MONAHAN, THE RULE OF LAW: IDEAL OR IDEOLOGY 97 (1987).

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decisions are. Even more importantly, those predetermined standards, whether statutes, administrative orders or case precedents, must be preannounced and publicly available. Otherwise the victims of illegal action, whether public or private, will have no way of knowing that they can seek redress by challenging the action in accordance with the ROL.

A second condition essential to the actualization of the ROL is meaningful access to justice. Government decisions will not be measured against predetermined standards unless persons aggrieved by government action or by wrongful action of another person, or somebody acting on their behalf, have the practical ability to initiate a process by which some agency, usually a court, will assess the consistency of the action with law. Normally meaningful access to justice will require the existence of a Bar that is substantially independent of control by the very government officials whose exercise of discretion is to be limited by the ROL.

The third condition to be mentioned here is that the agency doing the assessing, usually the judiciary, must have substantial independence (or separation) from the actors whose activities are being evaluated. Independence means that the judiciary should be free of fear of sanction for the decisions they reach. But there is a catch. If the judiciary is totally independent, to whom is the judiciary accountable? Does the principle of accountability of all government decisions apply to the judiciary as well?

This is what I will call the core idea of the Rule of Law, with respect to which the ROL phrase is appropriately used: the accountability of transparent government decisions (including judicial responses to private lawsuits) to predetermined standards applied by an independent body, probably a court, through a procedure that can be practically utilized by the aggrieved. Even within this category, however, there are important, debatable issues to be decided. The laws to which government decisions are accountable inevitably allow for some discretion, but too much discretion negates the very idea of accountability. How much discretion is too much is obviously a matter reasonable people can dispute. Inevitably, some government decisions will be so discretionary as to be not properly characterized as accountable to law at all—the making of foreign policy is an obvious example. Reasonable people can also dispute which decisions, and how many decisions, can be exempted from legal accountability without depriving a system of the ability to claim rightfully that, viewed as a whole, it complies with the ROL ideal. And as I have just implied, independence of the judiciary, surely a necessary condition to implementation of the ROL ideal, probably should not mean total independence, only substantial independence. These are issues to which I will return in Part IV of this Article, when I will discuss them partly in the context of the recent impeachment of President Clinton and the investigation by Independent Counsel Kenneth Starr.

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II. DISCRETION-FREE JUDICIAL DECISIONMAKING

A second category of ideas sometimes associated with the ROL phrase is a vision of the judicial decisionmaking process as based solely on logic and reason. The implication of this vision is that in any given case, once the facts are determined, there is a single correct answer; if two judges disagree, one is wrong and the other is right. I do not think anybody today believes that this vision describes every case. There are situations in which the law is ambiguous and a judge must choose among alternative interpretations in deciding a case. But there is a tremendous range of disagreement about how frequently reason alone suffices to decide a case once the facts are determined. Furthermore, the idea of a judicial reasoning process based solely on logic is held out as an ideal for which we should strive by making law less ambiguous, and by discouraging judges from resorting to anything other than reason whenever possible.

All this is commonly argued for in the name of the Rule of Law.[3] And it is easy to understand why the ideal of a reason-based, discretion-free judicial decisionmaking process is attractive. I earlier pointed out that the existence of any government discretion is inconsistent in some sense with an ideal that all decisions be accountable to law. While some government discretion is accepted as a practical necessity, discretion within the judiciary can be seen as more troublesome than discretion elsewhere in the government. Democracy makes electorally accountable many government officials with discretionary authority, but judges are often not elected, and even when they are, elections are often not contested on the content of judicial decisions. So judicial discretion appears to be less subject to political accountability than other government discretion. Furthermore, if judges have substantially unfettered discretion, there is a risk that discretion will be exercised in a manner favoring the interests of the government officials whose actions are subject to judicial review, further compromising the goals of the ROL identified with my first meaning of that phrase.

The ideal of equal justice before the law provides a separate reason for the attractiveness of the ideal of discretion-free judicial reasoning. The equal justice ideal, sometimes also described by the ROL phrase, is that citizens in the same circumstances should receive the same justice. This ideal implies that it should not matter which judge is assigned to a particular case. When evidence on factual questions is conflicting, different judges (or juries) will come to different conclusions, and so the equal justice ideal is impossible to

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3. *See, e.g.*, H. L. A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977); ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE (1990). Both authors characterize a legal system that allows judges great discretion to pick the applicable legal rule as inconsistent with the Rule of Law, and object to descriptions of current English and American systems as allowing such discretion.

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achieve perfectly. But it is an ideal that we can come closer to achieving if, once the facts are determined, there is only one correct legal outcome to any case,[4] and hence the temptation to believe that is in fact the case.

The question whether, once the facts are determined, there is a single correct legal answer to a dispute, is at the center of a raging debate today about whether constitutional and statutory texts should be interpreted according to their dictionary (or plain) meaning. The alternative is a "purposive" style of interpretation, which favors interpreting statutory texts or precedents in ways that further what is deemed to be their social purpose. The "textualists," as they are called, quite properly point out that reasonable people can disagree about both (1) the purposes of existing laws, and (2) what results in particular cases will further those purposes. Hence, a purposive style of interpretation insures judicial discretion. In exercising that discretion, the textualists argue, the purposivists risk treading into the domain of the legislature, perhaps misjudging what the legislature has already decided, and in any event making decisions (especially regarding issue (2)) that the legislature should make in the first instance.[5]

Many people question whether the textualists' view of the interpretive task is plausible. Borrowing on the rich twentieth-century theory of language and communication developed first by literary critics, persons whom I will call the "critics," question whether any text, let alone a statutory text, can have a "plain" meaning. There is always ambiguity about the meaning of language, the critics argue, just as the textualists correctly point out that there is often and perhaps always ambiguity about the purpose of a statute.[6] One does not have to agree with the extreme version of the critics' account to acknowledge that at least very often statutory texts have ambiguity, with no one interpretation that is more "plain" than another. The textualists propose no method for resolving such ambiguity. Instead, they are likely to defend the position, in the face of all contemporary literary theory, that texts do have a single meaning that is at least the "most plain," if not free of all ambiguity.

A similar issue arises with respect to common law precedent in areas in which there is no controlling statute. Even persons believing that mostly there is a single correct legal answer to a dispute often acknowledge that in

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4. Formulation of legal rules so that this goal becomes a reality, in order to ensure equal justice for all, is strongly advocated by Justice Scalia. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 5 U. CHI. L. REV. 1175 (1989) [hereinafter Scalia, *The Rule of Law*].

5. A leading statement of the textualist position is ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997). The author, Justice Antonin Scalia, is the leading proponent of textualist statutory interpretation on the United States Supreme Court. A leading statement of the purposivist position is ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS (1997). *See also* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).

6. This position is most often associated with the legal realist and the critical legal studies movements. For an excellent account of these movements, see NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE chs. 2 & 6 (1995).

HeinOnline --- 2000 Wis. L. Rev. 728 (2000)

the early days common law judges frequently exercised great discretion in creating new legal rules. As we are likely to understand the historical situation today, there was often a legal void. Statutes and decrees were few and often did not provide any principle that could be used to resolve a dispute presented to the court. Hence, the common law judges were forced to invent new rules.

Today, however, it is argued that there are few if any legal voids—precedents for the most part exist on all legal issues—and the techniques we all learn in law school for determining holding and distinguishing cases are sufficient to identify the correct precedent for any given case.[7] Or it is argued that there are conventionally accepted policies and principles undergirding the common law that can guide judges to a decision, in a manner that at least limits discretion, when direct precedent is lacking.[8] An alternative view is that there are still many gaps in the common law, filled by judges who create new legal principles as they need them to decide cases. Still another view, advanced by a group that I will call the "structuralists," argues that the common law in many situations contains two or more lines of precedent applicable to any given fact situation, and that the rules of distinction are not sufficient to identify one line of precedent as most appropriate. Courts choose between the lines of precedent, in the structuralists' view, and in doing so exercise important discretion.[9]

I side with those who understand the situation today as one in which judges exercise a great deal of discretion, both in interpreting texts and applying the common law. Those who associate the ROL phrase with a discretion-free style of judicial reasoning, in my view, necessarily condemn much current court activity as unavoidably inconsistent with the ROL. More importantly, I believe that sometimes courts should exercise discretion, even when it is not necessary to do so because statutory text or common law precedent is sufficient to permit reasoning alone to provide a decision. The issue here is judicial activism, both in constitutional law and equally importantly in private law, and it raises questions different from the ones just discussed.

Because judicial activism increases judicial discretion beyond what is minimally necessary, it raises issues, mentioned above, about the exercise of discretion by the judiciary. Furthermore, courts usually apply a newly created

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7. *See* MANCHESTER ET AL., EXPLORING THE LAW: THE DYNAMICS OF PRECEDENT AND STATUTORY INTERPRETATION 3-47 (1996); RUPERT CROSS, PRECEDENT IN ENGLISH LAW 39-96 (J.W. Harris ed., 4th ed. 1991).

8. This perspective is commonly associated with Ronald Dworkin. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); RONALD DWORKIN, A MATTER OF PRINCIPLE (1985).

9. For a recent statement of this position, see DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 82-92 (1997), *reprinted in The Paradox of American Critical Legalism*, 3 EUROPEAN L.J. 359, 366-74 (1997). For another discussion of similar issues, emphasizing the judiciary's role in doctrinal change, see HUGH COLLINS, MARXISM AND LAW 61-74 (1982).

HeinOnline --- 2000 Wis. L. Rev. 729 (2000)

rule to the parties in the very case before them. When that new rule overturns precedent or ignores the most plain meaning of a statutory text, it may be applied to parties who relied on the earlier law or most evident interpretation in planning their affairs. In these situations judicial activism results in decisions that are not consistent with a rule that had been predetermined and preannounced, violating a fundamental value underlying the ROL ideal.[10]

These difficulties must be balanced against the potential benefits of judicial activism. In my judgment the best argument for judicial activism is that democratically accountable legislatures today often are flawed institutions not capable of dealing sensibly with some issues. A court, despite or perhaps because of its undemocratic character, may be the best alternative institution to make the decision. For example, many legislatures have a difficult time dealing responsibly with highly charged issues that touch on sexual morality. Consider the question of what should happen when two people, perhaps of the same gender, cohabit and engage in regular sexual relations though not married, and then break up. How should we determine their respective rights in property acquired during the period of the cohabitation? Historically common law courts have refused to enforce contractual agreements pertaining to this issue if the contract was entered into during the period of the cohabitation.[11] Many legislators, often a majority, feel in situations like this that there is no way they can take a position without angering some important element in their constituency, and that their individual self-interest in reelection is best served by avoiding the issue. Taking any position at all will inevitably anger some group of constituents unnecessarily.

Legislatures are not all the same, and whether the collective legislative response is inaction will vary from country to country. An important variable is whether the country has a strong tradition of party loyalty in the legislature, because sometimes the electoral costs of legislative inaction are more costly for a party than for an individual legislator. But when legislative inaction is the likely result, an activist judiciary may be the best alternative we have, despite its inconsistency with democratic values and the difficulties judicial activism presents for some values underlying the ROL ideal. If legislatures will not legislate and judges will not overrule a precedent, society will continue to be governed by a perhaps outdated rule that most knowledgeable

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10. In American law this problem has led to discussions of whether courts should prospectively overrule—i.e., announce that henceforth they will rule differently, but not apply the new rule either to the case before them or to any case involving facts occurring before the overruling decision. The most famous statement of the pros and cons of prospective overruling is in HENRY HART & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 599-629 (William N. Eskridge & Phillip P. Frickey ed. 1994) (tentative ed. 1958).

11. This historic provision is being rapidly discarded in the United States as a result of judicially active decisions changing the historic common law position. The leading case is *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

HeinOnline --- 2000 Wis. L. Rev. 730 (2000)

people agree does not serve public policy well. It is an issue of the comparative competence of legislatures and courts in the world we live in, not an issue of their ideal competence in a theoretical world.[12]

The issue of judicial activism is related to another much-discussed issue: whether legislation should be drafted, or common law precedents crafted, with great specificity (rules) so as to minimize the amount of discretion needed in the application of law. The alternative is to draft or craft laws and precedents more broadly, specifying the goals to be pursued but allowing courts or administrative agencies to devise the best method to achieve those goals in a particular case (standards). Rules tend to minimize the compromises of the ROL ideals that are implicit in the exercise of discretion. Standards, on the other hand, permit courts or agencies to avoid unjust results in particular cases where policy concerns seem to require an other-than-ordinary disposition that the legislature did not anticipate or specially provide for.[13] In part because of difficulties that legislatures have in considering the merits of a great number of different situations and providing exceptions for special cases, the trend in much of the twentieth century in America has been toward legislation and common law precedents that employ standards rather than rules. Recently, however, some observers have argued that the pendulum has shifted too far toward standards and that we need a greater emphasis on rules, in part so that persons can better plan their affairs in light of predictable law.[14]

If I am correct that there both is and should be a good deal of judicial discretion in the interpretation of both statutes and common law precedent, this discretion has important implications for how much independence should be bestowed on the judiciary. On the one hand, if courts have discretion in choosing the legal rule to decide the case, democratic theory implies the need for some form of political accountability for the courts. Courts are then important policy-making institutions. The famous Portuguese lawyer-sociologist, Boaventura de Souza Santos, has observed that in the United States, where the tradition of judicial activism is more openly acknowledged than it is elsewhere, political involvement in the judicial selection process is greater than it is in Europe, and this correlation is neither surprising nor inappropriate.[15] Moreover, the existence of judicial discretion suggests the

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12. *See, e.g.*, NEIL KOMESAR, IMPERFECT ALTERNATIVES (1994); *see also* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998).

13. For a discussion of the advantages and disadvantages of rules and standards, see RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 42-61 (1990); Scalia, *The Rule of Law*, *supra* note 4; Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

14. *See Symposium: Formalism Revisited*, 66 U. CHI. L. REV. 527 (1999).

15. *See* Boaventura de Sousa Santos, *The GATT of Law and Democracy: (Mis)trusting the Global Reform of Courts*, *in* JANE JENSON & BOAVENTURA SANTOS, WANDERING INSTITUTIONS (1999).

HeinOnline --- 2000 Wis. L. Rev. 731 (2000)

desirability of including representatives of different genders, classes, and ethnicities on the judiciary, especially on multi-judge courts, so that each group has its special viewpoint heard when judicial discretion is exercised.

These considerations suggest that the existence and desirability of judicial discretion implies reduced judicial independence. But in some ways judicial discretion implies the need for greater independence. If judicial review is to be an important check on the exercise of discretion by the executive and legislature, judicial discretion implies that when acting in a judicial review capacity, judges must be independent of the officials whose behavior they are checking, for otherwise judicial review will be no control at all. For example, the existence of judicial discretion implies that the assignment of judges to cases involving judicial review issues, including all criminal cases, must be free of executive control. Otherwise the executive could influence the assignment of a case in which it is particularly interested to a judge whose exercise of discretion is quite predictable. Generally, assignment of judges to cases should be done in some non-discretionary way, emphasizing systematic rotation of cases among all judges as far as is practical.

It should be obvious that my discussion of judicial reasoning style issues is far from complete. I believe it is sufficient, however, to demonstrate that there are many arguments in favor and opposed to the contending positions. Because the question of the appropriate judicial reasoning style depends partly on perceptions of legislative competence, and legislative competence will vary from country to country, the same person might not draw the same conclusion with regard to the most desirable judicial reasoning style for all countries. My main thesis once again is not that one position or the other is right, but that the issues should usually be debated without either side invoking the phrase "Rule of Law" as a value-laden emotional appeal. If the issue is that a grant of discretion to the judiciary is so great that ROL values would be jeopardized even if the discretion were exercised by another institution of government, then the issue is appropriately addressed in ROL terms. But where the issue is whether the discretion should be exercised by the judiciary or some other institution of government, issues under democratic theory are raised but the ROL phraseology should not be used.

III. HUMAN AND PROPERTY RIGHTS

My third category of ideas associated with the Rule of Law phrase concerns arguments that the ROL requires legal rules with particular substantive content. Probably the most common application of this version of ROL is the argument that certain human rights must be respected. For example, imprisonment without trial is argued to violate the ROL because all persons are entitled, before being deprived of their liberty, to be informed of charges alleging violation of preannounced standards, and then to have a

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chance to contest before an independent judiciary the factual accuracy of the application of those standards to their behavior.

Some human rights are implied by my first category of meanings of the ROL—that governmental decisions should be transparent and accountable to legal standards administered by an independent judiciary. With regard to these human rights it seems to me appropriate to use the ROL phrase. This is not true of all rules advocated in the name of human rights, however. It is argued that no individual should be sanctioned for the expression of ideas or for reading materials of any content, that people should be free to associate with whomever they wish regardless of political motive, and that individuals should have control over their bodies (no involuntary female circumcision or prohibition of abortion, for example). Such proposals have their basis in the desire to create a zone of autonomy for the individual, an arena for human activity in which the individual can develop his/her own individuality. This is what we often call freedom. From the perspective of natural law, we might see these rights as allowing the human being, whom we believe to be the most intelligent of animals and the most capable of developing individual personalities, an opportunity to fulfill his/her biological destiny.

The claims for these human rights are not totally unrelated to my first category of ROL meanings. I have emphasized that the standards against which government action are to be measured must be preannounced. One reason for announcing in advance the limits on official discretion is to allow citizens to predict in advance what things they can do without objection. Predictability about application of the law facilitates a zone of autonomy from official interference, a zone in which individuals can choose freely what to do.[16] But there is a difference between requiring that limits on official discretion be preannounced, and placing substantive restrictions on what those limits must be. And while there is much merit in the claims for various human rights, they are not incontestable. Whether women should have a right to abortion stirs tremendous passions in many places. In the United States, the rights to free speech and association have been extended, by U.S. Supreme Court decision, to provide a constitutional right to any individual to spend as much money to support a political candidate as he/she wishes.[17] The

16. This function of the Rule of Law was much emphasized by F.A. Hayek, one of the twentieth-century philosophers most commonly associated with advocacy of the Rule of Law ideal. *See* FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72 (1972) ("Stripped of all technicalities [the Rule of Law ideal] means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.").

17. *See* Buckley v. Valeo, 424 U.S. 1 (1976). *Buckley* does not foreclose regulation of how much an individual can give directly to a candidate, but it does prevent regulation of how much an individual can spend independently of the candidate's campaign, even though the independent spending is designed to enhance the candidate's election chances.. For a discussion of unfortunate effects of the *Buckley* case on the fairness of American elections, see Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority*

HeinOnline --- 2000 Wis. L. Rev. 733 (2000)

result, many people believe, is to give the wealthy undue advantage in elections. I also believe it is appropriate to place some legal restrictions on hate speech. My point, once again, is that when dealing with claims for human rights that go beyond requiring that law be preannounced, there are reasonable arguments to be made on each side. They should be made directly. It only hinders debate to invoke the ROL phrase on one side or the other.

Another of the many meanings assigned to the ROL phrase is the idea that a legal system must adopt rules protecting property ownership and enforcing expectations arising from contracts. Thus, it has been argued in the name of the ROL that there can be no expropriation of property, or even undue regulation of its use, without due compensation, and that the parties to contracts must have access to an independent, court-like tribunal for enforcement of contracts more or less on the terms to which the parties have agreed (i.e., freedom of contract must be mostly respected).[18]

What I have called the first meaning of the ROL has implications for property and contract rights. When government, including the judiciary, takes action with respect to property, or adjudicates a private dispute respecting property rights, it should do so transparently and in accordance with predetermined rules or standards, which is to say according to law. But the arguments that are now being advanced go beyond advocacy of the existence of rules and standards. People are arguing for rules of a particular content, and in doing so they are straying beyond my first meaning of the ROL.

There are certainly arguments that can be made in favor of protecting property and contract rights. Like legal protection of human rights, legal protection of private economic rights can be one way to create a zone of autonomy from the State in order to permit fulfillment of individual destiny. If an owner's right to use his/her land as he/she wishes is legally protected, the owner is a freer person when on his/her property (one can build houses

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of Democratically Financial Elections, 94 COLUM. L. REV. 1160 (1994).

18. This was the position of Hayek. *See* F.A. HAYEK, THE CONSTITUTION OF LIBERTY 227-28 (1960). For more recent advocacy of the same view, see Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 THE WORLD BANK RESEARCH OBSERVER 1, 9 (1998) ("Legal reform is an important part of the modernization process of poor countries, but the focus of such reform should be on creating substantive and procedurally efficient rule of contract and property rather than on creating . . . an extensive system of civil liberties. . . . [A]. . . de-emphasis on the protection of civil liberties may be an important part of legal reform and an important tool for the protection of property and contract rights."). McAuslan observes that the World Bank also takes this position. *See* Patrick McAuslan, *Law, Governance and the Development of the Market: Practical Problems and Possible Solutions*, *in* GOOD GOVERNMENT AND LAW: LEGAL AND INSTITUTIONAL REFORM IN DEVELOPING COUNTRIES 25, 42 (Julio Faundez ed., 1997) ("[In] World Bank publications . . . the rule of law . . . is being redefined to emphasize its role in facilitating the enforcement of private contracts so that law reform to advance the rule of law is the same as law reform to advance the market economy.").

HeinOnline --- 2000 Wis. L. Rev. 734 (2000)

as one wishes, grow long grass if one likes, etc.) And if an individual's contractual expectations are protected, then at least sometimes it becomes easier for that person to acquire the wealth necessary to support a meaningful life without dependence on government or on others for economic sustenance.

But of course, there are counterarguments. In a world of scarce resources, one person's acquisition of private economic power is often at the expense of another person's economic power. That is one primary reason for regulation of the rights of property ownership and of the content of contractual obligations. Many of these economic regulations may be unwise, but it is not my purpose here to debate these issues. My point, once again, is that these issues should be debated on their merits, and nobody should be allowed to argue that one position or another is more or less consistent with the Rule of Law. When the World Bank, the IMF, U.S. AID, or whomever, advocate the establishment of the legal mechanisms of a free, unregulated economic marketplace,[19] they should be careful to advocate in the name of ROL only when arguing that there must be laws governing property and contract rights administered by some independent body, probably a judiciary. When they advocate for laws of a particular content, they should use other phraseology.

Brief mention should be made of a very different type of property right that is now sometimes discussed in terms of human rights, though not to my knowledge in terms of the ROL. I refer to the guarantee of minimal economic sustenance to each individual, including housing, medical care, food, and perhaps primary schooling.[20] If the purpose of guaranteeing human rights is to provide each individual with the autonomy needed to develop and express their personality, then freedom from economic want may be as important as freedom from a politically repressive State. But once again there are counterarguments. There are certainly those who would maintain that diversion of the resources needed to guarantee a minimally adequate standard of living to all persons will detract from investments needed to promote economic growth, even in a country as wealthy as the United States. The issues should be debated on their own terms, with neither side invoking the ROL phrase, as to my knowledge they are not.

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19. The World Bank has identified judicial reform as one of its principal concerns. *See* Maria Dakolias, *A Strategy for Judicial Reform*, 36 VA. J. INT'L LAW 167 (1995). However, when one of its showcase projects in Venezuela was critiqued by an organization of human rights lawyers, it was found that the World Bank was almost exclusively concerned with legal reforms that would assist the penetration of global economic forces into Venezuela. *See* LAWYERS' COMMITTEE FOR HUMAN RIGHTS AND VENEZUELAN PROGRAM FOR HUMAN RIGHTS EDUCATION AND ACTION, HALFWAY TO REFORM: THE WORLD BANK AND THE VENEZUELAN JUSTICE SYSTEM (Lawyers Committee for Human Rights, New York, 1996).

20. *See* Asian Human Rights Charter, Our Common Humanity: A People's Charter § 7.1 (Asian Human Rights Commission, Hong Kong, 1998) ("Every individual has the right to the basic necessities of life . . . .").

HeinOnline --- 2000 Wis. L. Rev. 735 (2000)

IV. LIMITATIONS TO THE ACCOUNTABILITY PROPOSITION

I will now return to my first category of ROL meanings, to discuss two significant refinements to the general proposition that all government decisions should be testable for legality before an independent judiciary. In the course of my discussion of these refinements, I will discuss the recent American experience with impeachment.

The first refinement is the exclusion of some decisions from any kind of judicial review. In American constitutional law doctrine, this is the "political question" doctrine. Foreign policy is an area where the political question doctrine is widely applied, and many Americans would say foreign policy decisions are not subject to the ROL—the making of war against Serbia, for example—only political checks and balances. It is worth noting, however, that even if government decisionmaking is non-justiciable from any substantive review, courts might still enforce, in the name of the ROL, procedures requiring that the executive obtain political approval from the legislature or some other institution.[21] The ROL can require adherence to procedures requiring that political decisions be made, while at the same time refusing to submit those decisions to any kind of substantive judicial review.

The impeachment controversy exemplifies this refinement to the core meaning of the ROL. Many Republicans argued that impeachment of the President was required if the United States were to have the ROL, because he had committed the crimes of perjury and obstruction of justice.[22] Assuming crimes were committed by the President, it was a little silly to say unless the President was removed from office, he was above the law. President Clinton can clearly be prosecuted once his term ends, and he has been held in contempt of court and fined while still in office. The issue was never whether the President is above the law in the sense that Kings of England used to be above the law. But the core meaning of the ROL entered into the impeachment debate in another way. The U.S. Constitution provides that the President may be impeached and removed from office for "treason, bribery, and other high crimes and misdemeanors." But nobody thinks that if President Clinton had been convicted and removed from office by the Congress he could have challenged the result in court on the ground that the charges against him did not meet the constitutional standard for removal from office. Congress would never have been held accountable to an independent judiciary on this decision.

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21. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (finding that the President had no inherent authority to seize control of the steel mills under his war powers without authorization from the Congress.).

22. *See* 145 CONG. REC. S299 (daily ed. Jan. 16, 1999) (closing remarks of Congressman Henry J. Hyde, Chair, House Judiciary Committee, at the Impeachment Trial of William J. Clinton) ("That none of us is above the law is a bedrock principle of democracy. . . . To erode that bedrock is to subscribe to a 'divine right of kings' theory of governance. . . . The vote you are asked to cast is, in the final analysis, a vote about the rule of law.").

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Although I regard myself a strong defender of what I call the core meaning of the Rule of Law, I also support exclusion of certain government decisions from any kind of substantive judicial review, and I do not believe that a legal system as a whole should be designated as inconsistent with the ROL simply because there are some well-considered exceptions to the principal of accountability to a judiciary. One of America's leading twentieth-century constitutional scholars, Alexander Bickel, defended the Supreme Court's use of the political question doctrine to abstain from certain decisions in order to preserve the judiciary's prestige. Professor Bickel described the judiciary as "the least dangerous branch," because it has so little power to raise armies, impose taxes, etc. The judiciary's source of power is its moral authority. Professor Bickel believed that the Court should sometimes avoid decision on some highly charged issues in order to conserve its moral authority for other matters. If the highly charged issue was one for which it is particularly difficult to articulate a basis for decision in terms of easily understood and applied general principles, and if political checks on unwise action seem likely to function reasonably well, the case for judicial abstention was stronger to Bickel. Foreign policy was one such area for Bickel. Further, it was better, Bickel argued, for a court to abstain by characterizing the issue as not justiciable, rather than specifically upholding the government decision as legal, because the latter action tended to legitimize the government decision in the public mind, making it more immune to political attack when political challenge was the only real check on government action.[23] I believe that Bickel's approach would have been the appropriate one if President Clinton had been convicted by Congress and then challenged the constitutionality of Congress's action in court.

There are other examples of this lack of meaningful accountability to law. Administrative agencies have been directed to invent whole new areas of law by giving content to such amorphous statutory terms as "unfair trade practices,"[24] and courts are directed not to enforce contractual provisions that are "unconscionable," a term not defined statutorily.[25] I believe that the legislative delegation to the agency or court in these instances is so broad that the discretion is not meaningfully limited by law. The legislation granting the discretion essentially contains no standards by which to measure or evaluate decisions reached.[26] Such delegations can be considered inconsistent with the ROL. But some such exceptions are characteristic of all legal systems. The question becomes whether the exceptions are so numerous or so significant

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23. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

24. *See, e.g.*, 15 U.S.C. § 45(a)(1) (1994).

25. *See* U.C.C. § 2-302 (1999).

26. Because there is not legal accountability, there is a greater need for political accountability in these circumstances, as was mentioned in Part I. Legislative oversight of the application of these delegations is particularly appropriate.

HeinOnline --- 2000 Wis. L. Rev. 737 (2000)

that the system as a whole should not be described as inconsistent with the ROL ideal.

The second refinement to the core meaning of the Rule of Law concerns the independence of the judiciary. Judicial independence is widely seen as critically necessary to the effective implementation of the first of my ROL meanings. Yet complete judicial independence raises questions about the accountability of the judiciary. Further, to the extent the judiciary makes as well as applies law—an issue I have discussed extensively in Part II—complete judicial independence raises troubling issues for democratic theory as well.

In practice, most systems compromise judicial independence in some respects through provisions for judicial selection and removal, the assignment of judges to cases, and the establishment of terms of service for judges. In my view the provision for judicial removal should be very restrictive, so that judges do not have to fear loss of position for reaching an unpopular decision. Normally, I believe, judges should serve for life or until a predetermined age (e.g., sixty-five). But because judges can become corrupt, sick, or crazy, there must be some provision for removal when voluntary resignation is not forthcoming. The procedures for such removal should be as insulated from political influence as possible.

Setting terms of service for judges raises similar problems. The concern, of course, is that other organs of government will try to influence judicial decisionmaking through manipulation of pay and benefits. Decreases in pay or benefits for judges should be prohibited, unless proportionate to a decrease applied to all judges and other professional government employees. Yet influence over the judiciary can be wielded as well if pay or benefit increases are discretionary, and in inflationary times prohibition of pay increases is not practical. Once again, whatever procedures are devised for setting the terms of service for judges should be as removed from politics as possible. Linking judicial pay and benefits to the pay and benefits given to other professional government employees should be strongly considered. All judges must be treated similarly when it comes to terms of service. Any differentials between judges in pay or benefits, or the provision of support services like supplies and secretaries, must be a function of rank and seniority and little else. Further, the pay, benefits, and support services must be sufficient to allow the judge to perform his/her duties in a professional manner.

Establishing routinized, non-discretionary systems for assigning judges to particular cases is also important to establishing the independence of the judiciary. Some discretion is probably required in such assignments as a matter of practicality, especially at the trial level. Considerations of regulating the workload between judges, so that justice is not delayed while some are overworked and others have nothing to do, require some discretion in the assignment of burdensome cases between judges. Once again, as much as possible the discretion that must inevitably be exercised should be as

HeinOnline --- 2000 Wis. L. Rev. 738 (2000)

divorced from control by the executive as possible, for fear that otherwise the discretion will be exercised to ensure the assignment of a case in which the executive is interested to a judge whose views are known to be favorable to the executive.

Selection and promotion of judges is often more politically controlled, and perhaps appropriately so. Selection systems vary considerably around the world. In continental Europe lawyers are likely to enter the judiciary immediately upon graduation from law school. Being a judge or a magistrate is a career choice. Promotion is by merit. I do not know how the merit process works, but over the years I have heard and participated in enough arguments about what makes for a good judge to know that reasonable people can disagree. In the United States, on the other hand, selection of judges, including the most powerful appellate judges, is often openly political. Since judges in the United States tend to be activist in their style of judicial decisionmaking, greater political control in the appointment process may be more appropriate. In accordance with democratic theory, the selection process can be used to ensure that the political values of law-making judges do not deviate too far from the political mainstream.

The judicial independence issue is related to the American impeachment controversy because of the position of the Independent Counsel, Kenneth Starr, and the controversy that surrounded his activities. Starr held a prosecutorial position. We do not always think of prosecutors as judicial officers, but they possess some powers that are quite judicial in nature. Particularly important is the decision not to charge an individual with an offense. This is a decision for which a prosecutor is not legally accountable to any court in the American or in most legal systems. Because prosecutors can make decisions for which they are not accountable to the law, some legal systems have sought to devise ways to provide for the independence of prosecutorial officials, like the judiciary, from political control. In the United States, we have not generally done so. The exception was the Independent Counsel statute, adopted in reaction to political interference in prosecutorial decisions concerning the Watergate scandal that ended the Nixon presidency.

Under the Independent Counsel statute,[27] which has now lapsed, the nation's chief prosecutorial officer, the United States Attorney General, was required to request appointment of an independent counsel whenever he/she received "credible and specific" information about a possible criminal offense committed by the President or any of a number of other high government officials. Appointment was made by a standing committee of three appellate judges appointed to two-year terms by the Chief Justice. Once appointed an independent counsel had almost complete independence. He (all but one of

27. 28 U.S.C. ch. 40 *et seq.* (1994). For fuller accounts and assessments of the Independent Counsel Statute, see Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463 (1996); Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601 (1998).

HeinOnline --- 2000 Wis. L. Rev. 739 (2000)

the independent counsels have been "he's") had virtually an unlimited budget. There were no time constraints on his investigation. He needed permission to expand the scope of his previously authorized investigation, but permission to investigate additional activities was easy to obtain so long as the individual target remained the same. He could file criminal charges, including charges against persons other than the high officials that were the target of the investigation. This meant that an independent counsel could bring charges against potential witnesses, in hopes of inducing a reluctant witness to incriminate the target in exchange for reduction or dismissal of the charges. An independent counsel could also grant prosecutorial immunity to witnesses. Finally, removal of an Independent Counsel was only "for cause" and almost impossible to achieve. None were removed in the twenty years of the statute's existence.

In Kenneth Starr's case this statutory independence was pushed to its limit. In the first place, though he was duly appointed by an independent committee of federal judges, he did not possess many of the characteristics one might normally expect in an Independent Counsel. Though beyond question a highly capable appellate attorney, he had no prosecutorial experience. He had held a political appointment in the administration of President Bush, whom President Clinton had defeated in the 1992 election. Before his appointment, Mr. Starr had been retained to represent conservative causes in politically charged cases, and he was a member of a well-known conservative legal organization.[28] Thus he began his investigation under suspicion of political motive, and his conduct since then aggravated these suspicions.

This is not the place to repeat all the criticisms that could be made of Starr's investigation. Starr's indiscretions in connection with the initiation of the Lewinsky investigation and in reporting excessive detail about the Clinton-Lewinsky sexual encounters in his impeachment referral have been widely condemned.[29] Though less commonly written about, I personally found equally objectionable Starr's threats to prosecute Lewinsky's mother if Lewinsky did not cooperate with Starr. Prosecutors commonly indict persons for the purpose of inducing them to become cooperative witnesses in return for immunity or leniency,[30] but prosecutorial discretion must always

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28. *See* Tim Weiner & Jill Abramson, *The President Under Fire: The Actors*, N.Y. Times, Jan. 28, 1998, at A22. The well-known conservative legal organization is the Federalist Society. Many of the lawyers participating in the Paula Jones litigation (in which the President gave his allegedly perjurous deposition) were also members of the Federalist Society. *See id.*

29. *See, e.g.*, RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 80-83 (1999); Robert W. Gordon, *Imprudence and Partisanship: Starr's OIC and the Clinton-Lewinsky Affair*, 68 FORDHAM L. REV. 639, 648-50, 703-05, 707-14 (1999).

30. This was a tactic used extensively and extremely aggressively by Starr, both before and after the investigation expanded to include the Lewinsky affair. One need only

HeinOnline --- 2000 Wis. L. Rev. 740 (2000)

be exercised in using this tactic. If the potential witnesses would not normally or do not deserve to be indicted, a serious means-ends issue is presented: Does the greater good of obtaining the testimony outweigh the injustice and other harm caused by indicting someone who would otherwise not be indicted? In my judgment, it was a clear abuse of discretion for Starr to have threatened prosecution of Lewinsky's mother for failure to reveal parent-child communications, where the offense being investigated was relatively minor (perjury in a civil deposition on a largely irrelevant matter) and not likely to be repeated. The harm caused was not only the emotional toil on Lewinsky and her mother, but the potential deterrence of frank discussions between parents and their children in other circumstances. Any parent of a Lewinsky-aged child (as Starr is) should have been keenly aware of this probable effect.

The most serious abuse of power in the impeachment saga was by Kenneth Starr, not President Clinton. The consequence was that Congress chose not to renew the Independent Counsel statute when it lapsed by its own terms at the end of June 1999.[31] That may have been an unfortunate overreaction, for clearly there are virtues in having substantial independence from political control for a prosecutor of high government officials. For the issues I am examining in this Article, however, the relevance of the Kenneth Starr story is to point to the dangers of complete independence. A prosecutor may be a more dangerous official than a judge, because of his ability to be proactive. For the most part a judge can only wreak havoc after somebody else chooses to bring the matter before him/her. A prosecutor with an unlimited budget need not be so restrained. My conclusion, therefore, is that there are respectable arguments for placing some limits on the independence of a special prosecutor. In particular, greater political control over the appointment of an independent counsel may limit the possibility of appointment of a person as inappropriate for his/her position as Kenneth Starr proved to be for his. It is only by analogy that the Kenneth Starr story suggests the need for some controls, probably also exercised at the time of appointment, over the judiciary, but I think it is an analogy that should be drawn.

V. SUMMARY AND CONCLUSIONS

I have identified three categories of meanings for the much-used phrase, Rule of Law (ROL). I believe these categories capture virtually all the meanings attributed to the phrase in contemporary discourse. My thesis has

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mention the (unsuccessful) prosecutions of Webster Hubbell and Julia Steele. I assume, but do not know for sure, that the tactic was instrumental in inducing Lewinsky to cooperate with Starr. The immunity deal with Lewinsky included immunity for her mother.

31. *See* David Johnston, *Attorney General Taking Control As Independent Counsel Law Dies*, N.Y. Times, June 30, 1999, at A1.

HeinOnline --- 2000 Wis. L. Rev. 741 (2000)

been that henceforth we should limit the phrase to the first category of meanings—the idea that government decisionmaking should be accountable to predetermined legal standards, which in turn is usually thought to imply the need for an independent judiciary. I have included only accountability to predetermined standards—what I call law—as within the meaning of the ROL, excluding accountability to political bodies or the electorate. Hence, issues of democracy should not be discussed in ROL terms.

The Rule of Law phrase is also often used when discussing either the ideal of discretion-free judicial decisionmaking or various proposals for individual personal or property rights. There is much virtue in the positions associated with these second and third meanings of the ROL, but those positions are not incontestable. The issues should be debated on their merits, without either side accusing the other of not favoring the ROL. Such charges distort debate. More importantly, they tend to compromise the moral force of the ROL phrase by associating it with contestable ideals, weakening the force of the phrase when it is applied to its core meaning.[32]

Finally, even within the area of the core meaning of the ROL, there is room to argue about some details. Perhaps some government decisions are best considered not justiciable by courts, meaning they are subject only to political controls. Substantial independence of the judiciary is exceedingly important, but complete independence carries its own risks. Crafting acceptable limits to judicial review and judicial independence are matters that must be debated, and once again I argue that debate should take place without recourse to emotional appeals phrased in ROL terms. What we need is a consensus about the minimum conditions needed to assure the sufficient accountability of government decisions to predetermined legal standards—my first category of ROL meanings. Then we should fight for that minimalist conception with all the moral force we can gather.

32. While advocating that we stop using the ROL phrase in arguments about desirable approaches to judicial decisionmaking or the content of (most) protected legal rights, I recognize that there are connections between these meanings and the accountability idea. I have discussed how the idea of discretion, though essential to modern government, in some sense compromises the ideal of accountability, and judicial discretion is no exception to this concern. And accountability of government decisions enhances their predictability, which in turn expands the zone of autonomy in which an individual is free to act as he/she chooses. Expansion of such zones of autonomy is the goal of all proposals to expand individual rights.

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