

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

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

Gowder contends that the rule of law is made up, at its core, of three notions: regularity, publicity, and generality.³ Regularity implies that the power of the

ON L. FULLER, *THE MORALITY OF LAW* 30–94 (rev. ed. 1969); DAVID LYONS, *ETHICS AND THE RULE OF LAW* (1984); Jeremy Waldron, *The Rule of Law as a Theater of Debate*, in ARGUING ABOUT —

3. The information in this paragraph and the next two paragraphs is supported in P

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GOWDER, *THE RULE OF LAW IN THE REAL WORLD* (2016).

between Gowder's egalitarian generality condition and his claim that the rule of law has only indirect connections with democracy. Finally, Murphy raises concerns about Gowder's account of the relations

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

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

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

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

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