
The Rule of Law under Pressure

The Enmeshment of National and International Trends

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The legal theory of post-war German counter-revolutionists was decisively influenced by international events and the concept which permitted an unlimited sovereignty to ignore international law is the source of the theory that political activity is not subject to legal regulation. This was the presupposition for the theory of the Prerogative State.

—Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship*¹

*War is no longer declared
but rather continued. The outrageous
has become the everyday. The hero
is absent from the battle. The weak
are moved into the firing zone.*

—Ingeborg Bachmann, “Every Day”²

These are difficult times. Populist and authoritarian leaders are dismantling rule-of-law norms domestically, and they are working to do so internationally. Although political actors increasingly deploy rule-of-law discourse, they frequently abuse it to legitimate authoritarian rule, often in the name of law and order. How to measure these shifts is a challenge given the variety of institutional means to advance or undermine the rule of law, yet both qualitative and quantitative analyses

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¹ ERNST FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* 66 (Oxford Univ. Press 2017) (1941).

² Ingeborg Bachmann, *Every Day*, in *DARKNESS SPOKEN* 39 (Peter Filkins trans., Zephyr Press 2006) (1953).

indicate overall declines in rule-of-law protections transnationally, which are essential for individuals to lead lives not subject to domination.

We conceive of the rule of law as an ideal – or meta-principle – under which individuals are not to be subject to the arbitrary exercise of power. We examine the interaction of domestic and international factors in eroding the rule of law, including the rise of populist, authoritarian leaders in traditionally democratic countries, the intensification of repression in existing authoritarian regimes, and the relative decline of Europe and the United States in relation to an authoritarian China and other emerging powers. These shifts weaken the diffusion and settling of rule-of-law norms within states, which, in turn, affects normative development and institutional practice internationally. They also are generating robust responses that we evaluate.

Challenges to the rule of law raise a series of conceptual and empirical questions that are transnational in their scope and implications. This introductory chapter is in five parts. Part I explains our conceptualization of the rule of law, necessary for the orientation of empirical study and policy responses. Following Martin Krygier, we formulate a teleological conception of the rule of law in terms of goals and practices, which, in turn, calls for an assessment of institutional mechanisms to advance these goals given varying social conditions and contexts. Part II sets forth the ways in which international law and institutions are important for rule-of-law ends, as well as their pathologies, since power also is exercised beyond the state in an interconnected world. Part III examines empirical indicators of the decline of the rule of law at the national and international levels. It notes factors that explain such decline, and why such factors appear to be transnationally and recursively linked. Part IV discusses what might be done given these shifts in rule-of-law protections. It responds to the Biden administration's rallying of a coalition of democracies to combat authoritarian trends at home and internationally, and it assesses tensions between political and economic liberalism. We then conclude in Part V, noting the implications of viewing the rule of law in transnational context for conceptual theory, empirical study, and policy response.

I Conceptualizing the Rule of Law: What's the Point?

We develop concepts because they are useful for understanding the world and intervening within it. The starting point for developing the concept of the rule of law is to assess what is at stake for individuals and the

communities of which they form part – that is, what is the problem that the rule of law aims to address. We start with Krygier’s conception of the rule of law in terms of social goals and practices, after which we turn to different normative and institutional means to advance these goals. It is both the ends and the means that can – and must – be assessed empirically to inform any effective response.

We posit that the rule of law is a normative ideal that should be viewed teleologically in terms of its ends. The goal of the rule of law is *to oppose the arbitrary exercise of power by setting boundaries on, and channeling, power’s exercise through known legal rules and institutions that apply to all*.³ The rule of law aims to limit, through legal rules and institutionalized practices, the exercise of power by some persons over others. Arbitrary power can be terrorizing. People internalize its threat.⁴ Through self-suppression and self-protective collaboration, individual freedom and civil society wither. The goal is thus to create restraints on government, as well as private power, together with channels for cooperative and coordinative activities,⁵ which provide security and predictability so that people can plan and organize their pursuits and do so without fear. Power can be used for good or ill. For us, as for theorists ranging from Judith Shklar in the last century to Montesquieu earlier, “the fear of violence and the threat of arbitrary government provide an essential context in which the rule of law takes its meaning.”⁶ As a goal, the rule of law is best viewed as a principle and

³ Martin Krygier, *The Rule of Law: Legality, Teleology, Sociology*, in *RELOCATING THE RULE OF LAW* 45, 60 (Gianluigi Palombella & Neil Walker eds., 2009). In the larger rule-of-law tradition, power is predominantly viewed in relational/agentive terms and not in constitutive terms. For multifaceted conceptions of power, at times referenced in terms of the four faces of power, see, for example, Michael Barnett & Raymond Duvall, *Power in Global Governance*, in *POWER IN GLOBAL GOVERNANCE I* (Michael Barnett & Raymond Duvall eds., 2005); Peter Digeser, *The Fourth Face of Power*, 54 *J. POL.* 977, 980 (1992); DENNIS WRONG, *POWER: ITS FORMS, BASES, AND USES* (3d ed. 2002). Whatever conception of power one adopts, or on which one focuses, there will be variation in practice, and one should assess imperfect institutional alternatives for tempering power through “criteria for distinguishing better from worse forms of power relations, or, more specifically, relations that promote participants’ political freedom – that is, their capacity to act in ways that affect norms and other political mechanisms defining the field of the possible – from those that approximate states of domination.” CLARISSA RILE HAYWARD, *DE-FACING POWER* 7 (2000).

⁴ HANNA ARENDT, *THE ORIGINS OF TOTALITARIANISM* 325 (1951) (conceptualizing “totalitarianism” as “a means of dominating and terrorizing human beings from within”).

⁵ On law’s channeling effects, see, for example, Lon Fuller, *Consideration and Form*, 41 *COLUM. L. REV.* 799, 799–824 (1941).

⁶ Leslie Green, *Law’s Rule*, 24 *OSGOODE HALL L.J.* 1023, 1026 (1986) (referencing Montesquieu); Judith Shklar, *Political Theory and the Rule of Law*, in *POLITICAL*

not simply as a set of rules, because rules can be manipulated to subvert goals.⁷ As an ideal, the rule of law will never be fully attained given human failings, but that does not make the principle any less important. In this chapter, we focus predominantly on public power, while noting that effective state power also is required to temper the arbitrary exercise of private power, particularly as states delegate and outsource traditional public tasks to private actors.⁸

Ultimately, for the rule of law to become effective, it must be institutionalized as part of a culture of conduct. It must become a *practice*.⁹ It is for this reason that we apply a broader conception of law that includes institutionalized practice.¹⁰ From a socio-legal perspective, the rule of law provides restraints on arbitrary state and private behavior through norms that enable people to reasonably know what is required of them, what is prohibited, what they may do, and what can be done to them, combined

THOUGHT AND POLITICAL THINKERS 21, 24 (Stanley Hoffmann ed., 1998) (“freedom from fear”).

⁷ John Braithwaite, *Rules and Principles: A Theory of Legal Certainty*, 27 *AUSTRALIAN JOURNAL OF LEGAL PHILOSOPHY* 47 (2002).

⁸ See ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT)* (2017); Philip Selznick, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* (1969); Martin Krygier, *The Ideal of the Rule of Law and Private Power*, in *RESEARCH HANDBOOK ON THE POLITICS OF CONSTITUTIONAL LAW* 14 (Mark Tushnet & Dmitry Kochenov eds., 2023). On the outsourcing of public tasks, see JODY FREEMAN & MARTHA MINOW, *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* (2009).

⁹ In this vein, Tamanaha defines the rule of law to mean that “government officials and citizens are bound by and abide by the law.” Brian Tamanaha, *The History and Elements of the Rule of Law*, *SINGAPORE JOURNAL OF LEGAL STUDIES* 232, 233 (2012). As Gerald Postema writes, “law can rule only if a certain *ethos* takes root in the political community . . . [T]he rule of law is robust in a polity only where its members, legal officials and legal subjects alike, take responsibility for holding each other to account under the law.” GERALD J. POSTEMA, *LAW'S RULE: THE NATURE, VALUE, AND VIABILITY OF THE RULE OF LAW* 20 (2022).

¹⁰ Halliday and Shaffer stipulate a meaning of law in processual terms that includes “soft law” and practice in Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS* 1, 6–14 (Terence C. Halliday & Gregory Shaffer eds., 2015) (defining a “transnational legal order” as “a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions”). From this perspective, law includes legislation, judicial decisions, and the practices of officials. Grattet et al. exemplify this approach in studying hate crimes, involving not only the diffusion of state legislation but also the conduct of police officers and prosecutors. Ryken Grattet, Valerie Jenness & Theodore R. Curry, *The Homogenization and Differentiation of Hate Crime Law in the United States, 1978 to 1995*, 63 *AMERICAN SOCIOLOGICAL REVIEW* 286 (1998). In a related vein, see the legal realist Karl Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 *YALE LAW JOURNAL* 1355, 1357 (1940) (referring to “law-ways”).

with the institutionalization of these norms so that they “count as a source of restraint and a normative resource.”¹¹ These restraints facilitate the advancement of multiple social goals.¹² Where institutionalized, the rule of law becomes a habit or routine.¹³

A teleological perspective reasons both forward in terms of an ideal, and backward in light of experience. It is the history of the arbitrary exercise of power, the real experience of abuse, that inspires conceptualization, empirical study, and social intervention. Our study of the rule of law is a legal-realist one, grounded in practice and experience and not in deductive reasoning.¹⁴ Pragmatically, we know the value of the rule of law through historical and contemporary experiences of the arbitrary exercise of power. But our study is also based on a goal and purpose, or – to use the terminology of the pragmatist John Dewey – an “end in view.”¹⁵

Before developing our argument regarding the rule of law from a transnational perspective, some caveats are in order. First, the rule of law is obviously not enough by itself and needs to be understood in relation to other social and institutional goals and practices. People and societies pursue multiple “goods,” including the satisfaction of basic human needs to enhance individual autonomy to make choices. As Michael Oakeshott writes, the rule of law “bakes no bread, it is unable to distribute loaves or fishes.”¹⁶ Yet, the rule-of-law conception used in this chapter has powerful ties to theories of liberty based on furthering people’s real-life capacities. It contributes to a vision (in Amartya Sen’s

¹¹ Krygier, *supra* note 3, at 60.

¹² Tamanaha highlights five “manifest functions” of the rule of law: personal and collective security and trust; the integration of society; legal restrictions on officials; individual liberty; and economic development. Brian Tamanaha, *The Functions of the Rule of Law*, in *THE CAMBRIDGE COMPANION TO THE RULE OF LAW* 221, 221–32 (Jens Meierhenrich & Martin Loughlin eds., 2021). For a parallel functionalist account of the international rule of law, see Simon Chesterman, *An International Rule of Law?*, 56 *AM. J. COMP. L.* 331 (2008) (“tool with which to protect human rights, promote development, and sustain peace”).

¹³ FRANCIS A. ALLEN, *THE HABITS OF LEGALITY: CRIMINAL JUSTICE AND RULE OF LAW* (1996); Halliday & Shaffer, *supra* note 10, at 42–44 (on normative settlement).

¹⁴ Karl N. Llewellyn, *Some Realism About Realism: Responding to Dean Pound*, 44 *HARV. L. REV.* 1222, 1236 (1931) (viewing “law as a means to social ends and not as an end in itself; so that any part needs constantly to be examined for its purposes, and for its effect, and to be judged in the light of both and of their relation to each other”).

¹⁵ John Dewey, *Valuation and Experimental Knowledge*, 31 *PHIL. REV.* 325 (1922); John Dewey, *Theory of Valuation*, 6 *PHIL. SCI.* 490 (1940).

¹⁶ MICHAEL OAKESHOTT, *The Rule of Law*, in *ON HISTORY AND OTHER ESSAYS* 164 (1999).

terms) of “expanding the real freedoms that people enjoy,” thereby expanding their capacity to make choices in furtherance of what they value.¹⁷ People are thus better situated to resist domination, from a republican perspective, and protect their autonomy from the arbitrary exercise of power.¹⁸ The rule of law, in this sense, can be viewed as a complement to other (nonlegal) means of tempering power, and thus as supportive of this broader ideal.

Second, from a critical perspective, the pursuit of the rule of law is also linked to the substance of law. When only the powerful determine law’s substance, adherence to rules is less a matter of choice and more a reflection of power relations. Democratic participation in the determination of law’s substance is thus a necessary complement to rule-of-law ideals.¹⁹ Contestation over the content of rules is a critical dimension of a robust, inclusive society protected by the rule of law.²⁰ The relation of

¹⁷ Sen and Martha Nussbaum define liberty in terms of “capabilities,” such that government has a role in furthering them. For Sen, a person’s capability reflects their “ability to achieve valuable functionings and well-being.” Amartya Sen, *Freedom of Choice: Concept and Content*, 32 *EUR. ECON. REV.* 269, 278 (1988); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 3 (1999); MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 4–15 (2000) (providing an overview of the capabilities approach in general and of the philosophy of Sen and Nussbaum); AMARTYA SEN, *COMMODITIES AND CAPABILITIES* (1985); IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 39 (1990) (“Justice should refer not only to distribution, but also to the institutional conditions necessary for the development and exercise of individual capacities and collective communication and cooperation.”).

¹⁸ PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997).

¹⁹ We conceptualize the rule of law and democracy as complements, while recognizing their overlaps when democracy is conceptualized in constitutional terms. Some theorists incorporate the rule of law in conceptualizing constitutional democracy. See, e.g., AZIZ HUQ & TOM GINSBURG, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* 10 (2018) (defining liberal constitutional democracy in terms of three elements: free and fair elections; core rights related to those elections; and the bureaucratic rule of law, involving independent courts and agencies, particularly as relates to democratic governance). Others incorporate democracy in conceptualizing the rule of law. See, e.g., Mattias Kumm, *Global Constitutionalism and Rule of Law*, in *HANDBOOK ON GLOBAL CONSTITUTIONALISM* 197, 203 (Anthony Lang & Antje Wiener eds., 2017) (representative institutions under free elections); Roberto Gargarella, *Constitutionalism and the Rule of Law*, in *THE CAMBRIDGE COMPANION TO THE RULE OF LAW*, *supra* note 12, at 425.

²⁰ Antje Wiener, *The Rule of Law in Inter-National Relations: Contestation Despite Diffusion – Diffusion Through Contestation*, in *HANDBOOK ON THE RULE OF LAW* 109 (Christopher May & Adam Winchester eds., 2018).

the rule of law to democracy is complex.²¹ Rule-of-law norms can be, and have been, advanced outside of democratic governance to different degrees in certain areas,²² and democratic governments can exercise arbitrary power and claim democratic legitimation to do so. Illiberal democracies have proliferated, as illiberal governments borrow from each other's playbooks to exercise power arbitrarily.²³ Their aim is to use rule-of-law language for their own illiberal ends.

The principles of democracy and the rule of law respond to different but interrelated questions and social problems. The issue of democratic governance poses the question of *who* exercises power. Rule-of-law concerns examine the question of *how* power is exercised.²⁴ Democracy and the rule of law nonetheless are related – even though, at times, in tension – since the rule of law provides a check and counterbalance to the unbridled exercise of power through majority rule. To start, the rule of law is a necessary condition for democracy. It is needed to assure that officials impartially conduct elections and count votes. In addition, the rule of law protects individual autonomy from domination so that citizens may freely participate in public processes that, in turn, affect them. As Jürgen Habermas writes, “on the one hand, citizens can make adequate use of their public autonomy only if, on the basis of their equally

²¹ Cf. TOM GINSBURG, *DEMOCRACIES AND INTERNATIONAL LAW* 21 (2021) (defining the rule of law in bureaucratic administration, focusing on the running of elections, as a component of democracy); Martin Krygier, *Tempering Power*, in *CONSTITUTIONALISM AND THE RULE OF LAW: BRIDGING IDEALISM AND REALISM* 34, 37 (Maurice Adams, Anne Meuswese & Ernst Hirsch Ballin eds., 2017) (would treat the rule of law as the broader concern and address constitutional concerns as falling within it); Corey Brettschneider, *A Substantive Conception of the Rule of Law: Non-Arbitrary Treatment and the Limits of Procedure*, 50 *NOMOS: AM. SOC'Y POL. & LEGAL PHIL.* 52, 57–61 (2011) (commenting on Waldron and conceptually differentiating participation under the rule of law, in terms of reason-giving consistent with citizens' equal status, from participation under democracy).

²² Take, for example, England at the time of the enclosure laws, as captured in E.P. THOMPSON, *OF WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 258–69 (1975), and Singapore today, as captured in JOTHIE RAJAH, *AUTHORITARIAN RULE OF LAW: LEGISLATION, DISCOURSE AND LEGITIMACY IN SINGAPORE* (2012).

²³ Fareed Zakaria, *Illiberal Democracy*, 76 *FOREIGN AFFS.* 22 (Nov./Dec. 1997); Kim L. Scheppelle, *Autocratic Legalism*, 85 *U. CHI. L. REV.* 545 (2018); David Landau, *Democratic Erosion and Constitution-Making Moments: The Role of Transnational Legal Norms*, in *CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER* 234 (Gregory Shaffer, Tom Ginsburg & Terence C. Halliday eds., 2019); ROSALIND DIXON & DAVID LANDAU, *ABUSIVE CONSTITUTIONAL BORROWING: LEGAL GLOBALIZATION AND THE SUBVERSION OF LIBERAL DEMOCRACY* (2021); Alvin Cheung, *Legal Gaslighting*, 72 *U. TORONTO L. REV.* 50 (2022).

²⁴ Martin Krygier, *Democracy and the Rule of Law*, in *THE CAMBRIDGE COMPANION TO THE RULE OF LAW*, *supra* note 12, at 406.

protected private autonomy, they are sufficiently independent,” and “on the other hand, they can arrive at a consensual regulation of their private autonomy only if they make adequate use of the political autonomy as enfranchised citizens.”²⁵ Both constitutional democracy and the rule of law provide institutional checks as moderating mechanisms that disincentivize the exercise of arbitrary power.²⁶ Because they serve as complements, they often rise and decline in parallel, as Part III shows.

Third, there is a long tradition of socio-legal and critical scholarship assessing the role of capital, class, race, and other attributes where law helps to constitute unequal social relations. As Robert Gordon writes, “legal relations . . . don’t simply condition how the people relate to each other but to an important extent define the constitutive terms of the relationship, relations such as lord and peasant, master and slave, employer and employee.”²⁷ For many scholars who criticize the liberal tradition, the rule of law is viewed more in terms of establishing “order” through the legitimating mechanism of law and legal institutions than “justice” in any substantive sense.²⁸ They are rightly wary of how law can mask, normalize, legitimate, and maintain unjust social relations. Within democracies such as the United States, minorities have been systematically subject to greater rule-of-law violations, whether formally under slavery and Jim Crow laws in the eighteenth, nineteenth, and twentieth centuries, or in institutional practices today in criminal, immigration, public health, and other areas of law.²⁹ Similarly, at the international

²⁵ Jürgen Habermas, *On the Internal Relation Between Rule of Law and Democracy*, 3 EUR. J. PHIL. 12, 17–18 (1995). See also JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 453 (William Rehg trans., 1996) (legitimacy as “procedural rationality”). In this vein, Kumm writes: “In the constitutionalist tradition, law actually has the legitimate authority it claims if, and only if, both in terms of the procedure used and results reached it is justifiable in terms of public reasons that those over whom laws claim authority might reasonably accept as free and equals.” Kumm, *supra* note 19, at 202.

²⁶ On the role of incentives, see, for example, Barry Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997).

²⁷ Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 103 (1984). Gordon focuses on law as power in a constitutive sense. For a related approach regarding economic ordering, see KATERINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* (2019).

²⁸ As Tamanaha notes, in the process these ordering mechanisms also empower and enrich lawyers. Tamanaha, *supra* note 12, at 233–34.

²⁹ ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877* (1988); MARGARET BURNHAM, *BY HANDS NOW KNOWN: JIM CROW’S LEGAL EXECUTIONERS* (2022); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); Michele Goodwin, *The*

level, critical scholars assess much of international law as a remnant of colonialism and imperialism.³⁰ Historical studies depict how colonizers exercised power under law to establish order and legitimate rule,³¹ although clearly in violation of this book's conception of the rule of law.³² Those in power in postcolonial states likewise can deploy colonial forms of state control in the name of the rule of law to dominate their populations.³³

These critiques support conceptualizing the rule of law in terms of its *goals* – its point – and differentiating the ends from any particular formal and substantive *means* to attain it. It is thus important to distinguish the “rule of law” from “rule by law” and not collapse them into a single formal concept of “legality.” Governments around the world embrace rule-of-law rhetoric while instantiating a “rule of some groups over others *by* and through the law.”³⁴ “Rule by law” implies that those

Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration, 104 CORNELL L. REV. 899 (2019); MICHELE GOODWIN, *POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD* (2020); DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES – AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022).

³⁰ SUNDHYA PAHUJA, *DECOLONIZING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY* (2011); ANTONY ANGLE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* (2005). As E.H. Carr earlier wrote, “When modern writers on international politics find the highest moral good in the rule of law, we are equally entitled to ask, What law? and Whose law?” E.H. CARR, *THE TWENTY YEARS’ CRISIS, 1919–1939*, at 179 (2d ed. 2001).

³¹ See, e.g., LAUREN BENTON & LISA FORD, *RAGE FOR ORDER: THE BRITISH EMPIRE AND THE ORIGINS OF INTERNATIONAL LAW, 1800–1850* (2018); JENNIFER PITTS, *BOUNDARIES OF THE INTERNATIONAL: LAW AND EMPIRE* (2018).

³² Lisa Ford notes the link between the logic of colonial peacekeeping and domestic rule-of-law violations, in line with this introduction’s central thesis. She writes: “The license of colonial peacekeeping also helped to produce Carl Schmitt’s conviction that the essence of modern sovereignty is the state of exception – the sovereign’s power to exceed and suspend the rule of law.” LISA FORD, *THE KING’S PEACE: LAW AND ORDER IN THE BRITISH EMPIRE* 22 (2022). See also CAROLINE ELKINS, *LEGACY OF VIOLENCE: A HISTORY OF THE BRITISH EMPIRE* 140 (2022) (calling the array of decrees that justified martial law, detention without trial, and collective punishment in the colonies “legalized lawlessness,” using the term “to describe the incremental legalizing, bureaucratizing, and legitimating of exceptional state-directed violence when ordinary laws proved insufficient for maintaining order and control”).

³³ Nick Cheesman, *Rule-of-Law Ethnography*, 14 ANN. REV. L. SOC. SCI. 167, 171 (2018); RAJAH, *supra* note 22, at 26, 43.

³⁴ BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 225 (2006) (emphasis in original); BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 96 (2004). For empirical illustrations, see *RULE BY*

holding the power to make and enforce legal norms do so to regulate and control the population, while those who govern are not themselves subject to the rules that they impose. The rule of law requires that both the governed and those who govern are subject to the same rules so that all are protected from the arbitrary exercise of power. It is distinguished from rule by law both in terms of purpose and consequence. Conceptualizing the rule of law in this way, and differentiating it from rule by law, clarifies how law – whether local, national, or international – can be used for good or ill, can curtail and temper, or support and legitimate, the arbitrary exercise of power.

The rule of law and rule by law are ideal-type constructs. In reality, “arbitrariness comes in degrees,” and practices vary along a continuum.³⁵ State practices vary across issue areas and as regards different populations. Singapore operates as a “dual state,” Jothie Rajah writes, “in that it matches the ‘law’ of the liberal ‘West’ in the commercial arena while repressing civil and political individual rights.”³⁶ In this regard, Singapore, given its economic success, can serve as a model for other authoritarian regimes that wish to attract domestic and transnational investment. Relatedly, Tamir Moustafa and others theorize how authoritarian regimes often provide for pockets of judicial independence for different functional reasons, including for controlling administrative agents.³⁷ The rule of law also can be applied variably to different populations. Michael McCann and Filiz Kahraman document how the US legal system has long operated as a “dual state” for Blacks and other

LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (Tom Ginsburg & Tamir Moustafa eds., 2008).

³⁵ Martin Krygier, *The Rule of Law: Pasts, Presents and Two Possible Futures*, 12 ANN. REV. L. SOC. SCI. 199, 204 (2016).

³⁶ RAJAH, *supra* note 22, at 23. The conception of the dual state begins with Ernst Fraenkel’s work on law in Nazi Germany. Fraenkel writes: “The courts are responsible for seeing that the principles of the capitalist order are maintained – even though the Prerogative State occasionally exercises its right to deal with individual cases in the light of expedience and the special nature of the case at hand.” FRAENKEL, *supra* note 1, at 73.

³⁷ Tamir Moustafa, *Law and Courts in Authoritarian Regimes*, 10 ANN. REV. L. & SOC. SCI. 281 (2014); RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES, *supra* note 34; Melissa Curley, Bjorn Dressel & Stephen McCarthy, *Competing Visions of the Rule of Law in Southeast Asia: Power, Rhetoric and Governance*, 42 ASIAN STUD. REV. 192 (2018); Mark Jia, *Special Courts, Global China*, 62 VA. J. INT’L L. 559, 566 (2022) (noting special courts for intellectual property, finance, internet, and international commercial law, showing how “China’s legal system can be increasingly professional in some ways while remaining lawless in others”).

minorities,³⁸ while Eric Foner describes the United States in the Jim Crow South as “a quasi-fascist polity . . . embedded within a purported democracy.”³⁹ Ji Li similarly assesses variation in rule-of-law protections in China as a function of the issue and parties in a dispute.⁴⁰

A central reason to define the rule of law in terms of goals and practices is the risk of creating formulaic checklists based on specified, formal characteristics. Authoritarians have become proficient in adopting formal institutions deemed important for the rule of law, but which – in practice – serve to subvert it, and replace it with the rule of a particular party, faction, or person that rules by law. Many scholars, moreover, tend to derive these checklists parochially from their own legal traditions – particularly European legal traditions – and not others. Countries can produce quite different sets of rules for regulating social life in furtherance of rule-of-law principles. As Laurence Rosen writes regarding Islamic conceptions of the rule of law: “One need not, therefore, be an unrepentant relativist or a claimant of universal values to nevertheless respect the organizing principles by which others place limits on power and treat one another with that degree of consideration to which they would expect any valid system of law to treat them as well.”⁴¹ Similarly, Makau Mutua stresses that Western concepts should not be simply transplanted to Africa, but rather varying cultural traditions and contexts must be recognized.⁴² There are, in other words, a variety of means to advance rule-of-law goals, adapted to local traditions and conditions.

In practice, one must advance beyond goals to address means. It is at this stage, we maintain, that the concept of the rule of law becomes more contested.⁴³ One way to understand perennial debates over whether to adopt a “thin” or a “thick” concept of the rule of

³⁸ Michael McCann & Filiz Kahraman, *On the Interdependence of Liberal and Illiberal/Authoritarian Legal Forms in Racial Capitalist Regimes . . . The Case of the United States*, 17 ANN. REV. L. & SOC. SCI. 483, 483–503 (2021).

³⁹ Eric Foner, *A Regional Reign of Terror*, N.Y. REV. OF BOOKS, Apr. 26, 2023, at 63, 64 (reviewing MARGARET BURNHAM, *BY HANDS NOW KNOWN: JIM CROW’S LEGAL EXECUTIONERS* (2022)).

⁴⁰ Ji Li, *The Power Logic of Justice in China*, 6 AM. J. COMP. L. 95 (2017).

⁴¹ Lawrence Rosen, *Islamic Conceptions of the Rule of Law*, in THE CAMBRIDGE COMPANION TO THE RULE OF LAW, *supra* note 12, at 86.

⁴² Makau Mutua, *Africa and the Rule of Law*, 23 SUR – INT’L J. ON HUM RTS. 159, 170 (2016) (“these core norms must grapple with Africa’s unique history and be adopted to its historical circumstances to achieve cultural legitimacy”).

⁴³ Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 L. & PHIL. 137, 138–44 (2002); Shklar, *supra* note 6.

law is that scholars turn to different *means* for the protection of the goal of the rule of law. Proponents contend that these thin and thick conceptions provide particular “promise” for attaining rule-of-law ends.⁴⁴ Specifying different means is necessary, but they must be empirically evaluated with the end always in view, and they must be adapted to fit different social conditions and contexts that will vary over time and place.

Many focus on, and argue for, a “thin” concept of the rule of law that views it only in procedural terms. Many legal theorists adopt formal conceptions, such as the law’s generality, equality of application, and certainty. Lon Fuller notably advanced eight elements that constitute conditions for the rule of law (or, in his terms, “excellence toward which a system of rules may strive”). Law should be “general, publicized, prospective, clear, non-contradictory, compliable, consistently applied, and reasonably stable.”⁴⁵ Joseph Raz specified similar principles and divided them into two groups, the first focused on formal standards that provide certainty and predictability to guide action, and the second focused on legal machinery to make the first effective.⁴⁶ These proponents highlight the coordinative and channeling functions of legal norms in providing a framework through which individuals and organizations might orient action, interact, and plan.⁴⁷ They stress, in the words of Raz, that the rule of law’s value lies in “curtailing arbitrary power, and in securing a well ordered society, subject to accountable, principled government.”⁴⁸ The checklists, however, should not define what the rule of law *is*. They rather incorporate important means to achieve

⁴⁴ Compare Jorgen Moller, *The Advantages of a Thin View*, in HANDBOOK ON THE RULE OF LAW, *supra* note 20, at 21, with Adriaan Bedner, *The Promise of a Thick View*, in HANDBOOK ON THE RULE OF LAW, *supra* note 20, at 34, and TOM BINGHAM, THE RULE OF LAW (2010) (including human rights).

⁴⁵ LON L. FULLER, THE MORALITY OF LAW (rev. ed. 1969). Fuller defends, in his words, a “procedural version of natural law.” *Id.* at 96–97. The succinct, quoted summary of Fuller is taken from Charles Sampford, *Reconceiving the Rule of Law for a Globalizing World*, in GLOBALIZATION AND THE RULE OF LAW 9, 14 (Spencer Zifcak ed., 2005).

⁴⁶ See JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 214–19 (1979) (listing eight principles). In a related vein, Chesterman views the rule of law in terms of three essential components: (1) the powers of government can only be exercised through law, (2) the law applies to the state and its officials, and (3) the law must apply equally to all. Chesterman, *supra* note 12.

⁴⁷ Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 48 (2008) (“Law in the first sense requires the existence of certain general norms that serve as a basis of orientation for people’s behavior, as well as a basis for decision by the courts.”). Cf. FRIEDRICH HAYEK, THE CONSTITUTION OF LIBERTY (1960).

⁴⁸ Joseph Raz, *The Politics of the Rule of Law*, 2 INDIAN J. CONST. L. 1, 8 (2008).

rule-of-law goals because, as we argue below, they address key sources of arbitrariness.

It is when the conception of the rule of law includes substantive norms and goals, such as a democratic form of government, participation, deliberation, and individual rights, that it becomes more contested. Leading philosophers and social theorists advance thicker conceptions of the rule of law that vary in their inclusion of substantive issues, such as participatory rights and human rights.⁴⁹ As Gianluigi Palombella puts it, the rule of law cannot “coincide with the mere existence of a legal order.”⁵⁰ Theorists such as Ronald Dworkin, Jeremy Waldron, Jürgen Habermas, and Philip Selznick all incorporate a discursive quality of reason-giving and argumentative justification in their conception of the rule of law.⁵¹ Proponents likewise advance these attributes as important checks on arbitrariness. Indeed, the lack of reason-giving constitutes an important source of arbitrariness, as we explain below.

Going further, Palombella insists that the rule of law requires democracy “paired with fundamental rights.”⁵² Terry Nardin similarly argues that the rule of law should not be confused with the mere existence of laws: “The expression ‘rule of law’ does no intellectual work if any effective system of enacted rules must be counted as law, no matter what its moral qualities.”⁵³ These moral qualities, he insists, must include rights: “The expression ‘rule of law’ . . . should be used only to designate a kind of legal order in which law both constrains decision-making *and protects the moral rights of*

⁴⁹ RONALD DWORKIN, *A MATTER OF PRINCIPLE* 259 (1985) (proposing the ideal of rule as a public conception of individual rights).

⁵⁰ Gianluigi Palombella, *The Rule of Law Beyond the State: Failures, Promises, and Theory*, 7 *INT’L J. CONST. L.* 442, 454 (2009).

⁵¹ Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, 50 *NOMOS: AM. SOC’Y POL. & LEGAL PHIL.* 1, 23 (2011) (“the Rule of Law rests upon: respect for the freedom and dignity of each person as an active intelligence”); Waldron, *supra* note 47, at 58–59 (concept “should emphasize . . . the procedural and argumentative aspects of legal practice”); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 453 (William Rehg trans., 1996) (legitimacy as “procedural rationality”); P. PHILIP SELZNICK, *PHILIPPE NONET & HOWARD M. VOLLMER, LAW, SOCIETY AND INDUSTRIAL JUSTICE* 253 (1969) (“Procedure cannot be ‘due’ if it does not conform to the canons of rational discourse.”).

⁵² Palombella, *supra* note 50 at 461.

⁵³ Terry Nardin, *Theorising the International Rule of Law*, 34 *REV. INT’L STUD.* 385, 394 (2008). *Cf.* Kumm conceptualizing in proceduralist terms “rights enabling individuals to contest” as unjustifiable any infringements of liberty and equality, as well as “the absence of meaningful possibilities to exercise . . . social and economic rights.” Kumm, *supra* note 19, at 203.

those who come within its jurisdiction."⁵⁴ United Nations reports on the rule of law similarly incorporate substantive conceptions, including consistency with "international human rights norms and standards."⁵⁵

More controversially, some World Bank reports have offered definitions of the rule of law that support market-oriented development policies grounded in property rights and contract enforcement.⁵⁶ Secure property and contract rights can be important means to advance the rule of law in that they provide for certainty and predictability and thus protection from power's arbitrary exercise. However, democratically governed societies will differ in how they define property and contract rights. It is important not to tether the concept of the rule of law to a particular form of political or economic ordering, such as a neoliberal model.⁵⁷

Whether one takes a thinner or thicker view of the means to advance the rule of law, the common goal among these conceptions is to oppose arbitrariness. Although we do not incorporate human rights within the definition of the rule of law, there are clear overlaps – such as regards due

⁵⁴ Nardin, *supra* note 53, at 397 (emphasis added). Cf. PAUL GOWDER, *THE RULE OF LAW IN THE REAL WORLD* (2016) (conceptualizing the rule of law in terms of social equality).

⁵⁵ See, e.g., U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004) (rule of law as a "principle of governance in which all persons, institutions, and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards").

⁵⁶ See Erik Jensen, *The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses*, in *BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW* 336 (Eric Jensen & Thomas Heller eds., 2003); Kathryn Hendley, *The Rule of Law and Economic Development in a Global Era*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 605 (Austin Sarat ed., 2004); 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."). Ironically, Chinese conceptions of the rule of law in terms of a private law variant involving the enforcement of contracts and dispute settlement for business sectors resonates with this conception. Karen Alter & Ji Li, *Chinese and Western Perspectives on the Rule of Law and Their International Implications*, in *CAMBRIDGE HANDBOOK ON CHINA AND INTERNATIONAL LAW* 94 (Ignacio de la Rasilla & Cai Congyan eds., 2024).

⁵⁷ Brian Z. Tamanaha, *The Dark Side of the Relationship Between the Rule of Law and Liberalism*, 3 N.Y.U. J.L. & LIBERTY 516 (2008) (tracing classical liberal and neoliberal use of rule-of-law rhetoric to challenge state legislation, from Dicey to Hayek to the World Bank); William C. Whitford, *The Rule of Law*, 2000 WIS. L. REV. 723, 723 ("phrase has been a slogan used for many political purposes").

process rights – and the two are intertwined and complementary in protecting individuals from power’s unbridled exercise.⁵⁸ Critically, the rule of law is a necessary condition and prerequisite for the protection of human rights, just as it is for democracy. If one can persecute individuals with impunity to stay in power, then formal rights lack bite.

From a socio-legal perspective, the ultimate challenge is implementation in practice (the law-in-action), which will be mediated by social institutions and legal culture. Because law is frequently ambiguous, involving the interplay of standards, rules, and exceptions, the application of the rule of law will always be contested. No legal process is “discretion-free” because law’s meaning is mediated through the operation of institutions and interactions involving people.⁵⁹ The rule of law thus should not be confused with the rule of courts or any other institutional means. It is an end that must be pursued through some form of institutionalization, of which courts can be an important exemplar. But any institutional means can be co-opted, abused, and subverted in practice. It is thus essential to keep the end always in view, and never confuse the existence of a particular institutional apparatus with the rule of law.

To develop appropriate means to protect rule-of-law goals, it is best to start with the source (or sources) of the problem – the different sources of arbitrariness.⁶⁰ Theorists define arbitrary power in slightly different ways, but the term generally refers to power that is subject to no constraints and, in particular, is not made to take account of the interests of those subject to it.⁶¹ In this vein, Philipp Pettit writes that an arbitrary act is one that “is chosen or

⁵⁸ We do not include human rights and democracy per se in the definition of the rule of law because we think it mistaken to load the concept with too many substantive requirements in a complex, pluralistic world. Nonetheless, we also conceive of human rights and democracy as important complementary means to temper the arbitrary exercise of power. We thus agree with the Venice Commission of the Council of Europe that the rule of law, democracy, and human rights are “three intertwined and partly overlapping core principles.” COUNCIL OF EUR. VENICE COMM’N, RULE OF LAW CHECKLIST (2016), www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf; see also POSTEMA, *supra* note 9, at 106 (“The two [rule of law and human rights] are interdependent, each having its own nature and function, as it were, but depending on the other to fulfill that function adequately.”).

⁵⁹ See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

⁶⁰ Krygier, *supra* note 35, at 203–05; Martin Krygier, *Tempering Power* (on file with author).

⁶¹ For different conceptions of arbitrariness, see, for example, Samuel Arnold & John R. Harris, *What Is Arbitrary Power?*, 10 J. POL. POWER 1 (2017) (assessing three conceptual formations of arbitrariness, and advocating the latter: (i) power as arbitrary insofar as it is unconstrained; (ii) power as arbitrary insofar as it is uncontrolled by those subject to it; and (iii) power as arbitrary insofar as it is not forced to track the interests of those subject to it).

not chosen at the agent's pleasure. And in particular . . . it is chosen or rejected without reference to the interests, or the opinions, of those affected."⁶² For a dictionary-oriented, legal definition, the tribunal in the case of *Siemens v. Argentina* cites *Black's Law Dictionary* and defines arbitrariness as follows: "In its ordinary meaning, 'arbitrary' means 'derived from mere opinion,' 'capricious,' 'unrestrained,' 'despotic.' *Black's Law Dictionary* defines this term as 'fixed or done capriciously or at pleasure; without adequate determining principle,' 'depending on the will alone,' 'without cause based upon the law.'"⁶³

Building from Krygier, we note five sources of arbitrariness to which different rule-of-law prescriptions respond.⁶⁴ A first, primordial concern is where the wielder of power is not subject, in practice, to the law, its controls and limits.⁶⁵ Authoritarian governments, in particular, violate this first and most critical dimension. They may pack institutions with their friends, or institutional decision-makers will decide in their favor out of fear. Democratic governments can as well, as illustrated by the 2024 US Supreme Court decision in *Trump v. United States*, where the Court granted "absolute" and "presumptive immunity" to the President, respectively for "core constitutional powers" and "official acts."⁶⁶ When

⁶² PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 55 (1997) (developing a republican theory of nondomination).

⁶³ *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/08, Award, ¶ 318 (Feb. 6, 2007) (also citing *The Oxford English Dictionary*). The word "arbitrary" derives from the Latin phrase "ad arbitrium," or "at will." See PHILIP PETTIT, *ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY* 58 (2012) (distinguishing the republican conception of arbitrariness from legality, or mere conformity to rules). The International Court of Justice, in its opinion in *ELSI*, wrote: "Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety." See *Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.)*, Judgment, 1989 I.C.J. 15, ¶ 128 (July 20).

⁶⁴ As we noted earlier, proponents of democracy and human rights also respond to concerns over arbitrariness, which aim to create checks on political decision-makers. The former (democracy) implicates *who* exercises power; and the latter (human rights) creates substantive limits on state prerogatives. We focus on a conception of the rule of law that addresses *how* power is exercised. Together, the three provide complementary means to temper the exercise of unbridled power.

⁶⁵ A polity subject to the rule of law is one where, in Plato's words, "law is master over rulers, and the rulers are slaves to the law." PLATO, *THE LAWS* 156 (Malcolm Schofield ed., Tom Griffith trans., 2016). In contrast, President Richard Nixon famously stated, "when the president does it . . . that means that it is not illegal." *Transcript of David Frost's Interview with Richard Nixon* (1977), *TEACHING AM. HISTORY*, <https://tinyurl.com/5n7dfycj> (last visited Aug. 21, 2024).

⁶⁶ The US Supreme Court held that a President has "absolute immunity" from criminal prosecution for acts, however criminal, when conducted within his "core constitutional

the law does not apply to those who rule, autocrats can attack opponents with impunity. When this dimension is lacking, the rule of law cannot guarantee fair elections and democratic government. The separation of powers and systems of institutional checks and balances are important means to hold rulers to account in support of rule-of-law goals and practices, but they too may be insufficient.⁶⁷

A second source of arbitrariness is where individuals are unable to know and predict how power will be wielded over them. It is because of these risks that many theorists define the rule of law in terms of known, nondiscriminatory, relatively stable, prospective, consistently applied rules. These attributes are important for all areas of law, but they are particularly important for criminal law and the application of sanctions. Individuals then can plan their lives with reasonable certainty and predictability regarding the law, and thus be less subject to coercion. It is this source of arbitrariness that inspired theorists such as Hayek, Fuller, and Raz, as well as the broader *Rechtsstaat* tradition.⁶⁸ These attributes contribute to greater social trust, facilitating cooperation.

A third source of arbitrariness is where individuals have no place to be heard, inform, question, or respond to how power is exercised over them. Due process assured by impartial institutions is critical for the protection of the rule of law. Raz highlights the importance of institutional machinery, and Waldron the need for contestation, to ensure the rule of law. If citizens have no place to contest decision-making and no institutional mechanism to access justice, the exercise of public power becomes less

powers,” and “presumptive immunity” for all other “official act(s).” *Trump v. United States*, 144 S. Ct. 2312, 2327, 2331 (2024). As Justice Sotomayor wrote in dissent: “The Court effectively creates a law-free zone around the President In every use of official power, the President is now a king above the law.” *Trump v. United States*, 144 S. Ct. 2312, 2731 (2024) (Sotomayor, J., dissenting). In a related vein, Trump himself wrote: “I have the absolute right to PARDON myself.” Jeannie Suk Gersen, *The Dangerous Possibilities of Trump’s Pardon Power*, *NEW YORKER* (Dec. 3, 2020), www.newyorker.com/news/columnists/the-dangerous-possibilities-of-trumps-pardon-power.

⁶⁷ Justice Brandeis wrote in dissent regarding the President’s removal power: “The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power.” *Myers v. United States*, 272 U.S. 52, 293 (1926).

⁶⁸ Carl Schmitt, in contrast, theorized law in terms of “who decides on the exception.” Since the exception is always available, law is without normative constraint, and the concept of the rule of law is illusory, a mask for the “will to power.” WILLIAM E. SCHEUERMAN, *CARL SCHMITT: THE END OF LAW* 34 (1999).

subject to controls, and decision-makers face fewer incentives to act in a nonarbitrary manner.⁶⁹

A fourth source of arbitrariness, articulated by Habermas and Selznick among others, is where authorities do not engage in public reason-giving in issuing their decisions, which reasons then can be contested, including before judicial, political, and administrative processes. One may, and indeed will, often disagree with the reasons given, but the very practice of public reasoning can provide important constraints on power's arbitrary exercise. Under the rule of law, in Justice Brandeis's words, "deliberative forces prevail over the arbitrary."⁷⁰

A fifth source of arbitrariness is the proportionality of any measure in terms of the reasonable relationship of means and ends.⁷¹ Decision-makers may create clear rules and provide access to courts but apply sanctions that are clearly disproportionate to the offense. Any restrictive measure should be grounded and justified as regards its proportionate relation to a public goal.

These five sources of arbitrariness all call for institutional checks. Different "thin" and "thick" conceptions of the rule of law respond to these concerns. These conceptions have given rise to numerous rule-of-law "checklists,"⁷² which are important, but only provided that the focus remains on the goal and actual practices. In this chapter, we thus conceptualize legal and institutional attributes advanced by theorists as important *means* to respond to the above sources of arbitrariness, as opposed to the definition of the rule of law itself.

Because sources of arbitrariness differ, rule-of-law protections can decline or improve along different dimensions in different substantive areas, as documented in the literature on dual states. For example, many authoritarian regimes create rule-of-law protections in commercial and administrative law to attract investment and spur economic growth. In contrast, they do not subject themselves to the law when that would threaten their hold on power. A key test for the rule of law thus lies in the

⁶⁹ Governments may attempt to create "legal black holes" to avoid public scrutiny of their actions, such as the United States in detaining without trial "enemy combatants" offshore in Guantanamo Bay. See DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN THE TIME OF EMERGENCY* 1–3 (2006).

⁷⁰ *Whitney v. California*, 274 U.S. 357, 375 (Brandeis, J., concurring).

⁷¹ Alec Stone Sweet & Jud Mathews, *Proportionality, Balancing, and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72 (2008).

⁷² See, e.g., COUNCIL OF EUR. VENICE COMM'N, *supra* note 58.

civic and political domains to constrain governments from engaging in repression to maintain power.

In the end, any meaningful understanding of the rule of law must be based on cultures of practice embedded in rule-governed institutions. To quote Nicholas Barber, “the rule of law amounts to a normative demand, a requirement that a certain set of mechanisms for the coercion and regulation of law is desirable.”⁷³ Implementing this goal will give rise to variation, in reflection of different traditions, circumstances, and ideologies.⁷⁴ In this vein, Fuller rightly maintained that pursuit of the rule of law is ultimately a “practical art” of developing institutions.⁷⁵ We thus must turn from the question of goals to the question of means. We must address the question of *how to* – or, as Nicola Lacey writes, “how to develop legal arrangements capable of constraining abuses of power and of addressing such abuses.”⁷⁶ The means entail different forms of checks on power’s uncontrolled exercise.

II The International Rule of Law from a Transnational Perspective

Many are skeptical about transporting the rule-of-law concept to international law. To start, many note the relatively “primitive” nature of international law in international relations, especially given the lack of institutions to enforce compliance.⁷⁷ Simon Chesterman, for example, cites the early rule-of-law theorist Dicey, who suggests international law is “miscalled” law and rather involves “rules of public ethics.”⁷⁸ International relations realists continue in this vein, arguing that international law is epiphenomenal and reflects the interests of powerful states. From this vantage, international law still can be useful for purposes

⁷³ NICHOLAS BARBER, *THE PRINCIPLES OF CONSTITUTIONALISM* 85 (2018).

⁷⁴ Taking a pluralist approach, Meierhenrich calls them “social imaginaries” that vary as a function of time and place. Jens Meierhenrich, *What the Rule of Law Is . . . and Is Not*, in *THE CAMBRIDGE COMPANION TO THE RULE OF LAW*, *supra* note 12, at 569.

⁷⁵ FULLER, *supra* note 45, at 91. Cf. PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* 53 (2017) (“The rule of law is better understood as a distinctive institutional system than as an abstract ideal.”).

⁷⁶ Nicola Lacey, *Philosophy, Political Morality and History: Explaining the Enduring Resonance of the Hart-Fuller Debate*, 83 N.Y.U. L. REV. 1059, 1072 (2008).

⁷⁷ See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 227 (2d ed. 2012) (1961). Rawls takes this approach in applying his theory of justice at the international level. JOHN RAWLS, *THE LAW OF PEOPLES* (1999).

⁷⁸ Chesterman, *supra* note 12, at 358 (citing Dicey).

of interstate coordination and cooperation, but powerful states will ignore it when it does not advance their interests.⁷⁹

The political scientist Ian Hurd maintains that one can still conceptualize the international rule of law from an international relations perspective, but one must do so distinctly in terms of the role of “law talk.” For Hurd, international law involves a practice of argumentation in which actors use international law strategically to justify state behavior, which he calls “lawfare.”⁸⁰ Powerful states “have the greatest influence over the design of international rules and the greatest capacity to both deploy and evade them.”⁸¹ They seek to justify their conduct by offering self-serving interpretations of international law, and those interpretations shape “future readings of the law.”⁸² For these reasons, third world approaches to international law (TWAIL) point to the biases in international law structures and practices that advantage powerful states and powerful constituencies within them.⁸³ They nonetheless stress the need and potential for international law.⁸⁴

We see no reason to create a distinct conception of the “international rule of law.” Rather, we maintain that the concept of the rule of law ultimately addresses the relation of authorities to individuals,⁸⁵ but that

⁷⁹ JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

⁸⁰ The term “lawfare” was prominently used in response to those contesting the George W. Bush administration’s policies following the September 11, 2001, terror attacks. For an early use of the term, see, for example, CHARLES DUNLAP, *LAW AND MILITARY INTERVENTIONS: PRESERVING HUMANITARIAN VALUES IN 21ST CENTURY CONFLICTS* (2001).

⁸¹ IAN HURD, *HOW TO DO THINGS WITH INTERNATIONAL LAW* 11 (2017).

⁸² *Id.* at 52.

⁸³ B.S. Chimni, *Legitimizing the International Rule of Law*, in *THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW* 290 (James Crawford & Martti Koskeniemi eds., 2015).

⁸⁴ James Gathii, *The Promise of International Law: A Third World View*, 36 *AM. U. INT’L L. REV.* 378 (2021).

⁸⁵ Cf. Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 *EUR. J. INT’L L.* 315, 341 (2011) (rule of law “requirements apply to the state for the sake of the well-being, liberty, and dignity of individuals”); Carmen Pavel, *The International Rule of Law*, 23 *CRIT. REV. INT’L SOC. & POL. PHIL.* 332, 334–47 (2020) (contending that the goal of an international rule of law is “the protection of individual and state autonomy,” but viewing state autonomy as “valuable to the extent it protects individual autonomy”). Brian Tamanaha conceptualizes the rule of law in terms of legality, “when government officials and legal subjects are bound by and abide by law,” and he thus maintains that the concept applies to interstate relations. See Chapter 2. We do not adopt a conception of the rule of law in terms of legality in light of the history of law’s deployment for purposes of domination, as in the history of colonialism and slavery. Nonetheless, we concur with Tamanaha on international law’s importance

international law's horizontal dimension of governing interstate relations is critical directly and indirectly for protecting individuals from power's arbitrary exercise. We thus retain our conception of the rule of law in terms of goals – to protect individuals from arbitrary power through legal rules and institutionalized practices, while providing channels for cooperative and coordinative activities. We nonetheless contend that international law is critical for advancing the rule of law in multiple direct and indirect ways that affect individuals and societies. At a minimum, the recognition of state boundaries and prohibition of the use of force except in self-defense helps ensure international peace and reduce the violence of war, thus protecting individuals and communities from power's arbitrary exercise in war. Going further, states can be viewed as agents or trustees in advancing rule-of-law goals, and not simply as subjects and beneficiaries of international law. International law creates norms, institutions, and mechanisms that aim to protect individuals from arbitrary power, whether directly or indirectly. At the same time, international institutions, multinational companies, and foreign states can wield power arbitrarily in ways that affect individuals. International law is thus critical for tempering their unbridled exercise of power as well.

Our assessment of the role of international law and institutions in advancing rule-of-law goals and practices is a *transnational* one. It incorporates international law and institutions within dynamic processes that implicate rule-of-law concerns within and across states, affecting individuals and societies. From a transnational perspective, we contend that international norms and institutions are important for protecting individuals from the arbitrary exercise of power. However, they also can advance the rule of the powerful by and through law. They thus also must be subject to critical scrutiny and transnational checks.

We build a socio-legal theory of the relation of international law and institutions to the rule of law conceptually and apply it empirically. As we will see in Part III, in an interconnected world trends regarding rule-of-law protections are transnational in scope. They involve shifting norms,

from a rule-of-law perspective in terms of the indirect and direct protections of individuals from power's arbitrary exercise that it can provide. In this vein, Tamanaha writes: "Protections for state sovereigns . . . are and should be included within the benefits of the international rule of law *for the good of individuals* in societies around the world." *Id.* We agree and use similar examples as Tamanaha to make our point, such as Russia's violation of basic norms in invading Ukraine and its implications for individuals and communities.

institutions, and practices at the local, national, and international levels. These developments are often enmeshed; they interact and recursively implicate international law and institutions, and, in turn, are implicated by them. Following World War II, and, more saliently, following the collapse of the Soviet Union and the end of the Cold War in the early 1990s, international law shifted from “classical Charter-based international law with its emphasis on state-oriented principles and underdeveloped human rights obligations towards a more value-based order which is actually capable of protecting and serving individuals,” including from the arbitrary exercise of power.⁸⁶ Rule-of-law norms and institutions became more salient around the globe, both in discourse and in actual practices.⁸⁷ The empirical question arises as to whether these trends are now in reverse, such that there are cycles in which rule-of-law norms advance and retreat at both the national and international levels.

To assess these trends, one should place international and national law and institutions within a single analytic frame in dynamic relationship with each other. Halliday and Shaffer conceptualize these processes in terms of “transnational legal ordering” that can give rise to the settlement and unsettlement of legal norms as part of “transnational legal orders” (TLOs) in different substantive domains.⁸⁸ TLOs are normative orders that implicate law and legal practice across and within multiple national boundaries. They consist of working equilibria of relatively settled legal norms and practices that can vary in their substantive and geographic reach. Halliday and Shaffer define them as “a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions.”

Transnational legal ordering arises out of the transnational framing and understanding of a social problem, which catalyzes actors to seek a resolution through law. Such problems affect all areas of social life and range from global warming to a lack of capital for economic development

⁸⁶ Heike Krieger & Georg Nolte, *The International Rule of Law – Rise or Decline? – Approaching Current Foundational Challenges*, in *THE INTERNATIONAL RULE OF LAW: RISE OR DECLINE?* 3, 12 (Heike Krieger, Georg Nolte & Andreas Zimmermann eds., 2019). Cf. ANNE PETERS, *BEYOND HUMAN RIGHTS: THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW* 8 (2016) (“The individual has become a primary subject (person) of international law.”).

⁸⁷ See, e.g., Chapters 3 (on global trends over time), 10, and 13.

⁸⁸ See generally *TRANSNATIONAL LEGAL ORDERS*, *supra* note 10.

to the exercise of arbitrary state power. TLO theory thus concurs with viewing the rule of law as a solution concept – as a response to a problem, the problem of the arbitrary exercise of power.

Transnational legal ordering entails dynamic processes that lead to the settlement and unsettlement of legal norms. Various facilitating circumstances and precipitating events catalyze lawmaking and changing practices at different levels of social organization, which, in turn, interact in a recursive manner over time. Different factors drive these processes at the transnational, national, and local levels. These factors include diagnostic struggles over the nature of the problem, actor mismatch between the codifiers and implementers of legal norms, indeterminacies in the law, and ideological tensions and contradictions within the norms.⁸⁹ Where certain mechanisms are ineffective, actors may develop new tools. Where new tools are operationalized, actors may seek new ways to harness or thwart them. Through these processes, transnational legal orders can become more or less settled and institutionalized, varying in their geographic and substantive scope, including but not limited to regions. These legal orders also can vary in their alignment with an underlying problem, whether addressing it directly or only tangentially, or addressing all or only a part of it.⁹⁰ For example, the legal order could address a broad definition of the problem (climate change) or narrower ones (such as the regulation of air transport, cargo ships, or energy infrastructure). Legal orders also may overlap and be in competition, as illustrated by advocates contesting the primacy of intellectual property and public health legal orders regarding access to medicines, or of anti-terrorism and national security law in light of due process requirements. Over time, transnational legal orders may rise, transform, and fall as legal norms settle and unsettle transnationally.

⁸⁹ Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112 AM. J. SOCIO. 1135 (2007) (on the concept of recursivity of law and practice); Halliday & Shaffer, *supra* note 10, at 37–42. The argument that international law is not a fixed set of rules but rather a recursive process echoes Sandholtz, who foregrounds the inherent dynamism of international norm systems. International law constantly evolves as “[a]ctors argue about which norms apply and what the norms require or permit.” WAYNE SANDHOLTZ, PROHIBITING PLUNDER: HOW NORMS CHANGE 10 (2007); see also Wayne Sandholtz, *Explaining International Norm Change*, in INTERNATIONAL NORMS AND CYCLES OF CHANGE 1, 13–15 (Wayne Sandholtz & Kendall Stiles eds., 2009).

⁹⁰ Halliday & Shaffer, *supra* note 10.

Our use of TLO theory in this book departs slightly from the way we have deployed it in the past. In the past, Halliday, Shaffer, and their collaborators viewed legal concepts in terms of how actors at different levels of social organization – ranging from the international to the national and local – framed problems and gave legal concepts meaning through recursive processes. In this way, they examined how legal norms develop, settle, unsettle, and change transnationally, such that their substantive meaning may alter, obscure, or become taken for granted. For example, Shaffer earlier conceptualized “transnational law” from a socio-legal perspective in terms of the “transnational construction and flow of legal norms,” “in which transnational actors, be they transnational institutions or transnational networks of public or private actors, play a role in constructing and diffusing legal norms, even if the legal norm is taken in large part from a national legal model.”⁹¹

Had we taken this approach, we would study how the meaning of the “rule of law” changes over time transnationally, settling and unsettling in practice in ways that transcend national boundaries. Such an approach would have applied a “phenomenological” conception of the rule of law, as developed elsewhere by Jens Meierhenrich⁹² and applied by Jothie Rajah, who examined different transnational rule-of-law scripts developed by the World Bank, United Nations, and World Justice Project.⁹³ In this introductory chapter, in contrast, we define the rule of law as a principle and practice (*constraints on the arbitrary exercise of power by setting boundaries on, and channeling, power’s exercise*), and we then assess the extent to which the principle and practice are under serious challenge today. This principle (or meta-principle) implicates law’s practice across substantive domains. We still assess changes in legal practice transnationally, but here we do so in light of a principle that we define in terms of goals and practices in response to different sources of arbitrariness. Both approaches (phenomenological and normative) are important for empirical investigation, critique, and policy responsiveness to different social and political contexts.

⁹¹ Gregory Shaffer, *Transnational Legal Process and State Change*, 37 L. & SOC. INQUIRY 229, 235 (2012).

⁹² Meierhenrich, *supra* note 74, at 494–512 (citing UNCTAD, *WORLD INVESTMENT REPORT 2018*, at 95 (2018)).

⁹³ Jothie Rajah, “Rule of Law” as *Transnational Legal Order*, in *TRANSNATIONAL LEGAL ORDERS*, *supra* note 10, at 340; Terence C. Halliday & Gregory Shaffer, *Researching Transnational Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS*, *supra* note 10, at 475, 494–95.

In this Part II, we assess the direct and indirect relation of international law and institutions to rule-of-law goals and practices as we have defined them. We contend that, in an interconnected world, the rule of law should be viewed as a normative social order that involves the horizontal, vertical, and transversal interaction of domestic and international law, which, in turn, reciprocally affect each other.⁹⁴ Any equilibrium at the international, national, or local level will be subject to influence by norms that are conveyed, settle, and unsettle transnationally.

International law and institutions implicate rule-of-law protections for individuals in the following three ways. First, from a minimalist perspective, international law and institutions can help to secure international peace, which ultimately affects individuals and societies. Second, international law and institutions can indirectly affect domestic rule-of-law practices in relation to individuals. National law often incorporates international law; national courts and other bodies may reference it; and national actors may otherwise harness it, including to protect rule-of-law concerns. Third, international law and institutions can directly grant rights to individuals and impose duties on national governments, international institutions, and private actors.

In each case, we note how international law can either support rule-of-law practices or undermine them. As law generally, it can validate practices of freedom or of domination, which is why it is important to differentiate the concept of rule of law from that of rule by law. Because international law is part of larger, transnational, norm-making processes, one should assess interactions between international, national, and local norms, institutions, and practices that implicate the rule of law. Figure 1.1 captures these processes of interaction as regards anti-terrorism and due process norms at different levels of social organization, which we further address below.

⁹⁴ Halliday & Shaffer, *supra* note 93. For an assessment of such interactions from a legal perspective, in complement to this book's socio-legal one, see *THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS: CONTESTATIONS AND DEFERENCE* (Machiko Kanetake & Andre Nollkaemper eds., 2016). On the transnational interaction of global and regional human rights bodies, see Yuval Shany, *The Interplay Between the Global and the Regional*, in *OXFORD HANDBOOK ON COMPARATIVE HUMAN RIGHTS LAW* (Neha Jain & Mila Versteeg eds., forthcoming).

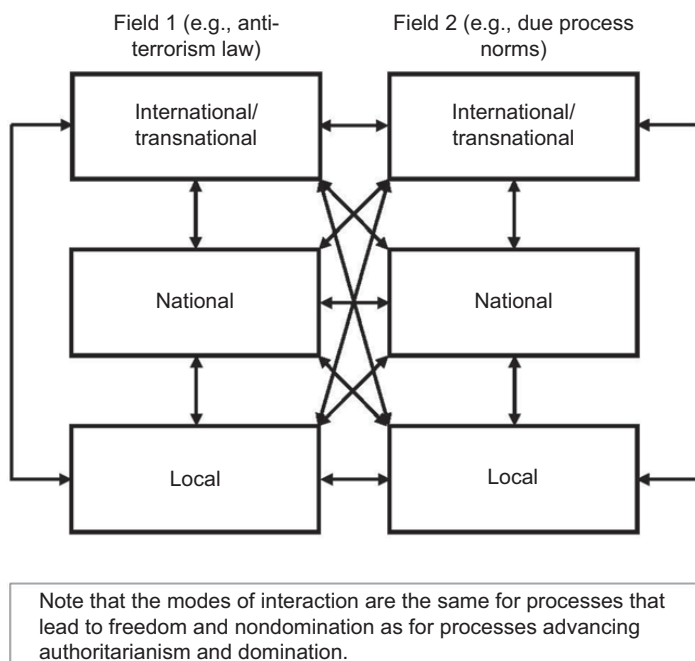


Figure 1.1 The transnational web of rule-of-law interactions.

1 *Minimalist Perspective of Rule of Law for Nonviolence, Peace, and Public Order*

The rule of law links analytically with the concept of peace by stressing the use of law to resolve conflicts in lieu of unbridled coercion and violence. At the international level of interstate relations, one of the core features of a “liberal international order” is the creation of multilateral institutions for the resolution of disputes under international law, thereby enhancing the security of states and their constituents.⁹⁵ There is no greater risk of arbitrary power exercised over individuals than the violence of war. As the philosopher Bernard Williams writes, the “Hobbesian question” of securing “order, protection, safety, trust, and the conditions of cooperation” is the “first” political question: “[S]olving it is the condition of solving, indeed posing, any others.”⁹⁶ It is for this reason that Steven Ratner prioritizes international law’s

⁹⁵ David A. Lake, Lisa L. Martin & Thomas Risse, *Challenges to the Liberal Order: Reflections on International Organization*, 75 INT’L ORG. 225, 225–57 (2021).

⁹⁶ Bernard Williams, *Realism and Moralism in Political Theory*, in IN THE BEGINNING WAS THE DEED: REALISM AND MORALISM IN POLITICAL ARGUMENT 3 (Geoffrey Hawthorn ed., 2005).

potential in providing a “pillar of peace” as a core aspect of theorizing international law in terms of justice.⁹⁷ The same is true as regards the rule of law. In a “thin” sense, international law is foundational to political order. It supports the maintenance of secure political communities and thus enhances the prospects of rule-of-law protections for these communities’ members.⁹⁸ Simply put, war and the immediate threat of war subject individuals and communities to increased risks of coercion and violence, whether by a foreign state, their own state, or nonstate actors. Practically, international law can protect, and has protected, individuals and communities from power’s arbitrary exercise.⁹⁹

Relatedly, from a transnational perspective, democratic peace theory provides powerful evidence that democracies grounded in the rule of law are less likely to go to war against each other than are authoritarian states, the latter being more likely to go to war against both each other and democratic states.¹⁰⁰ Where democratic norms grounded in the rule of law diffuse transnationally, the prospect of peace should increase, giving rise to “security communities.”¹⁰¹ These communities may be tied together through shared norms and broader legal orders that become institutionalized, particularly at the regional level.¹⁰² These two

⁹⁷ STEVEN R. RATNER, *THE THIN JUSTICE OF INTERNATIONAL LAW: A MORAL RECKONING OF THE LAW OF NATIONS* (2015) (focusing first on the “pillar of peace” in terms of the absence of armed conflict); HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 440 (2011) (international rule of law as an “instrument of preserving peace”).

⁹⁸ As Postema writes, “In the modern world, states are the sites of more or less integrated political communities, and well-ordered political communities realize to varying extents the value of membership [T]ransnational peace and security and international cooperation among states . . . are important for rule of law purposes because they also underwrite and secure the efforts of political communities to provide the good of membership.” POSTEMA, *supra* note 9, at 329.

⁹⁹ OONA A. HATHAWAY & SCOTT SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* (2017).

¹⁰⁰ See, e.g., BRUCE RUSSETT & JOHN R. ONEAL, *TRIANGULATING PEACE: DEMOCRACY, INTERDEPENDENCE, AND INTERNATIONAL ORGANIZATIONS* (2000); MICHAEL DOYLE, *LIBERAL PEACE: SELECTED ESSAYS* 4 (2012) (referring to states “founded on such individual rights as equality before the law, free speech and other civil liberties, private property, and elected representation” and notably “freedom from arbitrary authority”). For a precursor, see IMMANUEL KANT, *PERPETUAL PEACE: A PHILOSOPHICAL SKETCH* (1795). Cf. Christopher Layne, *Kant or Cant: The Myth of the Democratic Peace*, 19 *INT’L SECURITY* 5 (1994).

¹⁰¹ EMMANUEL ADLER & MICHAEL BARNETT, *SECURITY COMMUNITIES* (1998) (writing from a constructivist perspective).

¹⁰² International organizations with mostly democratic member states are significantly more likely to contribute to the peaceful resolution of disputes than those with fewer

perspectives – democratic peace theory and transnational diffusion of norms – can be combined to show how rule-of-law norms at the national and international levels mutually and recursively support each other to enhance the prospects of peace and nonviolence, and thus reduce the likelihood of arbitrary power inflicted on individuals.

The international institutions created in the decades after World War II, at a minimum, provided rules for governing interstate relations and reducing the risk of armed conflict. One of the goals of promoters of the United Nations and its family of specialized international organizations was to ensure peace among states. The UN Charter prohibits the use of force – and thus war – to settle international disputes other than for self-defense against an armed attack (Article 51) or when authorized by the UN Security Council (Article 42). Regional regimes developed in parallel, with the aim of not only preserving peace within the region but also promoting nonviolent, law-governed, democratic transitions within states. After the end of the Cold War, international institutions grew in prominence. The UN Security Council has never lived up to its purpose under the UN Charter of ensuring “the maintenance of international peace and security.” Following the end of the Cold War, it reached consensus in a few prominent cases, giving rise to interventions, including to promote peace and security in post-conflict settings. Most notably, the Security Council authorized interventions in Iraq in 1991 following Iraq’s invasion of Kuwait (Resolution 688), in Bosnia in 1992 (Resolution 770), in Somalia in 1992 (Resolution 794), in Haiti in 1994 (Resolution 940), and in Afghanistan in 2001 (Resolution 1386). Regional organizations in Africa – ECOWAS and the African Union – even acquired the authority to intervene militarily in their member states to uphold law-governed, democratic transitions.

Among the core aims of international courts and other institutions is the peaceful resolution of disputes. The International Court of Justice (ICJ) offers a general-purpose mechanism for resolving disputes when states grant it jurisdiction. Counterfactually, without the ICJ and other international tribunals, it would be more difficult for states to peacefully resolve disputes.¹⁰³ Take, for example, international boundary disputes. The ICJ has been particularly effective in peacefully resolving disputes in this area, complemented by the Permanent Court of Arbitration (PCA)

democracies. John Pevehouse & Bruce Russett, *Democratic International Governmental Organizations Promote Peace*, 60 INT’L ORG. 969 (2006).

¹⁰³ Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229 (2004).

Table 1.1 *Compliance with international court decisions on land and sea borders*

	Compliance	Partial compliance	Noncompliance	Total cases
ICJ	26	7	4	37
PCA	7	0	4	13
ITLOS	3	0	0	3
Total	38	7	8	53

and the International Tribunal for the Law of the Sea (ITLOS). From 1951 to 2021, there were 53 boundary disputes decided by international tribunals, comprising 22 land boundary disputes, 19 maritime boundary disputes, and 12 disputes involving land and sea questions. As shown in Table 1.1, the ICJ decided 37, the PCA 13, and ITLOS 3 in total.¹⁰⁴ Overall, states complied either fully or partially with 45 (around 85 percent) of these judgments.

The ICJ is complemented by other general purpose and specialized international tribunals. For example, the World Trade Organization (WTO) provides a legalized system for resolving trade disputes. Without it, trade wars are much more difficult to restrain, since tit-for-tat retaliation can lead to greater distrust and conflict, as evidenced both by the tariff and currency wars of the 1930s and the US–China trade war launched by the Trump administration in 2018 as the United States blocked appointments to the WTO’s Appellate Body. Indeed, US Secretary of State Cordell Hull believed that “economic blocs of the 1930s, practiced by Germany and Japan but also Britain, were the root cause of the instability of the period and the onset of the war.”¹⁰⁵ Among the aims of international investment arbitration is to resolve disputes over the treatment of aliens and their property that earlier had led to

¹⁰⁴ Authors’ count from the databases of the three tribunals and a review of post-judgment responses. In addition, there were two PCA cases, one in 1909 and the other in 1914, but we do not include these in the table given our focus on the legal order that arose after World War II. The ICJ was created in 1945, succeeding the earlier Permanent Court of International Justice, and it heard its first case, *Corfu Channel*, in 1947, issuing its decision on the merits in 1949. For earlier work, see *id.*

¹⁰⁵ JOHN IKENBERRY, *AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS 176–77* (2000); 1 CORDELL HULL, *THE MEMOIRS OF CORDELL HULL* 81 (1948) (“unhampered trade dovetailed with peace; high tariffs, trade barriers, and unfair economic competition, with war”).

armed interventions. Although the investment law regime is subject to significant critique from a rule-of-law perspective, the illegality of the use of force to protect citizens' property claims abroad represents, at a minimum, a significant advance.

Other international and regional fora provide jurisdiction for a range of disputes within their competence. The European Union (EU) provides a regional model. In this case, the EU and its predecessor organizations, starting with the European Coal and Steel Community, tied a powerful state (Germany) to a regional economic integration project with the aim of ensuring peace within Europe. Alec Stone Sweet analogously conceptualizes the European Court of Human Rights (ECtHR) under the Council of Europe as a Kantian "cosmopolitan legal order" advancing "Kant's blueprint for achieving Perpetual Peace."¹⁰⁶ These international institutions provide settings in which states can air their differences and resolve them through law and third-party institutions.

Global threats other than war affect the security of borders. Most saliently, there are the increasing risks posed by climate change, which have led to severe droughts and storms, cataclysmic fires and flooding. These threats can spur new interstate conflicts, whether over access to scarce water from shared lakes and river systems or because internal upheaval spills over borders, increasing the risks of power's arbitrary exercise. International cooperation is required to address the underlying causes of climate change, since one state's efforts go to naught if greenhouse gas-intensive production shifts elsewhere and other states take no action. International law and institutions can facilitate such cooperation, such as through binding rules, reciprocal pledges, and the generation of funding to address climate change risks. As with international law aimed at reducing the risks of war, international law and institutions addressing climate change also can indirectly support rule-of-law goals by reducing the underlying risks of power's arbitrary exercise.

Yet, international law and institutions also can support invasions and facilitate domination by powerful states over others. The 1884–85 Berlin Conference carved up Africa, which authorized King Leopold's brutal exploitation of the Congo. The League of Nations' and United Nations' mandate and trusteeship systems served to legitimate Western nations' continued rule over their colonies, with the UN Trusteeship Council

¹⁰⁶ ALEC STONE SWEET & CLARE RYAN, *A COSMOPOLITAN LEGAL ORDER: KANT, CONSTITUTIONAL JUSTICE AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2018). See also Harold Koh, *The Trump Administration and International Law*, 56 WASHBURN L. J. 413, 467 (2017) (referencing a "Kantian postwar system").

continuing to operate until 1994 when the last trusteeship territory, the island of Palau, became independent from the United States. Powerful states remain dominant in shaping and enforcing international law today, as reflected in the veto powers of the five permanent members of the UN Security Council. The fact that these nations can block the application of any measure as applied to themselves when they violate the UN Charter and invade other countries undermines the rule of law – the first source of arbitrariness discussed earlier. Moreover, when the Security Council authorizes action, there is no international court or other institution to hold it, or countries acting under its authorization, accountable. For example, US and NATO excesses in enforcing a Security Council resolution for a “no-fly zone” in Libya in 2011 led to the overthrow of the Qaddafi regime, and increased insecurity, suffering, and mass violence in that country.¹⁰⁷ In theory, interventions authorized by international institutions or referencing international law can reduce violence and conflict, but they also can worsen situations, rendering individuals more vulnerable to violence and arbitrary power.¹⁰⁸ Rule-of-law norms thus must apply to international institutions themselves.¹⁰⁹

Powerful actors also reference international law to authorize invasions that can lead to increased violence. For example, human rights claims helped frame the creation of a “responsibility to protect” doctrine, which can serve to justify “humanitarian interventions” and thus armed conflict in the name of human rights enforcement.¹¹⁰ President Putin’s rhetoric to legitimize Russia’s 2022 invasion of Ukraine in the name of “humanitarian intervention” illustrates how powerful actors deploy humanitarian rhetoric and international law for self-interested reasons. Russia’s veto of a Security Council resolution calling on it to halt its attacks and withdraw

¹⁰⁷ Phyllis Bennis, *Lessons from NATO’s Last No-Fly Zone*, FOREIGN POL’Y IN FOCUS (Mar. 29, 2022), <https://fpif.org/lessons-from-natos-last-no-fly-zone/>; Alan J. Kuperman, *A Model Humanitarian Intervention? Reassessing NATO’s Libya Campaign*, 38 INT’L SECURITY 105 (2013) (“The intervention extended the war’s duration about sixfold; increased its death toll approximately seven to ten times; and exacerbated human rights abuses, humanitarian suffering, Islamic radicalism, and weapons proliferation in Libya and its neighbors.”).

¹⁰⁸ SIMON CHESTERMAN, *JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW* (2001); Tom Ginsburg, *In Defense of Imperialism? The Rule of Law and the State-Building Project*, in GETTING TO THE RULE OF LAW 224 (James Fleming ed., 2011). UN peacekeepers are to step in when states “fail.” In these cases, they directly assume rule-of-law responsibilities.

¹⁰⁹ See Chapter 6.

¹¹⁰ MARK MAZOWER, *GOVERNING THE WORLD: THE HISTORY OF AN IDEA: 1815 TO THE PRESENT* ch. 13 (2012).

from Ukraine illustrates how the Council's permanent members block the application of international law against themselves.

2 *Indirect Processual Links Supporting Rule-of-Law Practices within States*

International institutions and international law are important for norm-making, oversight, assessment, and funding of rule-of-law initiatives that indirectly affect institutional practices within states.¹¹¹ They are best viewed as part of larger transnational normative processes involving the conveyance of norms, which ultimately are applied within states toward individuals. Since World War II, international institutions have aimed to delimit state prerogatives affecting the rights of all persons, for which the rule of law is fundamental. They create focal points for transnational networks of civil society groups that can help to embolden and empower those advancing rule-of-law goals domestically. Domestic groups can use reporting, peer review, and judicial or other transnational mechanisms to enhance their positions in domestic political, judicial, and administrative institutions and processes, potentially “locking in” domestic rule-of-law reforms.¹¹²

One way that scholars have framed the so-called liberal international order in the post-World War II era is to view states as agents of higher-order international rules for the protection of human rights, for which the rule of law provides a foundation. Political scientists Tanja Börzel and Michael Zürn labeled this a “postnational liberal international order” in that it comprised conditionally sovereign states, which gained legitimacy by enforcing and guaranteeing liberal rights, rules, and decisions implicating the rule of law.¹¹³ The Universal Declaration of Human Rights sets out fundamental individual rights that states are obligated to respect

¹¹¹ For a sample of work on the indirect impact of international institutions, see Geoff Dancy & Kathryn Sikink, *Ratification and Human Rights Prosecutions: Toward a Transnational Theory of Treaty Compliance*, 44 NYU J. INT'L L. & POL. 751 (2011); Xinquan Dai, *Why Comply? The Domestic Constituency Mechanism*, 59 INT'L ORG. 363 (2005); SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006); BETH SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).

¹¹² Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT'L L. & POL. 707 (2006).

¹¹³ Tanja A. Börzel & Michael Zürn, *Contestations of the Liberal International Order: From Liberal Multilateralism to Postnational Liberalism*, 75 INT'L ORG. 282, 282–305 (2021).

through “the rule of law.”¹¹⁴ The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Cultural and Social Rights, together with other global and regional treaties, elaborate these rights and create international mechanisms to oversee their application. Over time, these treaties’ membership, scope of coverage, and enforcement mechanisms have expanded.

We conceptualize the protection of human rights, as noted in Part I, as important means that complement and overlap with the rule of law in advancing rule-of-law goals. These rights are almost universally recognized in national constitutions,¹¹⁵ which, in turn, reflect transnational processes of constitution-making and constitutional practice.¹¹⁶ To be a modern state is to have a constitution, and increasingly since 1945 national constitutions define individual rights and obligate the state to respect and protect them through institutionalized means founded on the rule of law.¹¹⁷ The Universal Declaration of Human Rights has been particularly influential in shaping rights provisions in national constitutions.¹¹⁸ Such rights are developed recursively in international and domestic law and institutions through transnational processes.¹¹⁹ In the words of the late ICJ judge James Crawford, one of the main roles “of international law is to reinforce, and on occasions to institute, the rule of law internally.”¹²⁰ In this vein, in 2004 UN Secretary-General Kofi Annan stressed:

¹¹⁴ The Declaration’s preamble provides, “Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by *the rule of law*.” G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (emphasis added). In addition, various provisions directly address rule-of-law concerns. To give two examples, Article 7 of the Universal Declaration provides that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law,” and Article 11 prohibits ex post facto penal laws. *Id.*

¹¹⁵ David Sloss & Wayne Sandholtz, *Universal Human Rights and Constitutional Change*, 27 W.M. & MARY BILL RTS. J. 1183 (2019).

¹¹⁶ CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER, *supra* note 23.

¹¹⁷ Colin J. Beck et al., *Constitutions in World Society: A New Measure of Human Rights*, in CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER, *supra* note 23, at 85, 95; Zachary Elkins, Tom Ginsburg & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT’L L.J. 61 (2013).

¹¹⁸ Zackary Elkins & Tom Ginsburg, *Imagining a World Without the Universal Declaration of Human Rights*, 74 WORLD POL. 327 (2022).

¹¹⁹ ENGLE MERRY, *supra* note 111; Halliday & Shaffer, *supra* note 10, at 37–42.

¹²⁰ James Crawford, *International Law and the Rule of Law*, 24 ADEL. L. REV. 3, 8 (2003). Crawford also writes that “it is better to see the present system of public order at the international level . . . as an interpenetration of legal orders.” *Id.* at 10.

States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty – by which I mean the fundamental freedom of each individual, enshrined in the charter of the UN and subsequent international treaties – has been enhanced by a renewed and spreading consciousness of individual rights. When we read the charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.¹²¹

These protections are contingent on the rule of law.

The protection of individual rights against the arbitrary exercise of power is part of the mission of a range of international and regional institutions. Eight of the principal international human rights treaties include provisions that allow the relevant treaty bodies to receive individual communications alleging violations. The Human Rights Committee, for example, established under the ICCPR, can receive and decide on individual claims of ICCPR rights violations by the 106 states that have accepted the First Optional Protocol to the ICCPR.¹²² The Human Rights Committee lacks power to enforce these rights directly, but states are obliged to respond to its findings. In 2022, for example, it found that Australia had arbitrarily interfered with the rights of indigenous Torres Strait Islanders by failing to protect them adequately from the effects of climate change.¹²³

This is just one part of the architecture of international human rights institutions, which include the UN Human Rights Council, the Office of the High Commissioner for Human Rights under the UN Secretary-General, the committees created to oversee the other international human rights treaties, and various reporting and investigative bodies, such as the system of UN special rapporteurs. States are accountable to these bodies, and constituents within states can reference and appeal to their work to advance rule-of-law goals. For example, under the UN Paris Principles, over one hundred countries created national human rights institutions, which generated a transgovernmental system of monitoring that facilitates norm diffusion.¹²⁴ Similarly, more reporting mechanisms

¹²¹ Kofi Annan, *Two Concepts of Sovereignty*, *Economist*, Sept. 18, 1999, at 49.

¹²² Hum. Rts. Committee, *Introduction to the Committee*, UNITED NATIONS (2022), www.ohchr.org/en/treaty-bodies/ccpr/introduction-committee.

¹²³ Kristen Lyons, *Australia Violated the Rights of Torres Strait Islanders by Failing to Act on Climate Change, the UN Says. Here's What That Means*, *Conversation* (Sept. 25, 2022, 4:41 AM), <https://tinyurl.com/serrdsej>.

¹²⁴ Katerina Linos & Tom Pegram, *Architects of Their Own Making*, 38 *HUM. RTS. Q.* 1109, 1110 (2016) ("International endorsement has since triggered a norm cascade on a global

can have catalytic impacts within countries through media coverage, nongovernmental advocacy, legislative references, and administrative follow-up.¹²⁵

Regional bodies are particularly important for overseeing and monitoring human rights protections implicating rule-of-law goals.¹²⁶ The European Union established conditions for membership under which state institutions must guarantee democracy, the rule of law, and human rights (the “Copenhagen criteria” of 1993). It also established a mechanism for holding states accountable for violations of rights contained in the EU’s Charter of Fundamental Rights (CFR). National judges can hear individual complaints regarding violations of the Charter, and, where there is uncertainty, they can seek interpretive guidance from the Court of Justice of the European Union.¹²⁷ The Court of Justice has found that Article 2 of the Treaty of the European Union “contains values [including the rule of law] which . . . are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States.”¹²⁸ It has applied the value of the “rule of law” embedded in Article 2 to require member states to maintain an independent judiciary, which is a major concern in Hungary and Poland.¹²⁹ In parallel, the European Commission for Democracy and Law (the “Venice Commission”), within the Council of Europe, is charged with helping states that wish “to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law.”¹³⁰ These regional bodies can contribute to the formation of regional legal orders, although these too

- scale, with NHRIs increasing from twenty such structures before 1990 to approximately 130 NHRIs in 2015.”); Luka Glušac, *Universal Periodic Review and Policy Change: The Case of National Human Rights Institutions*, J. HUM. RTS. PRAC. 1, 2 (2022) (“Today more than a hundred countries have established NHRIs, of which more than 85 are accredited with the highest A status by GANHRI, in a process facilitated and approved by the United Nations – proving that they are fully compliant with the Paris Principles.”).
- ¹²⁵ See, e.g., Cosette Creamer & Beth Simmons, *The Dynamic Impact of Periodic Review of Women’s Rights*, 81 L. & CONTEMP. PROBS. 31 (2018).
- ¹²⁶ GOVERNANCE TRANSFER BY REGIONAL ORGANIZATIONS: PATCHING TOGETHER A GLOBAL SCRIPT (Tanja Börzel & Vera Van Julen eds., 2015).
- ¹²⁷ *How to Report a Breach of Your Rights*, EUR. COMM’N (Dec. 7, 2021), <https://tinyurl.com/4prmka52>.
- ¹²⁸ Case C-156/21, Hungary v. Parliament & Council (Conditionality Regulation), EU: C:2022:97 (Feb. 16, 2022).
- ¹²⁹ Kim Lane Scheppele, *Restoring Democracy Through International Law*, AM. U. J. INT’L L. (forthcoming).
- ¹³⁰ *For Democracy Through Law*, COUNCIL OF EUR. VENICE COMM’N, www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN (last visited Aug. 21, 2024).

will show internal variation in terms of the concordance of regional, national, and local practice.¹³¹ Variation among regional legal orders can reflect different regional traditions and transnational borrowings among neighboring countries.¹³²

International human rights law and institutions arguably are most powerful when national institutions, such as national courts, reference and enforce international norms within national systems.¹³³ This transnational framing of international law resonates with Kim Lane Scheppelle's assessment of international courts in "three-dimensional space." As she maintains, international courts should not be viewed hierarchically as super appeals courts or primarily as "back stops" to national courts, but rather as part of broader normative orders that horizontally among themselves and vertically in relation to national courts affect institutional practices, particularly for the protection of the rule of law.¹³⁴ All members of the Council of Europe must incorporate the European Convention on Human Rights into national law, and national judges in these countries reference the Convention in applying national law.¹³⁵ The UK Human Rights Act, for example, requires that UK judges interpret statutes, so far as possible, in ways that are compatible with the UK's international human rights commitments.¹³⁶ In Germany, courts generally are obliged "to take note of and consider the relevant case law of the international courts with jurisdiction for Germany."¹³⁷

¹³¹ On variations in patterns of concordance, see Halliday & Shaffer, *supra* note 10, at 44–46.

¹³² See, e.g., Melissa Curley, Bjorn Dressel & Stephen McCarthy, *Competing Visions of the Rule of Law in Southeast Asia: Power, Rhetoric and Governance*, 42 *ASIAN STUD. REV.* 192 (2018).

¹³³ SIMMONS, *supra* note 111.

¹³⁴ Kim Lane Scheppelle, *The Constitutional Role of Transnational Courts: Principled Legal Ideas in Three-Dimensional Political Space*, 28 *PENN. ST. INT'L L. REV.* 451 (2010). See also Chapters 7 and 11.

¹³⁵ See, for example., the "Border Guard" case where the German court appeals to the norms of international law. Rudolf Geiger, *The German Border Guard Cases and International Human Rights*, 9 *EUR. J. INT'L L.* 540, 546 (1998). Cf. S. AFR. CONST., 1996, § 233 ("When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.").

¹³⁶ Human Rights Act 1998, c. 42, § 3 (UK), www.legislation.gov.uk/ukpga/1998/42/section/3.

¹³⁷ BVerfGK 9, 174 (2006) (First Chamber of the Second Senate), 2 BvR 2115/01, 2 BvR 2132/01, 2 BvR 348/032010, of 19 Sept. 2006, para. 53 (cited in PETERS, *supra* note 86, at 485).

Direct decisions of a human rights court against one state can have effects in other states, illustrating transnational processes at work. Laurence Helfer and Eric Voeten, for example, provide evidence that ECtHR decisions against one country substantially increase the probability of national-level policy change across Europe, such as in the area of the protection of LGBT equality.¹³⁸ Relatedly, within many Latin American countries one cannot meaningfully study constitutional law developments without incorporating their relation to the inter-American human rights system and changes in legal culture regarding the rule of law.¹³⁹ These bodies generate interpretations that courts outside of their regions reference, including other regional courts and other national courts (such as in the United States and India).¹⁴⁰

Courts also frequently apply or otherwise consider international law in interpreting national law.¹⁴¹ In doing so, they participate in, and are critical to, international law's implementation, development, and practice. As the Supreme Court of Canada stated in the case *Nevsun Resources Ltd. v. Araya et al.*, "Canadian courts, like all courts, play an important role in the ongoing development of international law."¹⁴² They are important not only in "implementing" international law, but also in "advancing" it. In that way, they "contribute . . . to the 'choir' of domestic court judgments around the world shaping the 'substance of international law.'"¹⁴³ The opinion affirmatively cites former member of the Canadian Supreme Court Gérard La Forest, who writes, "our

¹³⁸ Laurence Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L ORG. 77 (2014).

¹³⁹ JAVIER COUSO, ALEXANDRA HUNEUS & RACHEL SIEDER, CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA 112 (2010); see also Chapter 10.

¹⁴⁰ See, e.g., Alec Stone Sweet, Wayne Sandholtz & Mads Andenas, *The Failure to Destroy the Authority of the European Court of Human Rights: 2010–2018*, 21 LAW & PRAC. INT'L CTS. & TRIBUNALS 244 (2022) ("The Inter-American Court of Human Rights and the various African regional courts virtually never issue an important judgment without consulting the relevant rulings of the European Court."); *Lawrence v. Texas*, 539 U.S. 558 (2003) (referencing a decision of the ECtHR); Khosla Madhav, *Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision*, 59 AM. J. COMP. L. 909 (2011).

¹⁴¹ See, for example, the "Charming Betsy" canon of interpretation in the United States, which derives from Justice John Marshall's statement that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. 64 (1804).

¹⁴² *Nevsun Resources Ltd. v. Araya* [2020] 1 S.C.R. 166, para. 70 (Can.).

¹⁴³ *Id.* paras. 71–72.

courts – and many other national courts – are truly becoming international courts in many areas involving the rule of law.”¹⁴⁴

Many international organizations have incorporated and promoted rule-of-law norms in their rules and jurisprudence. For example, WTO panels have found that a central goal of the WTO legal system is to provide individual traders with certainty and predictability from the arbitrary action of other governments. In the *United States – Section 301* case, the European Union challenged US unilateral legislation used to threaten US sanctions against it before the WTO dispute settlement system had completed its review. The panel found that such legislation could be challenged “as such” given its “chilling effects’ on the economic activities of individuals.” The panel stressed, “it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix The multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual economic operators. The lack of security and predictability affects mostly these individual operators.”¹⁴⁵

Relatedly, in the *United States – Shrimp* case, a group of south and southeast Asian nations challenged a US ban on shrimp imports from countries that did not require certain shrimp trawling practices to protect endangered sea turtles. The Appellate Body found that, although the US objective was legitimate, the United States had failed to provide “due process” rights to the other countries to defend themselves and adapt to the new measure. It found that the application of the US measure was “arbitrary” in that the certification process was not “transparent” or “predictable,” did not provide any “formal opportunity for an applicant country to be heard or to respond to any arguments that may be made against it,” did not result in a “formal written, reasoned decision,” and offered “no procedure for review of, or appeal from, a denial of an application.”¹⁴⁶ The Appellate Body focused, in particular, on the transparency obligations set forth in Article X of the GATT, pursuant to which WTO members are to publicize their laws and regulations so as to give

¹⁴⁴ Gérard La Forest, *The Expanding Role of the Supreme Court of Canada in International Law Issues*, 34 CAN. Y.B. INT’L L. 89, 100–01 (1996) (cited in *Nevsun*, para. 70).

¹⁴⁵ Panel Report, *United States – Sections 301–310 of the Trade Act of 1974*, ¶¶ 7.73, 7.76, 7.81, WTO Doc. WT/DS152/R (adopted Jan. 25, 2000). The GATT is the General Agreement on Tariffs and Trade, which went into effect in 1948 and was incorporated as a WTO-covered agreement in 1995.

¹⁴⁶ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 180, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998).

foreign traders proper notice.¹⁴⁷ These requirements respond to two of the sources of arbitrariness we foregrounded in Part I – the provision of transparent, published rules, and of an impartial tribunal where persons can respond to and challenge an authority’s decisions against them.

The United Nations, World Bank, and other organizations, including regional and national agencies, have created a rule-of-law industry of consultants giving technical advice, which intensified in the 1990s and 2000s.¹⁴⁸ Discourse on the rule of law proliferated in Security Council resolutions, in Secretary-General reports, and in other UN groups, particularly as relates to UN peacebuilding and rule-of-law assistance in post-conflict settings.¹⁴⁹ Some of these processes focused on legal empowerment to support civil society and grassroots organizations within states.¹⁵⁰ As one UN document declares, the rule of law is a concept “at the very heart of the UN mission,” which is “interlinked and mutually reinforcing” with human rights and democracy.¹⁵¹ In parallel, rule-of-law promotion became central within the World Bank and other development agencies.¹⁵²

¹⁴⁷ *Id.* ¶¶ 182–83.

¹⁴⁸ Veronica Taylor, *Big Rule of Law*, in *STRENGTHENING THE RULE OF LAW THROUGH THE UN SECURITY COUNCIL 27* (Jeremy Farrall & Hillary Charlesworth eds., 2016); Kristen Boon, “Open for Business”: *International Financial Institutions, Post-conflict Economic Reform, and the Rule of Law*, 39 N.Y.U. J. INT’L L. & POL. 513, 572 (2007).

¹⁴⁹ See Chapter 6. Between 1998 and 2006, the phrase “rule of law” appeared in at least sixty-nine Security Council resolutions. JEREMY FARREL, *UNITED NATIONS SANCTIONS AND THE RULE OF LAW 22* (2007). A Security Council resolution first used the words “rule of law” in 1996 regarding the Secretary-General’s efforts in Burundi. S.C. Res. 1040, ¶ 2 (Jan. 29, 1996). In 2011, the UN published its *Rule of Law Indicators: Implementation Guide and Project Tools*, which focused on criminal justice institutions, and in particular on police, the judicial system, and prisons.

¹⁵⁰ Stephen Golub, *The Legal Empowerment Alternative*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 161* (Thomas Carothers ed., 2006); U.N. Secretary-General, *Guidance Note of the Secretary-General: UN Approach to Rule of Law Assistance* (Apr. 14, 2008) (“meaningful ownership requires the legal empowerment of all segments of society”).

¹⁵¹ UNITED NATIONS, *NEW VOICES: NATIONAL PERSPECTIVES ON RULE OF LAW ASSISTANCE 8* (2011); see also G.A. Res., Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, U.N. Doc. A/RES/67/1 (Nov. 30, 2012). For a list and brief overview of relevant UN documents, see Leander Beinlich & Anne Peters, *An International Rule of Law*, OXFORD BIBLIOGRAPHIES (2021), <https://tinyurl.com/b4a3t6dw>.

¹⁵² David Trubek, *The “Rule of Law” in Development Assistance: Past, Present, and Future*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 74* (David Trubek & Alvaro Santos eds., 2006); see, e.g., WORLD BANK, *WORLD DEVELOPMENT REPORT 2017: GOVERNANCE AND THE LAW* (2017).

International and transnational processes are also critical for targeting the practices of nonstate entities, such as multinational corporations that operate in countries with few rule-of-law protections. The United Nations developed Guiding Principles on Business and Human Rights in 2011, to which multinational corporations agree to adhere.¹⁵³ Private organizations and national regulatory agencies have promoted reporting on adherence to legal norms involving expanded environmental, social, and governance practices (ESG), as under the Global Reporting Initiative¹⁵⁴ and the Equator Principles.¹⁵⁵ At times, different public and private initiatives combine in complex ways to bolster rule-of-law protections, such as in the industrial workplaces of global supply chains.¹⁵⁶

However, just as international law and institutions can support rule-of-law processes, they also can undermine them. The turn to securitization after the September 11, 2001, terrorist attacks offers a powerful example. The UN Security Council created an Al-Qaida and Taliban sanctions regime in which a sanctions committee, mirroring the composition of the Security Council, could require the global freezing of an individual's assets with no transparency or due process. Following the Security Council's lead, countries around the world passed anti-terrorism laws that governments then used in repressive ways.¹⁵⁷ Some human rights and other regional courts responded to these developments, most notably in the European Union in the *Kadi* case. There, the European Court of Justice voided an EU regulation implementing UN Security Council mandates to freeze the assets of suspected terrorists and their

¹⁵³ UNITED NATIONS, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS "PROTECT, RESPECT AND REMEDY" FRAMEWORK (2011).

¹⁵⁴ Cynthia Williams, *The Global Reporting Initiative, Transnational Corporate Accountability, and Global Regulatory Counter-Currents*, 1 U.C. IRVINE J. INT'L TRANSNAT'L COMP. L. 67 (2016).

¹⁵⁵ John M. Conley & Cynthia A. Williams, *Global Banks as Global Sustainability Regulators?: The Equator Principles*, 33 LAW & POL'Y 542 (2011).

¹⁵⁶ Larry Cata Backer, *Are Supply Chains Transnational Legal Orders? What We Can Learn from the Rana Plaza Factory Building Collapse*, 1 U.C. IRVINE J. INT'L TRANSNAT'L COMP. L. 11 (2016).

¹⁵⁷ Kim Lane Scheppele, *The International Standardization of National Security Law*, 4 J. NAT'L SECURITY L. POL'Y 437 (2010); Kim Lane Scheppele, *The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 347 (Sujit Choudhry ed., 2007).

financiers on the grounds that it violated the accused's due process rights.¹⁵⁸ Other courts followed suit.¹⁵⁹ This response catalyzed some Security Council reforms, notably the creation of an Office of the Ombudsperson, although its powers were limited.¹⁶⁰

Private actors, such as multinational companies, also harness rule-of-law rhetoric to advance their material interests. Public and private actors have developed different indicators to measure the rule of law, some of which reflect a neoliberal tilt that can favor foreign capital.¹⁶¹ The Heritage Foundation's rule-of-law index, for example, focuses on the security of property rights.¹⁶² Bilateral investment treaties and investor–state arbitration highlight how businesses may use international law to challenge government regulations that, investors contend, undermine certainty and predictability under the rule of law. The *Tecmed* arbitration, for example, recalling Hayek's attack on social welfare legislation, set a standard for "fair and equitable treatment" under which "the foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor so that it may know beforehand any and all rules and regulations that will govern its investments."¹⁶³ Because democratic political processes legitimately change environmental, labor, and other regulations over time, the *Tecmed* standard of fixing all rules and regulations in advance could be highly constraining. Business can use it not only to sue states for billions of dollars when new regulations violate business

¹⁵⁸ Grainne de Burca, *The European Court of Justice and the International Legal Order After Kadi*, 51 HARV. INT'L L.J. 1 (2009).

¹⁵⁹ Machiko Kanetake, *The Interfaces Between the National and International Rule of Law: The Case of UN Targeted Sanctions*, 9 INT'L ORGS. L. REV. 267 (2012); Erika de Wet, *Judicial Challenges to the Security Council's Use of Sanctions*, in STRENGTHENING THE RULE OF LAW THROUGH THE UN SECURITY COUNCIL, *supra* note 148, at 193; *see, e.g., Nada v. Switzerland*, App. No. 10593/08 (Sept. 12, 2012), <https://hudoc.echr.coe.int/eng?i=001-113118>.

¹⁶⁰ Kimberly Prost, *The Office of the Ombudsperson: A Case for Fair Process*, in STRENGTHENING THE RULE OF LAW THROUGH THE UN SECURITY COUNCIL, *supra* note 148, at 181.

¹⁶¹ Rajah, *supra* note 93.

¹⁶² Tom Ginsburg & Mila Versteeg, *Rule of Law Measurement*, in THE CAMBRIDGE COMPANION TO THE RULE OF LAW, *supra* note 12, at 494, 498.

¹⁶³ *Técnicas Medioambientales Tecmed SA v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 154 (May 29, 2003), 8 ICSID Rep. 130 (2006). *Cf. FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM* 80 (1994) (defining the rule of law as where "the government in all its actions is bound by rules fixed and announced beforehand" – i.e., private planning is protected from democratic, legislative intervention).

“expectations.”¹⁶⁴ They also can chill regulation by threatening legal claims.¹⁶⁵ Yet, domestic institutions often operate corruptly and arbitrarily, which is a central reason to create international institutional complements. It is thus critical to retain focus not only on rule-of-law goals but also on institutional alternatives to pursue them, all of which will be imperfect, but where some will be better or worse in different contexts.¹⁶⁶

3 *Direct Links between International Institutions and Individuals*

International law also, in some cases, provides direct legal protections and legal accountability for individuals in support of the rule of law. It can do so in jurisdictions where international law is directly applicable as a cause of action before national courts, and under treaties granting individuals the right to bring direct claims against states before regional courts. The most active regional human rights court is the ECtHR, followed by the Inter-American Court of Human Rights (IACtHR), and the African Court on Human and Peoples’ Rights. These regional human rights courts receive and adjudicate individual claims of state violations of the relevant regional treaties.

In these cases, international law and institutions serve, in part, as a backstop to protect the rule of law, while also potentially shaping the normative field transnationally. International human rights courts, like the ECtHR and the IACtHR, can accept jurisdiction over a petition only after all domestic legal recourse has been sought and exhausted. In those cases, where domestic courts are to enforce rights under the convention but fail to do so, individuals retain the right to bring claims directly to the regional court in question. Stone Sweet labels such tribunals “trustee courts,” since they are charged not with advancing state purposes but rather with holding states accountable for violations of treaty-based

¹⁶⁴ “In cases decided in favor of the investor, the average amount claimed was US\$1.3 billion and the average amount awarded was US\$504 million.” Anne Orford, *A Global Rule of Law*, in *THE CAMBRIDGE COMPANION TO THE RULE OF LAW*, *supra* note 12, at 538 (citing UNCTAD, *WORLD INVESTMENT REPORT 2018*, at 95).

¹⁶⁵ Tarald Laudal Berge & Axel Berger, *Do Investor–State Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Bureaucratic Capacity*, 12 *J. INT’L DISP. SETTLEMENT* 1 (2021); Kyla Tienhaara, *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor–State Dispute Settlement*, 7 *TRANSNAT’L ENV’T L.* 229 (2018).

¹⁶⁶ Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 *AM. J. INT’L L.* 361 (2018) (evaluating alternative institutional mechanisms for resolving investment disputes in light of the rule of law).

rights against those within the state's jurisdiction.¹⁶⁷ As regards criminal law, international criminal law and courts primarily serve to establish responsibility for international crimes when domestic institutions are incapable of, or prevented from, doing so. The International Criminal Court (ICC) was designed to provide for legal accountability when state institutions fail. The ICC Office of the Prosecutor prosecutes genocide, crimes against humanity, war crimes, and the crime of aggression only when states are unwilling or unable to do so. In practice, it has catalyzed national investigations and some prosecutions for atrocity claims, and it can have other indirect effects.¹⁶⁸ Likewise, in investment law, under the World Bank's Convention on the Settlement of Investment Disputes, a "Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention," although this requirement often is not applied in practice.¹⁶⁹

These complementarity mechanisms prioritize legal decision-making within domestic jurisdictions. They recognize domestic authorities as the primary guardians of the rule of law, but subject to an international accountability mechanism. In the process, they can enhance legal certainty and equal application of the law. By empowering domestic courts to oversee compliance with legal obligations (which directly or indirectly reflect international law), complementarity mechanisms can broaden international law's reach within states.¹⁷⁰ There is some (preliminary)

¹⁶⁷ ALEC STONE SWEET & CLARE RYAN, *A COSMOPOLITAN LEGAL ORDER* 102 (2018).

¹⁶⁸ James Stromseth, *Is the ICC Making a Difference?* JUST SECURITY (Dec. 6, 2017), www.justsecurity.org/47717/icc-making-difference/. For a case study, see William Burke-White, *Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Governance in the Democratic Republic of Congo*, 18 LEIDEN J. INT'L L. 557 (2005). Cf. Leigh Payne, *The Justice Paradox?: Transnational Legal Orders and Accountability for Past Human Rights Violations*, in *TRANSNATIONAL LEGAL ORDERS*, *supra* note 10, at 439 (noting how processes can also be abused to target the opposition).

¹⁶⁹ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 26, Mar. 18, 1966, 575 U.N.T.S. 159.

¹⁷⁰ For example, Anne Van Aaken maintains that "[i]f investment law is a kind of international administrative law, a harmonious combination and an alignment of the internationalized system of state liability and the national systems seems desirable." Anne Van Aaken, *Primary and Secondary Remedies in Investment Arbitration and State Liability: A Functional and Comparative View*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW* 721, 754 (Stephan Schill ed., 2010); see also Richard C. Chen, *Bilateral Investment Treaties and Domestic Institutional Reform*, 55 COLUM. J. TRANSNAT'L L. 547 (2017).

empirical evidence that they may do so better than the alternative of using international tribunals as substitutes for domestic courts.¹⁷¹

In practice, international institutions are both promoters (on the offensive) and subjects (on the defensive) of the rule of law. Although there is no centralized public power at the international level, international and regional institutions began to exercise increasing authority directly over individuals following the collapse of the Soviet Union and the end of the Cold War, particularly in relation to peacekeeping operations, sanctions, the use of force, and the US-pronounced “war on terror.” Given its new regulatory roles, the United Nations’ adherence to the rule of law has been seriously challenged. While the UN established thirteen peacekeeping operations between 1946 and 1988, with constrained roles that were primarily tasked with monitoring ceasefire lines, the UN Security Council has created fifty-eight additional operations around the globe since 1988, whose operational scope significantly expanded, including the provision of basic policing functions.¹⁷² The Security Council authorized peacekeeping and rule-of-law-building mandates in Afghanistan, Iraq, Haiti, Sierra Leone, and Timor Leste, as have NATO and the European Union in Kosovo and the African Union in Somalia. When UN personnel were accused of murder, rape, torture, corruption, and other tortious acts, the United Nations claimed immunity, in violation of fundamental rule-of-law accountability norms, spurring protestations against UN practices.¹⁷³ Similarly, while the Security Council applied only two sanctions regimes in its first forty-three years (against the racist, white minority regimes of Rhodesia and South Africa), since 1989 it has imposed thirty-two additional ones.¹⁷⁴ The Security Council also increasingly authorized the use of force in its resolutions,

¹⁷¹ See Chapter 5. See also Jennifer L. Tobin & Susan Rose-Ackerman, *When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties*, 6 REV. INT’L ORGS. 1, 5 (2011) (providing empirical evidence that international dispute settlement mechanisms have more impact when they complement an existing set of effective domestic institutions); Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT’L REV. L. & ECON. 107, 119 (2005) (providing empirical evidence that investor–state dispute settlement may “reduce courts’ incentives to improve performance by depriving key actors from a need to invest in institutional improvement”).

¹⁷² See Chapter 6.

¹⁷³ Jeni Whalan, *Strengthening the Local Accountability of UN Peacekeeping*, in STRENGTHENING THE RULE OF LAW THROUGH THE UN SECURITY COUNCIL, *supra* note 148, at 135, 139; see also Jose Alvarez, *The United Nations in the Time of Cholera*, 108 AJIL UNBOUND 22 (2017).

¹⁷⁴ Whalan, *supra* note 173.

rising from one extraordinary instance during the Cold War (in Korea when the Soviet Union briefly absented itself from the Security Council) to forty-eight resolutions between 1990 and 2014.¹⁷⁵

The Security Council has been particularly challenged for exercising legislative and administrative power to combat “terrorism.” After the September 11, 2001, terror attacks, the Security Council issued a series of resolutions, most notably Resolution 1373 which, among other matters, required states to criminalize terrorism in domestic law and freeze assets of individuals and groups that the Security Council blacklists.¹⁷⁶ Anti-terrorism laws proliferated globally, and government officials used them to advance their own agendas, including to criminalize dissent.¹⁷⁷ The Security Council ordered the seizure of an accused’s assets with little to no due process, as noted in Section 2. As Scheppele writes, “for states whose commitment to international law is part of their own deep devotion to the rule of law as a basic principle of state legitimacy, new draconian anti-terrorism laws could be portrayed as necessary in order to comply with international law,” regardless of the lack of due process.¹⁷⁸

From the vantage of TLO theory, national and regional courts can intervene to protect rule-of-law concerns involving international institutions, just as international institutions have done regarding national practices.¹⁷⁹ They are part of a broader transnational legal process. As we have seen, some regional and national courts responded by constraining compliance with Security Council asset seizure orders where they were deemed to violate rule-of-law requirements within regional and national legal orders, as in the *Kadi* case.¹⁸⁰ The Security Council responded in 2009 by creating the Office of the Ombudsperson, empowered to investigate and make “delisting”

¹⁷⁵ *Id.*

¹⁷⁶ S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

¹⁷⁷ Kim Lane Scheppele, *The Empire of Security and the Security of Empire*, 27 *TEMPLE INT’L COMPAR. L.J.* 241 (2013).

¹⁷⁸ *Id.* at 248.

¹⁷⁹ Each involves a form of *Solange* reasoning, where courts at the national or international level, as the case may be, will not intervene so long as rule-of-law protections are observed at the other level. *Solange* refers to jurisprudence of the German constitutional court regarding the enforcement of judgments of the Court of Justice of the European Union. Alec Stone Sweet, *The Structure of Constitutional Pluralism: Review of Nico Krisch, “Beyond Constitutionalism: The Pluralist Structure of Post-National Law,”* 11 *INT’L J. CONST. L.* 491 (2013).

¹⁸⁰ Machiko Kanetake, *The Interfaces Between the National and International Rule of Law: The Case of UN Targeted Sanctions*, 9 *INT’L ORGS. L. REV.* 267 (2012); STRENGTHENING THE RULE OF LAW THROUGH THE UN SECURITY COUNCIL, *supra* note 148.

recommendations. In this transnational sense, the late judge James Crawford was not wholly correct when he wrote that only when the International Court of Justice has “clear jurisdiction judicially to review action of all United Nations political agencies, including the Security Council . . . could the rule of law be said to extend to international political life.”¹⁸¹ Nonetheless, serious challenges remain, illustrated by the ombudsperson’s resignation in 2021 on rule-of-law grounds, including the lack of institutional independence of the Office of the Ombudsperson, the Security Council’s extensive reliance on confidential evidence, and a refusal to permit petitioners to examine the reasons for their inclusion on the sanctions list.¹⁸² These ongoing challenges continue to catalyze responses and reform proposals from within and outside the Security Council by state and nonstate actors.¹⁸³

Because international law and institutions not only support rule-of-law protections but also affect individuals directly in ways that implicate the rule of law, scholars have turned to analytic frames borrowed from constitutional and administrative law for assessing and constraining international institutions. Global administrative law theorists foreground tools of accountability, transparency, and reason-giving as checks on international and domestic institutions.¹⁸⁴ Other scholars have developed global constitutionalist frames,¹⁸⁵ transnational pluralist ones,¹⁸⁶ and constitutional pluralist hybrids,¹⁸⁷ for reconceptualizing international law in ways that place greater focus on the individual and individual rights.¹⁸⁸ These normative projects aim, in different ways, to advance rule-of-law concerns globally, including in response to the enhanced role and authority of international institutions since the 1990s. These conceptions of

¹⁸¹ James Crawford & Susan Marks, *The Global Democracy Deficit: An Essay in International Law and Its Limits*, in RE-IMAGINING POLITICAL COMMUNITY 72, 84 (Daniele Archibugi, David Held & Martin Kohler eds., 1998).

¹⁸² Colum Lynch, *How a Dream Job Became a Bureaucratic Nightmare for a Top U.N. Lawyer*, FOREIGN POL’Y (July 27, 2021, 12:50 PM), <https://tinyurl.com/3d7nr8a7>. See generally FIONA DE LONDRA, THE PRACTICE AND PROBLEMS OF TRANSNATIONAL COUNTER-TERRORISM (2022).

¹⁸³ See Chapter 6.

¹⁸⁴ Benedict Kingsbury, Nico Krisch & Richard Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005).

¹⁸⁵ See, e.g., ALEC STONE SWEET & JUD MATHEWS, PROPORTIONALITY, BALANCING AND CONSTITUTIONAL GOVERNANCE: A COMPARATIVE AND GLOBAL APPROACH ch. 6 (2019).

¹⁸⁶ See, e.g., NICO KRISCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW (2010).

¹⁸⁷ See, e.g., Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317 (2002).

¹⁸⁸ JAN KLABBERS, ANNE PETERS & GEIR ULFSTEIN, THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (2009); Kumm, *supra* note 19; PETERS, *supra* note 86.

international law are components of viewing the rule of law within a broader transnational context involving transnational legal ordering.¹⁸⁹

III Empirical Trends in Transnational Context

International and national law and practice interact to shape norms across substantive fields. These interactions are recursive in that developments in one site can have intended and unintended effects in others, which in turn can spur new normative development and institutional change. For example, national legal norms, especially those of powerful states, often shape international ones, but the norms may be revised and recalibrated in the process. In turn, international legal norms and institutions provide normative resources for actors at the national and local levels, new strategies of justification and argument, and new alternatives for social action. These processes also can catalyze national and local resistance that spurs new institutional strategies and normative change.

In this Part III, we first lay out our argument that the world risks a deepening negative cycle of overall decline in rule-of-law protections at the national and international levels (Section 1). After addressing the challenge of measuring rule-of-law practices (Section 2), we then examine existing evidence of national (Section 3) and international (Section 4) trends. We conclude by appraising possible explanatory factors for the parallel decline of multiple rule-of-law indicators (Section 5).

1 Our Argument

From a transnational perspective, this volume assesses whether there might be common trends regarding rule-of-law protections at the national and international levels, involving cycles of settlement and unsettlement of rule-of-law norms and practices. We ask: Do rule-of-law norms and practices shift at the national and international levels in parallel? Our working hypothesis is that they do, although with variation across and within regions. Given the transnational enmeshment of national and international norm-making and practice, we contend that developments at one level can have reinforcing – and subverting – effects on the other in a recursive manner. These trends can give rise to virtuous and vicious cycles. Where national rule-of-law practices erode, especially in powerful states, and where authoritarian states become more powerful globally, we

¹⁸⁹ TRANSNATIONAL LEGAL ORDERS, *supra* note 10; Shaffer, *supra* note 91.

expect that such erosion and power shifts will implicate international law and practice. Where international rule-of-law norms and monitoring and enforcement institutions weaken, national and local actors will have fewer institutional and normative resources available to protect the rule of law.

To flesh out our claim, we note that rule-of-law promotion proliferated as part of transnational legal ordering processes after the collapse of the Soviet Union in 1990.¹⁹⁰ Liberal norms diffused transnationally, backed by significant economic incentives, such as the carrot of joining the European Union, spurring studies of “the global diffusion of markets and democracy.”¹⁹¹ The wave of democratization and transnational constitutional processes, in turn, spurred greater openness of state legal systems toward international law.¹⁹² At the time, as former Soviet bloc states gained independence, they joined the key international institutions at the core of an international order grounded in law: the European Union, the European Convention on Human Rights under the Council of Europe, the World Trade Organization, and the various specialized organizations of the United Nations system. International courts and cases before them proliferated beyond Europe. As captured by the Project on International Courts and Tribunals, the number of international courts rose from six to over two dozen between 1989 and 2014, which collectively issued over 37,000 binding legal rulings.¹⁹³ In parallel, states adopted new constitutions and institutions that created new resources and mechanisms for national and local actors to enhance rule-of-law protections. These constitutions incorporated international norms and created new institutional oversight and enforcement processes. During this period, indicators on the rule of law and neighboring concepts such as democracy reached their peaks.¹⁹⁴ There were, of course, severe challenges in advancing the rule of law in many jurisdictions, especially

¹⁹⁰ Rajah, *supra* note 93; Halliday & Shaffer, *supra* note 93, at 494–95.

¹⁹¹ Beth A. Simmons, Frank Dobbin & Geoffrey Garrett, *Introduction: The Diffusion of Liberalization*, in *THE GLOBAL DIFFUSION OF MARKETS AND DEMOCRACY 1* (Beth A. Simmons, Frank Dobbin & Geoffrey Garrett eds., 2008).

¹⁹² Kevin Cope, Pierre-Hugues Verdier & Mila Versteeg, *The Global Evolution of Foreign Relations Law*, 116 *AM. J. INT’L L.* 1, 48–53 (2022).

¹⁹³ KAREN ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW* (2014); RUTH MACKENZIE ET AL., *THE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS* (2d ed. 2010).

¹⁹⁴ LARRY DIAMOND, *ILL WINDS: SAVING DEMOCRACY FROM RUSSIAN RAGE, CHINESE AMBITION, AND AMERICAN COMPLACENCY* (2019).

those with weak institutions.¹⁹⁵ Nonetheless, the overall trends were positive, captured in Kathryn Sikkink's claim of a transnational "justice cascade."¹⁹⁶

In the last decade, by contrast, indicators measuring the rule of law, together with complementary concepts such as democracy, have declined, while national demands for greater autonomy from regional and multilateral institutions and their normative constraints have increased. Overall, we appear to be moving from what Thomas Carothers characterized as a "rule-of-law revival"¹⁹⁷ in the 1980s to what can be characterized as authoritarian relapse and rule-of-law decline today.¹⁹⁸ In an interconnected world, we have turned from a period characterized by the development of institutions and transnational processes promoting "transitional justice," as reflected in a profuse literature,¹⁹⁹ to processes consolidating what can be viewed as "gradual autocratization."²⁰⁰ In this shift, authoritarian regimes do not simply terminate institutions developed during the rule-of-law-revival. Rather, having inherited them, they mimic and harness formally liberal mechanisms for authoritarian ends.²⁰¹ Witness Victor Orbán referencing other countries' institutional mechanisms while adapting them in new ways to defend his authoritarian, anti-liberal aims.²⁰² Anti-liberal movements learn from and adapt these processes for similar authoritarian purposes.²⁰³ These strategies illustrate the risks of focusing exclusively on rule-of-law checklists as opposed to goals and practices. As

¹⁹⁵ PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE, *supra* note 150.

¹⁹⁶ Compare KATHRYN SIKKINK, EVIDENCE FOR HOPE: MAKING HUMAN RIGHTS WORK IN THE 21st CENTURY (2017), with TRICIA D. OLSEN, LEIGH A. PAYNE & ANDREW G. REITER, TRANSNATIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY (2010).

¹⁹⁷ Thomas Carothers, *The Rule-of-Law Revival*, FOREIGN AFFS., Mar./Apr. 1998. By the early 2000s, however, Carothers already had written of the "end of the transition paradigm." Thomas Carothers, *The End of the Transition Paradigm*, 13 J. DEMOCRACY 5 (2002).

¹⁹⁸ For a current example, see Chapter 12.

¹⁹⁹ See, e.g., RUTI TEITEL, TRANSITIONAL JUSTICE (2000).

²⁰⁰ Anna Luhrmann & Staffan Linderg, *A Third Wave of Autocratization Is Here: What Is New About It?*, 26 DEMOCRATIZATION 1095, 1107 (2019).

²⁰¹ See, e.g., Kim Lane Scheppele, *Autocracy Under Cover of the Transnational Legal Order*, in CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER, *supra* note 23, at 188.

²⁰² *Id.*

²⁰³ S.G.F. Hall & T. Ambrosio, *Authoritarian Learning: A Conceptual Overview*, 33 E. EUR. POL. 143 (2017); Scheppele, *supra* note 201.

David Law writes, the role of law and courts in authoritarian regimes “deserves attention for the insights that it contains into the biases and vulnerabilities concealed within the structure of our own judicial institutions.”²⁰⁴ One can add the vulnerabilities contained within our executive, legislative, and administrative institutions as well.

There can be considerable resistance to these developments, so that change will be neither linear nor determined. Challenges to the rule of law in Hungary and Poland, for example, have catalyzed responses from the European Union, as well as from internal groups.²⁰⁵ Yet, there are also powerful forces aimed at constraining regional oversight, whether through exit (such as Brexit) or voice, which will weaken regional institutions, their influence, and the resources they provide to local actors (say, following the election of Georgia Meloni in Italy or if Marie Le Pen were to triumph in France). Other international shifts will affect these internal regional developments, such as resurgent nationalism and coercive geopolitics in powerful states such as China, Russia, and the United States. Sections 3, 4, and 5 provide empirical evidence and explanations regarding enmeshed trends at the international and national levels, and the cycles they represent.

2 *The Challenge of Measurement*

Before discussing the empirical evidence, we stress both the challenge of measuring trends in rule-of-law protections and the importance of doing so. Given different conceptions of what constitutes the rule of law and the means to achieve it, different indicators measure different things. Measurements use different sources of information, which raises challenges regarding validity, reliability, and bias in the data, especially as regards uneven cross-country data. Moreover, even where common trends are identified regarding rule-of-law practices, it is very difficult to establish the causal forces behind these trends.²⁰⁶

A number of indexes purport to measure the rule of law, but they measure different things, highlighting certain goals and means over

²⁰⁴ David Law, *How to Rig the Federal Courts*, 99 *GEO. L. REV.* 779, 835 (2010).

²⁰⁵ Antoine Buyse et al., *The Rule of Law from Below: A Concept Under Development*, 17 *UTRECHT L. REV.* 1 (2021).

²⁰⁶ Tamanaha, *supra* note 12, at 231–32 (noting the problem of establishing causation and causal direction); Tom Ginsburg, *Pitfalls of Measuring the Rule of Law*, 3 *HAGUE J. ON RULE L.* 269 (2011); Stephan Haggard et al., *The Rule of Law and Economic Development*, 11 *ANN. REV. POL. SCI.* 205 (2008).

others. Mila Versteeg and Tom Ginsburg examined rule-of-law indicators developed by the World Bank, the Heritage Foundation, Freedom House, and the World Justice Project, assessing their different focuses and their overlaps.²⁰⁷ These indexes differ in emphases, with the Heritage Foundation focused to a greater extent on property rights and Freedom House more on human rights, while the World Bank and World Justice Project examine broader ranges of issues. One might thus expect these indicators to be weakly correlated.

Despite the use of different component measurements, Versteeg and Ginsburg find “the four indicators . . . to be remarkably similar.”²⁰⁸ They show that the measurement of “corruption,” which – like the rule of law – encompasses the goal of “government impartiality,” closely correlates with all four rule-of-law indicators.²⁰⁹ The correlation of these measurements could suggest that they indeed capture something broadly about empirical trends. Corruption, for example, affects each of the five sources of arbitrariness noted in Part I, as it leads to non-transparency, inconsistency, partiality, and a lack of proportionality, which the powerful can harness for authoritarian ends.

Versteeg and Ginsburg nonetheless raise caution. In particular, they question the extent to which convergences in measurement may reflect a common reliance on expert perceptions and information constraints given the challenges of gathering data. They also note that, by combining multiple factors into a single ordinal number, indexes will conflate different aspects of the rule of law and the means to attain it.²¹⁰ They thus applaud the World Justice Project’s index for being modular, so that researchers can use the database to focus on particular aspects (or sources of arbitrariness),²¹¹ which then can be assessed in different contexts.

Lon Fuller long ago wrote that we need “standards against which the degree of attainment of a condition of legality could be evaluated.”²¹²

²⁰⁷ Ginsburg & Versteeg, *supra* note 162, at 494–512.

²⁰⁸ *Id.* at 502.

²⁰⁹ *Id.* at 504–05.

²¹⁰ See also SALLY ENGLE MERRY, *THE SEDUCTIONS OF QUANTIFICATION: GLOBAL GOVERNANCE, HUMAN RIGHTS, AND THE RISE OF INDICATOR CULTURE* (2016).

²¹¹ Ginsburg & Versteeg, *supra* note 162; see also Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE*, *supra* note 150, at 31, 63 (on disaggregation); Jerg Gutmann & Stefan Voigt, *The Rule of Law: Measurement and Deep Roots*, 54 *EUR. J. POL. ECON.* 68 (2018).

²¹² Kristen Rundle, *The Morality of the Rule of Law: Lon L. Fuller*, in *THE CAMBRIDGE COMPANION TO THE RULE OF LAW*, *supra* note 12, at 186.

Developing and revising such standards, nonetheless, should always focus on the ends of the rule of law and not be fixed on particular institutional mechanisms. Given differences in social, cultural, and institutional contexts and heritages around the world, as well as the role of informal institutions, there is no one means to advance the rule of law. Since advancing the rule of law will take different forms in different contexts, the promotion of the rule of law will always bedevil advocates and institutions.²¹³

Despite these challenges, we contend that empirical study is crucial, and quantitative and qualitative data and studies are improving thanks to sustained efforts, ranging from ethnographies to large-n statistical analyses. The large-n studies tend to rely on surveys and thus assess perceptions within countries. The World Justice Project has developed extensive surveys, which it uses to assess the perceptions of lawyers and lay persons within countries.²¹⁴ These perceptions are important from the perspective of TLO theory, since the law in action depends on the mentalities of actors, what they take as norms for appropriate behavior, affecting social expectations, communication, and behavior.²¹⁵ To assess social context and institutional behavior, one needs empirical study, which calls for the integration of law and the social sciences.²¹⁶ If our argument is correct, then such empirical work must engage with transnational processes to assess how national and international trends interact.

3 National Rule-of-Law trends

The past decade has witnessed a worrisome decline in the rule of law at the domestic level across a range of countries, on a variety of measures. In this

²¹³ Thomas Carothers, *The Problem of Knowledge*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE, *supra* note 150, at 15, 21 (2006) (“Rule-of-law practitioners have been following an institutional approach, concentrating on judiciaries, more out of instinct than well-researched knowledge.”); Haggard et al., *supra* note 206, at 221 (there are a variety of formal and informal institutions that make up a “rule of law complex”).

²¹⁴ See Chapter 3.

²¹⁵ Halliday & Shaffer, *supra* note 10; NIKLAS LUHMANN, A SOCIOLOGICAL THEORY OF LAW 105 (1985) (“Law is essential as structure, because people cannot orient themselves towards others or expect their expectations without the congruent generalization of behavioral expectations.”).

²¹⁶ Daniel Abebe, Adam Chilton & Tom Ginsburg, *The Social Science Approach to International Law*, 22 CHI. J. INT’L L. 1 (2021); Terence C. Halliday & Gregory Shaffer, *International Law and Transnational Legal Orders: Permeating Boundaries and Extending Social Science Encounters*, 22 CHI. J. INT’L L. 168 (2021).

section, we look at several of those indicators.²¹⁷ Each of them relies on a different set of observable features of governments – features that plausibly capture key behavioral implications of our conception of the rule of law (legal rules that set limits on the arbitrary exercise of power by some persons over others) in light of different sources of arbitrariness.²¹⁸ Each set shows overall declines in the rule of law within both democracies and authoritarian regimes. These declines generally do not reflect sudden transitions, such as following a military coup, but rather are gradual declines in the degree of rule-of-law protections within countries at different starting points.

According to World Justice Project (WJP) data (Figure 1.2),²¹⁹ over the past eight years forty-three states show a significant decrease in the rule of law, whereas only three show a significant improvement.²²⁰ Table 1.2 lists the states with the largest declines. Most of the states with a drop in the rule of law started from a relatively low point, though two (Poland and the Republic of Korea) began with scores above 0.70 (on a scale of 0–1).²²¹ For those distrustful of quantitative indicators, the list of states – which includes Brazil, Egypt, Hungary, Poland, the Philippines, Turkey, and Venezuela – resonates, in our view, with common understandings. Overall, the WJP reports that in every year since 2015 the rule of law diminished in about 60 percent of countries, with a peak of 74 percent of countries showing a decline in 2020.²²²

²¹⁷ As Versteeg and Ginsburg have noted, the various indicators developed to assess the rule of law status of states “build significantly different substantive values into their definitions of the RoL” and deploy varying measurement strategies. Mila Versteeg & Tom Ginsburg, *Measuring the Rule of Law: A Comparison of Indicators*, 42 L. & Soc. INQUIRY 100, 101 (2017). The four indicators (including those produced by the World Justice Project and Freedom House) examined by Versteeg and Ginsburg are nevertheless highly correlated. *Id.* at 102. The question of how adequately the indicators capture the underlying concept (rule of law) is beyond the scope of this study; we therefore report rule-of-law data and readers can take into account the challenges inherent in empirically measuring the concept.

²¹⁸ The rule of law indicators that we review here all claim to be based on rule-of-law practices, not on formal law.

²¹⁹ WJP data, unlike other measures, relies on both country experts and citizen surveys.

²²⁰ To exclude minor shifts in the rule of law score, we counted only those states that experienced a change of more than one standard deviation in the *WJP Rule of Law Index*.

²²¹ For comparison, ten countries scored 0.80 or higher in the *WJP Rule of Law Index* in 2021 (Austria, Canada, Denmark, Estonia, Finland, Germany, Netherlands, New Zealand, Norway, and Sweden).

²²² *WJP Rule of Law Index*, WORLD JUST. PROJECT, <https://worldjusticeproject.org/rule-of-law-index/insights> (last visited Aug. 21, 2024). Those 74 percent of countries, moreover, represented 85 percent of the world’s population.

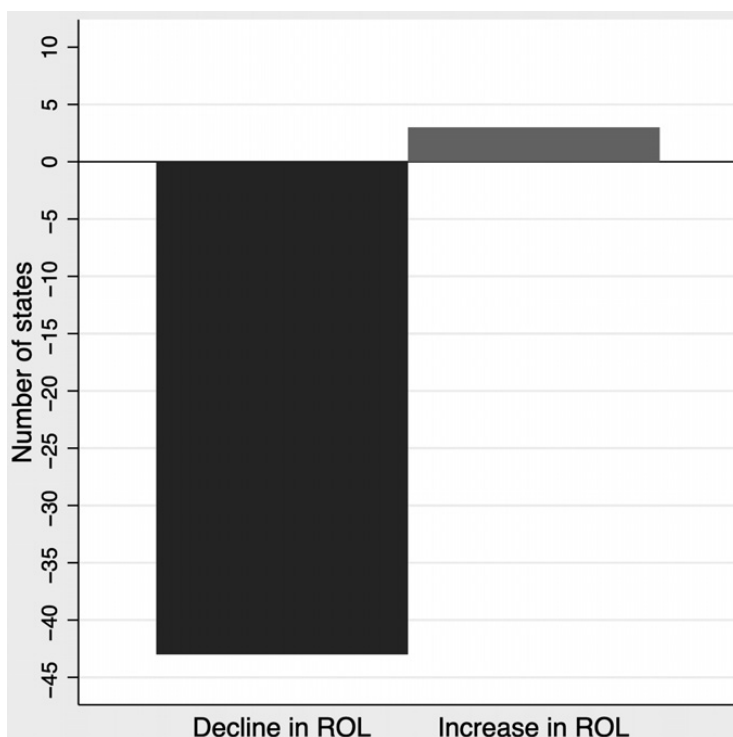


Figure 1.2 Changes in the rule of law, 2015–23, World Justice Project.

When we disaggregate the WJP data in terms of those indicators most directly tied to the five sources of arbitrariness that we identified in Part I, we find similar declines, as captured in Table 1.3. Using WJP data, we constructed indicators for three of the five sources of arbitrariness.²²³ We then compared countries' performance on these measures in 2015 and 2023.

²²³ The *WJP Rule of Law Index* is composed of forty-four component indicators. We devised indicators of the *sources of arbitrariness* reported in Table 1.3 with selected *WJP Rule of Law Index* components. The WJP data did not include suitable measures of the fourth and fifth sources of arbitrariness (authorities do not engage in reason-giving, such as regards proportionality, in issuing their decisions). The measures reported in Table 1.3 were constructed using the following WJP indicators:

For 1, first source of arbitrariness (The wielder of power is not subject to controls, limits, or accountability mechanisms): 1.1 Government powers are effectively limited by the legislature; 1.2 Government powers are effectively limited by the judiciary; 1.3 Government powers are effectively limited by independent auditing and review; 1.4 Government officials are sanctioned for misconduct; 1.5 Government powers are subject to nongovernmental checks; 1.6 Transition of power is subject to the law.

Table 1.2 *World Justice Project: largest declines in rule of law, 2015/16 to 2023*

Country	WJP 2015/2016	WJP 2023	Change
Belarus	0.53	0.45	-0.08
Egypt	0.43	0.35	-0.08
Poland	0.72	0.64	-0.08
Hungary	0.58	0.51	-0.07
Mexico	0.48	0.42	-0.07
Nicaragua	0.42	0.35	-0.07
Brazil	0.55	0.49	-0.06
El Salvador	0.51	0.45	-0.06
Georgia	0.66	0.60	-0.06
Grenada	0.66	0.60	-0.06
Myanmar	0.41	0.35	-0.06
Philippines	0.52	0.46	-0.06
Bosnia and Herzegovina	0.56	0.51	-0.05
Ghana	0.60	0.55	-0.05
Iran	0.44	0.39	-0.05
Republic of Korea	0.79	0.74	-0.05
Trinidad and Tobago	0.57	0.52	-0.05
Turkey	0.46	0.41	-0.05
Venezuela	0.31	0.26	-0.05

Note: World Justice Project, *WJP Rule of Law Index* (2023). World Justice Project scores range from 0 to 1. The table shows the nineteen largest declines. An additional eleven countries had a decline of 0.04. For most countries, the first year included in the data is 2015; for two countries in the table (Grenada, Trinidad and Tobago) it is 2016.

For 2, second source of arbitrariness (Individuals are unable to know and predict how power may be wielded over them): 3.1 Publicized laws and government data; 3.2 Right to information; 3.3 Civic participation.

For 3, third source of arbitrariness (Individuals have no place to be heard, inform, question, or respond to how power is exercised over them): 3.4 Complaint mechanisms; 4.3 Due process of the law and rights of the accused; 4.4 Freedom of opinion and expression is effectively guaranteed; 4.7 Freedom of assembly and association is effectively guaranteed; 6.4 Due process is respected in administrative proceedings; 7.1 People can access and afford civil justice. Interestingly, for this third source, indicators have declined significantly regarding freedom of expression and of assembly, but not regarding the other indicators.

See WORLD JUST. PROJECT, *THE GLOBAL RULE OF LAW RECESSION CONTINUES* (2023), <https://worldjusticeproject.org/rule-of-law-index/> (last visited Aug. 21, 2024).

Table 1.3 *Changes in the sources of arbitrariness, 2015–2023*

Sources	Number of countries	
	Less arbitrariness	More arbitrariness
1. Wielder of power is not subject to controls, limits, or accountability mechanisms.	35	78
2. Individuals unable to know how power may be wielded over them.	24	89
3. Individuals have no place to question or respond to how power is exercised over them.	33	80

N = 113 countries. Eleven countries lacked data for 2015; for those countries we used 2016 data.

Strikingly, for all three sources of arbitrariness, far more countries underwent an increase in arbitrariness than experienced a decline, as shown in Table 1.3. It is also telling that 58 countries showed greater arbitrariness on all three counts in 2023. Out of 113 countries for which we have data, 88 showed an increase in two or more of the sources of arbitrariness.

Figure 1.3 charts the number of countries showing an increase and the number undergoing a decline in the Freedom House rule-of-law indicator. Strikingly, in no year since 2005 has the number of countries showing an increase in the rule of law exceeded the number suffering a decline. Since 2017, the number of countries expanding the rule of law has dropped dramatically, while the number with a declining rule of law has remained high. Rule of law scores from the Varieties of Democracy project depict a similar trend. Rule of law scores began a steady rise after the 1990 collapse of the Soviet Union. From 1990 until 2012, states showing increases outnumbered states undergoing declines in all but two years. By contrast, from 2013 through 2021, declines were more numerous than increases in all but two years.²²⁴

In some instances, autocratic governments expanded their powers (as in Niger and Belarus). In others, elected governments eroded the

²²⁴ Michael Coppedge et al., *V-Dem Codebook v11.1*, VARIETIES OF DEMOCRACY (V-DEM) PROJECT (2021), www.v-dem.net/static/website/img/refs/codebookv111.pdf.

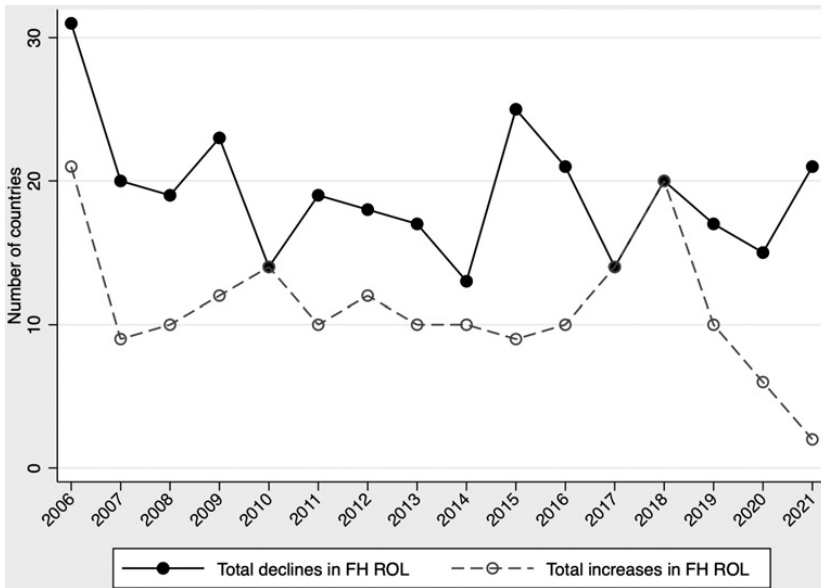


Figure 1.3 Freedom House rule of law index.

rule of law by bringing formerly independent regulatory bodies under executive control and replacing judges on supreme courts (as in Hungary and Poland). Table 1.4 lists the twenty countries with the largest declines in the rule of law under two measures (V-Dem and Freedom House). Turkey has undergone an especially striking retreat. Notably, Freedom House lists the same democracies that display declines in the V-Dem rule-of-law indicator, but it also includes the United States.

Democracy and the rule of law are tightly interlinked. On the one hand, the rule of law is an essential prerequisite of democracy, since people cannot freely participate if they fear being subject to the arbitrary exercise of power, and election results can be manipulated without a trustworthy, independent, and institutionalized election system. On the other hand, strong democratic institutions can serve as an important bulwark of the rule of law, tempering the exercise of power (although not necessarily, as Hungary and Poland demonstrate). Measures of democracy show striking declines over the past decade. Figure 1.4 shows the net change in the level of democracy in the world according to two V-Dem indicators. The first measures the extent to which countries meet the criteria of *polyarchy*. It captures the “electoral principle of democracy,” which, through free and

Table 1.4 *Decline in the rule of law, 2011–2020*

V-Dem		Freedom House	
Country	Decrease (on a scale of 0–1)	Country	Decrease (on a scale of 0–16)
Turkey	-0.43	Turkey	-5
Zambia	-0.30	Nicaragua	-4
Thailand	-0.20	Rwanda	-4
Comoros	-0.14	Tanzania	-4
El Salvador	-0.14	Ukraine	-4
Ivory Coast	-0.14	Venezuela	-4
Poland	-0.14	Azerbaijan	-3
Brazil	-0.13	Bosnia and Herzegovina	-3
Philippines	-0.13	Burundi	-3
Belarus	-0.11	Central African Republic	-3
Bosnia and Herzegovina	-0.11	Gabon	-3
Hungary	-0.11	Hungary	-3
Mauritius	-0.11	Lesotho	-3
Niger	-0.11	Philippines	-3
Mauritania	-0.10	Tajikistan	-3
Nicaragua	-0.10	United States of America	-3
Serbia	-0.10	Indonesia	-2
Moldova	-0.09	Moldova	-2
Slovenia	-0.08	Poland	-2
Togo	-0.08	Yemen	-2

Note: The V-Dem rule-of-law variable (v2x_rule) has a range of 0 to 1. The Freedom House rule-of-law indicator ranges from 0 to 16.

fair electoral competition, makes “rulers responsive to citizens.”²²⁵ The second, *liberal democracy*, “emphasizes the importance of protecting individual and minority rights against the tyranny of the state and the tyranny of the majority,” in addition to free elections.²²⁶ The graphs indicate the balance between the number of states showing an increase in

²²⁵ *Id.* at 43.

²²⁶ *Id.* at 44.

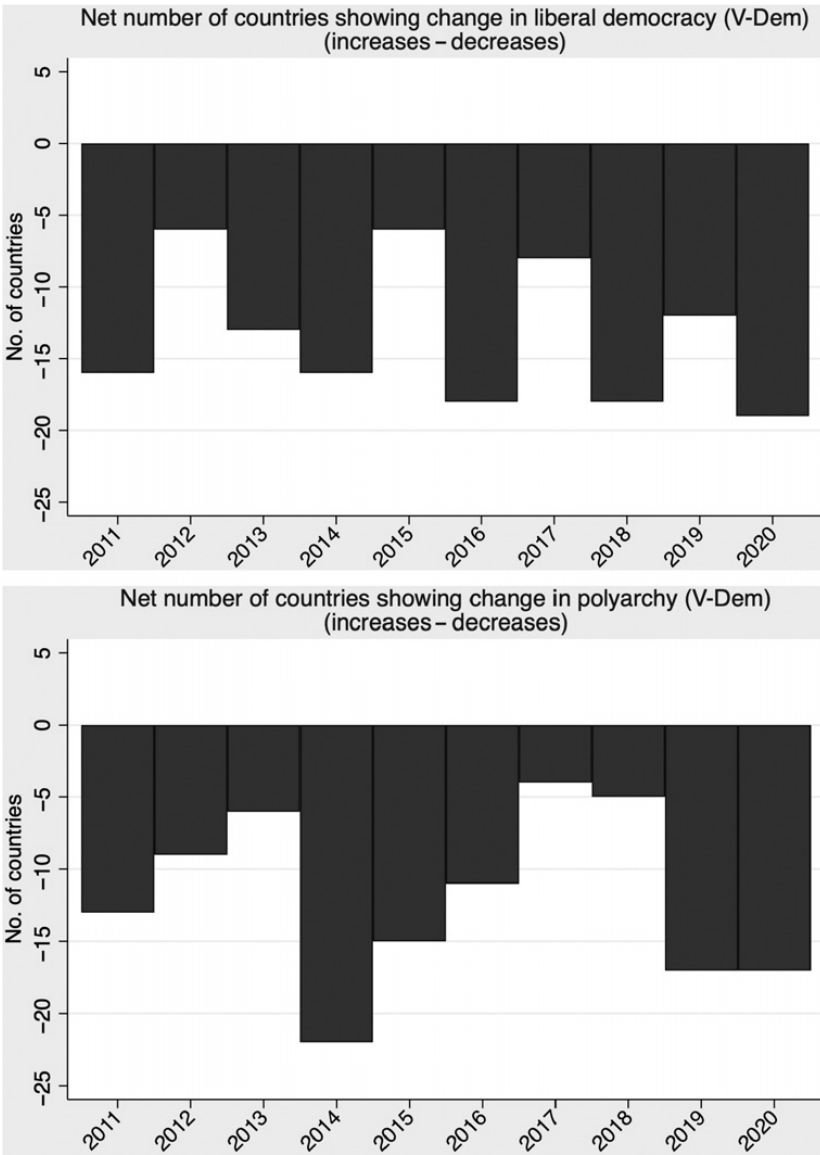


Figure 1.4 Decline in democracy indicators.

a given indicator (greater democracy) and the number of states exhibiting a decrease (diminished democracy). For each of the last ten years, declines have been more numerous, sometimes dramatically so.

Table 1.5 *Decline in democracy, 2011–2020*

V-Dem polyarchy		V-Dem liberal democracy	
Country	Decrease	Country	Decrease
Bolivia	-0.36	Poland	-0.34
Hungary	-0.32	Hungary	-0.29
Serbia	-0.27	Brazil	-0.28
Poland	-0.26	Turkey	-0.28
Thailand	-0.26	Serbia	-0.25
Turkey	-0.26	India	-0.23
India	-0.25	Mauritius	-0.23
Yemen	-0.22	Benin	-0.22
Nicaragua	-0.21	Thailand	-0.21
Venezuela	-0.21	Bolivia	-0.18
Brazil	-0.20	Comoros	-0.17
Comoros	-0.20	Philippines	-0.16
Mauritius	-0.20	Zambia	-0.16
Benin	-0.19	Botswana	-0.15
Zambia	-0.19	Nicaragua	-0.15
Bangladesh	-0.17	Moldova	-0.14
Mali	-0.14	Slovenia	-0.14
Botswana	-0.13	United States of America	-0.12
Burundi	-0.13	Czech Republic	-0.11
Philippines	-0.12	Mali	-0.11

Note: The V-Dem polyarchy variable captures the extent to which “the ideal of electoral democracy” is “in its fullest sense achieved.” The V-Dem liberal democracy variable captures the extent to which the “liberal principle of democracy” – including protection of individual and minority rights – is achieved. Both variables range from 0 to 1 (V-Dem Codebook 2021, 43–44).

Table 1.5 lists the countries showing the greatest declines in both measures. Many of the same democracies that suffered drops in measures of the rule of law (Brazil, Hungary, Philippines, Poland, Turkey, United States) also show declines in measures of democracy. India appears in both lists as well. In parallel, the Economist Intelligence Unit downgraded Japan, South Korea, and the United States from “Full Democracies” to “Flawed Democracies” between 2014 and 2019. For the first time in three

decades, it found that over half of the world's countries, governing over half of world population, are neither "Full" nor "Flawed Democracies."²²⁷ Similarly, in its *Freedom in the World 2021* report, Freedom House warned that 2020 "marked the 15th consecutive year of decline in global freedom. The countries experiencing deterioration outnumbered those with improvements by the largest margin recorded since the negative trend began in 2006."²²⁸ In other words, three complementary mechanisms for tempering the arbitrary exercise of power (rule of law, democracy, and civil and political rights) declined in parallel.

Sandholtz examines three key indicators of decline that implicate the rule of law: judicial independence, independent media, and civil society.²²⁹ Civil society organizations are key compliance constituencies needed to keep governments and other powerful actors accountable, and independent media and independent courts provide important support for their efforts. These institutional actors help protect the rule of law by casting light on and countering power's arbitrary exercise, and all three are under attack. Judicial independence has declined globally through the purging and intimidation of judges and the packing of courts with government loyalists, as illustrated by authoritarian strategies in Hungary and Poland.²³⁰ The Hungarian government even passed legislation voiding the entire jurisprudence of the country's constitutional court in order to thwart institutional checks on its power.²³¹ Freedom House documents, in parallel, continuous attacks on and deterioration of media independence around the world over a decade, "with new forms of repression taking hold in open societies and authoritarian states alike."²³² Governments in traditional democracies have increasingly cracked down on independent media, with many launching tax and other civil and criminal investigations in retaliation for adverse coverage. Reporters

²²⁷ ECONOMIST INTELLIGENCE UNIT, *DEMOCRACY INDEX 2022: FRONTLINE DEMOCRACY AND THE BATTLE FOR UKRAINE 3* (2023).

²²⁸ Sarah Repucci & Amy Slipowitz, *Freedom in the World 2021: Democracy Under Siege*, FREEDOM HOUSE (2022), <https://freedomhouse.org/report/freedom-world/2021/democracy-under-siege>.

²²⁹ Wayne Sandholtz, *Resurgent Authoritarianism and the International Rule of Law*, 28 SW. J. INT'L L. 209 (2023).

²³⁰ *Id.*; R. Daniel Keleman, *The Assault on Poland's Judiciary*, FOREIGN AFFS. (July 26, 2017), www.foreignaffairs.com/poland/assault-polands-judiciary.

²³¹ Scheppele, *supra* note 23, at 550–53.

²³² Sarah Repucci, *Freedom of the Media: A Downward Spiral*, FREEDOM HOUSE (2019), <https://freedomhouse.org/report/freedom-and-media/2019/media-freedom-downward-spiral>.

Without Borders dropped Japan to 71st in “world press freedom rankings,” while India, under President Modi, fell to 150th.²³³ UNESCO’s 2022 report finds that “[o]ver the past five years, approximately eighty-five percent of the world’s population experienced a decline in press freedom in their country.”²³⁴ Governments, in addition, increasingly repress civil society organizations, including by cutting off financial support from foreign sources.²³⁵ Following the lead of China and Russia, dozens of countries have adopted new restrictions on foreign funding of nongovernmental organizations, and many have prohibited such funding.²³⁶ UN High Commissioner for Human Rights Michelle Bachelet rebuked Israel, for example, when it not only cracked down on civil society groups but, in December 2021, designated without substantiation as “terrorist organizations” six Palestinian civil society groups that had long defended human rights and delivered humanitarian aid.²³⁷ These trends bode ill for the rule of law.

4 International Trends

There is parallel evidence of decline in international law and institutions, which some now call a “crisis,” a decline that implicates rule-of-law protections.²³⁸ The evidence that we present is largely of a qualitative nature. It concerns challenges to, and constraints placed on, international courts, a turn away from treaties to informal agreements and understandings, the

²³³ *Index*, REPORTERS WITHOUT BORDERS (2022), <https://rsf.org/en/index>; *India: Media Freedom Under Threat*, REPORTERS WITHOUT BORDERS (May 3, 2022), <https://rsf.org/en/india-media-freedom-under-threat>.

²³⁴ UNESCO, JOURNALISM IS A PUBLIC GOOD: WORLD TRENDS IN FREEDOM OF EXPRESSION AND MEDIA DEVELOPMENT, GLOBAL REPORT 2021–2022 (2022) (on file with authors).

²³⁵ U.N. Secretary-General, *Rep. of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and Association*, U.N. Doc. A/74/349 (Sept. 11, 2019) (“there continues to be a worrying trend of closing civic space in many countries across the world”).

²³⁶ Darin Christensen & Jeremy M. Weinstein, *Defunding Dissent: Restrictions on Aid to NGOs*, 24 J. DEMOCRACY 77, 80 (2013); Saskia Brechenmacher, *Repression and Responses: Cross-Cutting Themes*, in CIVIL SOCIETY UNDER ASSAULT: REPRESSION AND RESPONSES IN RUSSIA, EGYPT, AND ETHIOPIA 91 (2017), <https://tinyurl.com/3h4typ7z>; Chrystie F. Swiney, *The Counter-Associational Revolution: The Rise, Spread, and Contagion of Restrictive Civil Society Laws in the World’s Strongest Democratic States*, 43 FORDHAM INT’L L.J. 399 (2019).

²³⁷ Press Release, United Nations, *Outraged over Israel’s Designation of Six Civil Society Groups as Terrorists*, U.N. Doc. GA/PAL/1443 (Dec. 7, 2021), [/www.un.org/press/en/2021/gapal1443.doc.htm](http://www.un.org/press/en/2021/gapal1443.doc.htm).

²³⁸ Krieger & Nolte, *supra* note 86, at 4.

neutering of international institutional scrutiny of human rights and rule-of-law violations, and the distortion and harnessing of international law to support repression, such as in the name of suppressing “terrorism,” “separatism,” and “extremism” to maintain “public order.”

First, states have negatively responded to international judicial oversight over the last decade, and in particular by international human rights courts.²³⁹ To start, there has been considerable backlash against the flagship human rights court, the ECtHR, which addresses the “rule of law” in its jurisprudence, building on the preamble to the European Convention on Human Rights.²⁴⁰ States have done so through threats of withdrawal, pressures for greater accommodation through the principles of subsidiarity and the margin of appreciation, reduced support from national courts, and executive neglect of the Court’s rulings. It was the rising number of claims – and their increased political and economic stakes – that triggered state responses. For example, the number of individual applications charging Russia with human rights violations nearly doubled from 1999 to 2001, and they rose to 12,328 in 2013. Following the ECtHR judgment in *Yukos v. Russia*, which ordered 2.51 billion dollars in compensation to Yukos shareholders for unfair tax proceedings,²⁴¹ President Putin signed a law that gave the Constitutional Court of Russia the authority to decide whether to comply with ECtHR judgments.²⁴² Following its invasion of the Ukraine in 2022, Russia was expelled from the Council of Europe and ceased being a party to the European Convention on Human Rights on September 16, 2022.²⁴³

²³⁹ Erik Voeten, *Populism and Backlashes Against International Courts*, 18 PERSPS. ON POL. 407, 408 (2020) (“[B]acklashes against international courts are not just about sovereignty. Populist attacks on international courts often closely track efforts to curb domestic courts”); Wayne Sandholtz, Yining Bei & Kayla Caldwell, *Backlash and International Human Rights Courts*, in CONTRACTING HUMAN RIGHTS: CRISIS, ACCOUNTABILITY, AND OPPORTUNITY 159 (Alison Brysk & Michael Stohl eds., 2018); Mikael Madsen, Pola Cebulak & Micha Wiebusch, *Backlash Against International Courts: Explaining the Forms and Patterns*, 14 INT’L J.L. CONTEXT 197 (2018).

²⁴⁰ Mario Oetheimer & Guillem Cano Palomares, *European Court of Human Rights (ECtHR)*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 71 (2020) (“The Court has used concepts such as the rule of law and ‘democracy’, two fundamental values underlying the whole ECHR system and the COE, as interpretative tools for the development of the rights set forth in the ECHR.”).

²⁴¹ Lukas L. Alpert, *Russia Must Compensate Yukos Shareholders*, *European Court Rules*, WALL ST. J. (July 28, 2014), <https://tinyurl.com/uhssz97p>.

²⁴² Alexandra Sims, *Vladimir Putin Just Signed a Law Allowing Russia to Ignore International Human Rights*, INDEPENDENT (Dec. 15, 2015), <https://tinyurl.com/5n7bv8z2>.

²⁴³ See Chapter 8.

Long-standing democracies also challenged the Court, including Denmark, Switzerland, and the United Kingdom. The United Kingdom, for instance, had generally shown a high rate of compliance with ECtHR judgments, but a pair of cases – one involving prison inmates’ right to vote and another involving the deportation of a Muslim cleric to Jordan – raised the British government’s ire and fueled a rise in public opinion favorable to withdrawing from the Court. At the 2012 Brighton ministerial conference on the future of the ECtHR, the British government sought to trim the Court’s powers,²⁴⁴ a project that so far has failed.²⁴⁵ However, Conservative governments in power until mid 2024 considered withdrawing from the Convention and replacing the Human Rights Act so that the Convention is no longer incorporated into UK law.

There has been similar backlash against other regional human rights courts, as well as the International Criminal Court. In the Americas, after a series of rulings by the IACtHR against Venezuela, the Constitutional Chamber of the country’s Supreme Tribunal of Justice blocked six IACtHR judgments from being applied. President Hugo Chávez then withdrew Venezuela from the Inter-American Convention on Human Rights in 2012, following Trinidad and Tobago earlier. After the IACtHR ruled in 2014 that the government of the Dominican Republic violated the Inter-American Convention on Human Rights by denying identity documents and Dominican nationality to Haitian immigrants and their descendants, and detaining and expelling them, the Dominican Constitutional Tribunal issued a decision that appeared to nullify the country’s IACtHR membership and remove it from the IACtHR’s jurisdiction.²⁴⁶ In April 2019, Argentina, Brazil, Chile, Colombia, and Paraguay issued a joint declaration to the Inter-American Commission on Human Rights calling for greater national “autonomy,” signaling that the inter-American human rights system had become too intrusive in challenging state failures to respect individual rights. The African Court on Human and Peoples’ Rights has faced similar pressures, with only eight states currently permitting nationals to bring cases to the Court, after four states – Rwanda, Tanzania, Benin, and Côte d’Ivoire – withdrew their permission for direct access, following

²⁴⁴ Lawrence R. Helfer, *The Benefits and Burdens of Brighton*, ESIL REFLECTIONS (June 8, 2012), <https://esil-sedi.eu/the-burdens-and-benefits-of-brighton/>.

²⁴⁵ Stone Sweet, Sandholtz & Andenas, *supra* note 140.

²⁴⁶ *Expelled Dominicans and Haitians v. Dominican Republic*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282 (Aug. 28, 2014); Press Release, Organization of American States, IACHR Condemns Judgment of the Constitutional Court of the Dominican Republic, O.A.S. Press Release No. 130/14 (Nov. 6, 2014).

decisions against them.²⁴⁷ Similarly, Burundi and the Philippines have withdrawn from the International Criminal Court, and other states have threatened to follow suit.²⁴⁸

The backlash is not limited to human rights courts. China rejected a ruling of the Permanent Court of Arbitration against its claims in the South China Sea, calling the decision “wastepaper.”²⁴⁹ The United States neutered the Appellate Body of the World Trade Organization by blocking the appointment of new members after existing members’ terms expired, a tactic that Zimbabwe (under President Mugabe) earlier used against the South African Development Community Tribunal following unfavorable rulings regarding its land seizures.²⁵⁰ The United States then increasingly deployed its economic power unilaterally to challenge foreign practices it did not like, in violation of WTO law, a tactic that China also adopted. Similarly, a number of states terminated (or allowed to expire) bilateral investment treaties instituting investor–state dispute settlement (including India, Indonesia, South Africa, and the United States regarding NAFTA’s investment chapter), and some withdrew from the International Centre for Settlement of Investment Disputes, which provides a procedural framework for such arbitrations. Investor–state arbitral tribunals themselves have raised rule-of-law challenges given their asymmetric nature, where only investors can bring claims and investors appoint one of the three arbitrators. Still, if the goal is enhanced rule-of-law protections within states, the better institutional alternative will vary with different contexts, which alternatives should include international venues, especially when national rule-of-law indicators decline.²⁵¹

Second, in addition to challenges to international courts, states have turned away from treaty-making and increasingly made use of informal, nonbinding mechanisms.²⁵² Since the early 2000s, there has been

²⁴⁷ *Declarations*, AFR. CT. ON HUM. & PEOPLES’ RTS., www.african-court.org/wpafc/declarations/ (last visited Aug. 21, 2024).

²⁴⁸ Jason Gutierrez, *Philippines Officially Leaves the International Criminal Court*, N.Y. TIMES (Mar. 17, 2019), www.nytimes.com/2019/03/17/world/asia/philippines-international-criminal-court.html.

²⁴⁹ Jane Perlez, *Tribunal Rejects Beijing’s Claims in South China Sea*, N.Y. TIMES (July 12, 2016), www.nytimes.com/2016/07/13/world/asia/south-china-sea-hague-ruling-philippines.html.

²⁵⁰ Karen Alter, James Gathii & Laurence Helfer, *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. INT’L L. 293 (2016).

²⁵¹ Puig & Shaffer, *supra* note 166.

²⁵² INTERNATIONAL LAWMAKING (Joost Pauwelyn, Ramses Wessel & Jan Wouters eds., 2012).

a quantitative decline in new treaties, and the International Law Commission's work has ceased giving rise to treaties.²⁵³ Nonbinding international norms – sometimes referred to as “soft law” – can exercise normative influence in support of problem-solving, and thus help develop international law and enhance its effectiveness and legitimacy.²⁵⁴ The turn to less formal mechanisms thus should not necessarily worsen rule-of-law protections.²⁵⁵ Nonetheless, the move away from multilateral treaties and from publicized written commitments monitored by third-party institutions reflects systemic changes that are worrisome, especially with the rise in power of authoritarian states and heightened geopolitical competition and conflict. As geopolitics and security become more pervasive concerns and more issues are viewed in zero-sum terms, states use less formal and less transparent means to govern their relations. These shifts toward informal, nontransparent mechanisms reduce accountability and enhance the ability of powerful states to deploy coercive leverage to advance their interests. For example, China's Belt and Road Initiative illustrates the use of informal mechanisms, such as memoranda of understanding and undisclosed contracts, through which ruling elites form economic and political ties. Deploying these mechanisms, China is well positioned to exercise leverage as it works to create a China-centric economic order.²⁵⁶ Given a lack of public scrutiny, these types of arrangements, in turn, raise corruption concerns, which is a key source of arbitrariness and thus an indicator of the undermining of the rule of law.²⁵⁷ Authoritarian governments are likely to rely on these types of less formal arrangements, which provide fewer specific legal commitments backed by third-party dispute settlement.²⁵⁸

²⁵³ Jan Wouters, *International Law, Informal Law-Making and Global Governance in Times of Anti-Globalism and Populism*, in *THE INTERNATIONAL RULE OF LAW: RISE OR DECLINE?*, *supra* note 86, at 242, 251–52.

²⁵⁴ DINAH SHELTON, *COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM* (2000); Gregory Shaffer & Mark A. Pollack, *Hard and Soft Law*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 197* (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012).

²⁵⁵ Sanderijn Duquet et al., *Upholding the Rule of Law in Informal International Lawmaking Processes*, 6 *HAGUE J. ON RULE L.* 75 (2014).

²⁵⁶ Gregory Shaffer & Henry Gao, *A New Chinese Economic Order?*, 23 *J. INT'L ECON. L.* 607 (2020).

²⁵⁷ See Ginsburg & Versteeg, *supra* note 162, at 504–05.

²⁵⁸ Tom Ginsburg, *Authoritarian International Law?*, 114 *AM. J. INT'L L.* 221 (2020).

Third, authoritarian governments, in parallel, have worked to neutralize existing international institutions' scrutiny of human rights practices, while developing and harnessing international norms to enhance state control. China's and Russia's leaders have viewed international civil and political rights in support of rule-of-law norms as a tool used by the West to weaken their governments' standing internationally and to destabilize their governments internally. In response, they aim to reshape international law to protect their hold on power, whether by curtailing existing institutions' oversight of compliance with international law commitments, or by creating new institutions and new legal norms.²⁵⁹

These governments use different forms of leverage to curtail international scrutiny of their internal practices by engaging, as Ginsburg writes, in a "concerted effort to neutralize multilateral forums as vehicles for democracy promotion," human rights, and the rule of law.²⁶⁰ China has a seat on the Human Rights Council, where (for the 2020 Council session), nearly half of the membership (21 out of 47 countries) consisted of autocracies,²⁶¹ despite the formal requirement that members of the Council have a strong record of respecting human rights. Following the issuance of a report by the Office of the United Nations High Commissioner for Human Rights in August 2022, which found that China's human rights violations in Xinjiang could amount to crimes against humanity, China called the Office a "thug and accomplice of the US and the West."²⁶² China then won a vote in the Human Rights Council to block further scrutiny of the report's findings, defeating a US proposal.²⁶³ In parallel, China has attempted to defund human rights promotion in UN peacekeeping operations, block the accreditation of civil society groups before the UN, and curtail the role of UN Special Rapporteurs.²⁶⁴ The result could be a decline in human rights

²⁵⁹ TOM GINSBURG, *Authoritarian International Law*, in DEMOCRACIES AND INTERNATIONAL LAW 186 (2021).

²⁶⁰ Ginsburg, *supra* note 258, at 255.

²⁶¹ Wayne Sandholtz, *Authoritarianism, International Human Rights, and Legal Change*, in IS THE INTERNATIONAL LEGAL ORDER UNRAVELING? (David Sloss ed., 2022). Russia held a seat until it was suspended in 2022 following its invasion of Ukraine.

²⁶² Michele Bachelet, the UN High Commissioner for Human Rights, released the report minutes before her term ended. China had placed considerable pressure on her to not release it. Jan van der Made, *Beijing Furious over Damning UN Rights Report on Uyghurs in Xinjiang*, RFI (Sept. 1, 2022, 16:59), <https://tinyurl.com/mfah6urh>.

²⁶³ Nick Cumming-Bruce, *China Turns Back Move for U.N. Debate on Abuse of Uyghurs*, N. Y. TIMES (Oct. 6, 2022), www.nytimes.com/2022/10/06/world/asia/china-un-xinjiang-uyghurs.html (vote of 19–17, with 11 abstentions).

²⁶⁴ Nicholas Bequelin, *China's Crimes in Xinjiang Cannot Go Unpunished*, N. Y. TIMES, Oct. 3, 2022, at A22.

monitoring and enforcement and, more generally, a reduced use of third-party institutions, including international courts.²⁶⁵

Fourth, authoritarian governments aim to reshape the content of international law in ways that they can deploy domestically to support their hold on power. They do so, in part, through increasing their participation and leadership roles within international organizations in order to exercise influence. China, for example, has successfully pursued leadership roles for Chinese nationals. In 2020, Chinese nationals headed four of the UN's fifteen agencies; no other country's nationals led more than one.²⁶⁶ Chinese nationals led the Food and Agricultural Organization (FAO), critical for issues of food security and standard setting; the UN Industrial Development Organization (UNIDO), which has praised and supported China's Belt and Road Initiative; the International Civil Aviation Organization (ICAO), which controversially worked to isolate Taiwan; and the International Telecommunications Union (ITU), which helps shape the governance of information and communications technologies, implicating government controls. In addition, a Chinese national almost became Director General of the World Intellectual Property Organization (WIPO) in 2020, losing only after concerted US and European lobbying for an alternative candidate from Singapore.²⁶⁷ In parallel, China has dramatically increased its leadership positions in international standard-setting bodies across councils, technical management boards, technical committees, subcommittees, and working groups. Such standards are crucial for infrastructure projects, including for telecommunications, where Chinese companies are among the world's leaders. China regularly volunteers to host standards meetings and provide secretariat services. Chinese nationals held the presidencies of the International Standardization Organization (ISO) from 2015 to 2017, and of the International Electrotechnical Committee (IEC) from 2020 to 2022. A Chinese national also presided over Interpol, the

²⁶⁵ John Fisher, *Human Rights Council Membership Has Its Consequences*, HUM. RTS. WATCH (Jan. 14, 2019, 9:11 AM), www.hrw.org/news/2019/01/14/human-rights-council-membership-has-its-consequences; Ginsburg, *supra* note 258.

²⁶⁶ Courtney J. Fung & Shing-Hon Lam, *China Already Leads 4 of the 15 U.N. Specialized Agencies – and Is aiming for a 5th*, WASH. POST (Mar. 3, 2020, 6:00 AM), <https://tinyurl.com/y37xde4z>.

²⁶⁷ Michael McCaul, *The United States Can't Cede the U.N. to China*, FOREIGN POL'Y (Sept. 24, 2019, 12:32 PM), <https://foreignpolicy.com/2019/09/24/the-united-states-cant-cede-the-u-n-to-china/>. The United States organized a campaign to block China's candidate to lead WIPO. Nick Cumming-Bruce, *U.S.-Backed Candidate for Global Tech Post Beats China's Nominee*, N.Y. TIMES (Mar. 4, 2020), <https://tinyurl.com/5n9y2acs>.

International Criminal Police Organization, until (ironically) China arrested him on a trip home in 2018, in the middle of his term, on charges of corruption and bribery.

Through enhancing their engagement in international institutions, authoritarian governments can reshape, develop, and then harness international norms for authoritarian ends at home. China and other authoritarian states have promoted international law norms of sovereignty and noninterference in a state's internal affairs. In this way, China hopes to counter the individualist turn of international law, with its increased emphasis on human rights, which the United States and Europe championed during the Cold War, and which became more institutionalized after the Soviet Union's collapse. China and other authoritarian states, in particular, have championed the development of international norms and mechanisms that they can use for repressive purposes. China, for example, has worked within the International Telecommunications Union to develop a new internet infrastructure that facilitates state control. It successfully supported a UN General Assembly resolution on "Countering the Use of Information and Communications Technologies for Criminal Purposes" that it and others can reference to justify internal suppressive measures. It also promulgates regional norms that it can use to repress internal dissent and counter foreign critique, such as regards China's suppression of Uyghurs, Tibetans, and the people of Hong Kong. Through the Shanghai Cooperation Organization, China cooperates with neighboring countries to combat the "three evils" of "terrorism, separatism, and extremism," including through international extradition agreements.²⁶⁸ These agreements serve to legitimize China's targeting of human rights and democracy activists, including their lawyers, and its suppression of free expression and the free flow of information on national security grounds. Russia and other states have followed its lead. The result of these shifts could be the recasting of international law and institutions to better serve authoritarian interests, leading to an "authoritarian international law."²⁶⁹

One should be careful not to idealize the turn to international law and institutions in the 1990s and 2000s given the exercise of Western hegemony.²⁷⁰ At the same time, one should assess the implications of existing trends for the rule of law from a comparative institutional perspective. That is, one should ask whether the rising challenges to

²⁶⁸ SHANGHAI COOP. ORG., SHANGHAI CONVENTION ON COMBATING TERRORISM, SEPARATISM, AND EXTREMISM (2011).

²⁶⁹ Ginsburg, *supra* note 258.

²⁷⁰ Detlev Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843 (2001).

international institutions and law will advance or undermine rule-of-law goals. The evidence presented above indicates that domestic rule-of-law protections are declining overall, and that they parallel challenges to international law and institutions. These dual challenges to rule-of-law goals at the domestic and international levels, we contend, are part of a broader, transnational, interactive, negative cycle.

5 *The Enmeshment of National and International Trends*

Rule-of-law norms are part of a liberal tradition that can have quite radical political implications.²⁷¹ They are increasingly contested through a combination of illiberal *domestic* developments within traditional democracies (including in the United States) and shifts in *international* power with China's rise as an authoritarian state. *Internally*, a populist, anti-globalist backlash against the international order has upended domestic politics in many countries. President Donald Trump's "America First" attacks on the international legal order, which the United States had predominantly forged, illustrate the links between national processes and international institutional checks. The Trump administration and its allies within the United States promoted and forged new ties with nationalist and authoritarian parties and leaders abroad while attacking, neutering, and withdrawing from international institutions and treaties, from the UN Human Rights Council to the International Criminal Court and its Office of the Prosecutor. *Externally*, international anti-terrorism norms and institutions promoted by the United States in the early 2000s already had created new institutional and normative resources for authoritarian governments.²⁷² These authoritarian governments, most notably China, rose as global economic powers, creating new challenges for international institutions, and particularly international courts. The result could be the "dejudicialization of international politics."²⁷³

The upsurge of illiberalism and economic nationalism within the United States undercut the liberal international order from within, as the United States under the Trump administration paradoxically became

²⁷¹ NICK CHEESMAN, *OPPOSING THE RULE OF LAW: HOW MYANMAR'S COURTS MAKE LAW AND ORDER* 263 (2016) ("The rule-of-law ideal is not a conservative doctrine but a radical one: a doctrine going to the radix, or root, of political power. It is an idea that fundamentally challenges how power has been and continues to be exercised.").

²⁷² Scheppele, *The Migration of Anti-Constitutional Ideas*, *supra* note 157.

²⁷³ Daniel Abebe & Tom Ginsburg, *The Dejudicialization of International Politics?*, 63 *INT'L STUD. Q.* 521 (2019).

a revisionist power. Europe has faced parallel internal contestations, illustrated by Brexit, the rise of illiberal parties within member states, especially but not only within Central and Eastern Europe,²⁷⁴ and an increasingly aggressive Russia. Externally, an authoritarian China now vies for regional and global leadership to shape international norms and institutions, and its repressive politics are fundamentally at odds with liberal values. These domestic and international developments interrelate, and they pose severe challenges to the advancement of rule-of-law goals and practices.

The transnational development and conveyance of norms occur through different mechanisms, including through coercion, reciprocity, socialization, and modeling.²⁷⁵ In parallel, iterative transnational processes of norm development are driven by the indeterminacy of legal texts, ideological tensions and contradictions within texts, diagnostic struggles over the nature of the problem (including as contexts change), and actor mismatch between those that adopt norms and those that implement them in practice.²⁷⁶ For example, the term “rule of law” is vague and its meaning contested, reflecting a degree of indeterminacy. To the extent that actors view the rule of law in terms of legality or as defined by checklists, authoritarians can deploy rule-of-law rhetoric and adapt formal measures in ways that advance authoritarian ends.²⁷⁷ International norms, in turn, often reflect compromises that incorporate ideological tensions and contradictions. For example, take the tensions between international law norms for the suppression of terrorism and norms to ensure due process and proportionality. Authoritarian governments can advance one aspect (suppressing terrorism) while ignoring the other (ensuring due process and proportionality).²⁷⁸ Relatedly, there will be ongoing tensions concerning the conceptualization of problems, which implicates legal responses. For example, the governing norms of the trade regime are being redefined in national security terms, and they have moved away from concerns about nondiscrimination and fairness toward nonnationals.²⁷⁹ Finally, there are always mismatches between

²⁷⁴ IVAN KRASSTEV & STEPHEN HOLMES, *THE LIGHT THAT FAILED: A RECKONING* (2019).

²⁷⁵ JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 17 (2000); Simmons, Dobbin & Garrett, *supra* note 191.

²⁷⁶ Halliday & Carruthers, *supra* note 89; Halliday & Shaffer, *supra* note 10, at 37–42.

²⁷⁷ See, e.g., Scheppele, *supra* note 201.

²⁷⁸ GINSBURG, *supra* note 259.

²⁷⁹ Cf. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 180, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998);

those who negotiate and enact international legal norms and those who implement them. Implementing institutions and officials at the state and substate levels shape the law in action.

From the perspective of transnational legal ordering, the question becomes, What are the facilitating circumstances and precipitating conditions that give rise not only to a transnational legal order but also to its decline, including through the formation of rival transnational legal orders?²⁸⁰ There have been a number of facilitating circumstances over the last decade, including power shifts, unintended consequences, legitimacy challenges, effectiveness concerns, and a reconceptualization of problems. There has been a shift in global power with the economic and political rise of China and the relative decline of the United States and Europe. These shifts have increased China's leverage over others while decreasing those of the United States and European Union. China's economic rise was, in part, an unintended consequence of the legal architecture for economic globalization that the United States had erected. After China joined the WTO, foreign capital invested massively in China, as well as in global supply chains linked to new Chinese manufacturing. This legal architecture also favored transnational capital over domestic labor, since capital was free to invest elsewhere and use that leverage in labor–capital relations. The result was a significant rise in income for capitalists, high-level management, and many professionals, accompanied by stagnant income for most Americans, which drove income inequality to levels not seen in the United States since the 1920s.²⁸¹ These developments undercut a sense of the legitimacy and effectiveness of the trade regime. They triggered a growing invocation of national security exceptions that enhance executive power at the expense of legislative and judicial

Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, *Toward a Geoeconomic Order in Trade and Investment*, 22 J. INT'L ECON. L. 655 (2019).

²⁸⁰ Halliday & Shaffer, *supra* note 93, at 507–11, 524 (setting forth a series of hypotheses that come out of the book's case studies, including power shifts, legitimacy deficits, changed contexts, inflexibility, internal contradictions, distributive bias, and ineffectiveness); Halliday & Shaffer, *supra* note 10, at 32–37 (on facilitating circumstances and precipitating conditions).

²⁸¹ EMMANUEL SAEZ & GABRIEL ZUCMAN, *THE TRIUMPH OF INJUSTICE* (2019); U.S. INT'L TRADE COMM'N, *DISTRIBUTIONAL EFFECTS OF TRADE AND TRADE POLICY ON U.S. WORKERS 18–19* (2022) (based on the existing literature, which needs further development, finding reduced employment for low-skill manufacturing workers, reduced earnings for non-college-educated workers or those previously employed in manufacturing jobs, and a disproportionate effect on wages of minority workers).

oversight.²⁸² They help explain why, paradoxically, the United States (as the incumbent power) and not China (the emerging power) has become revisionist in upending the regime.²⁸³

China's emergence as a regional and global power, and rising concerns about inequality, in turn, catalyzed a shift in the conceptualization of international "problems" within US and European policy circles, spurring a rethinking of international law and institutions' role. In international economic law, there has been a shift toward a focus on geopolitics, national security, supply chain resiliency, and social inclusion, away from one on economic efficiency, which had been foundational for an international legal system supportive of economic globalization. As a result, national security bureaucracies' power has risen both in the United States and China at the expense of trade ministries.

These facilitating circumstances create the conditions for precipitating events that implicate rule-of-law practices. For example, the North Atlantic financial crisis of 2008 helped accelerate China's gains in economic power, called into question the superiority of the US economic model in relation to China's state-driven alternative, and further contributed to economic precarity for working-class Americans.²⁸⁴ The combination of facilitating circumstances and precipitating conditions catalyzed backlash against the international economic order and helped empower populist, economic nationalist leaders within countries.²⁸⁵ Ongoing crises could further these trends, including ecological crises driven by climate change,²⁸⁶ which, in turn, exacerbate "migration crises" that populist leaders can harness.

²⁸² Kristen Eichensehr & Cathy Hwang, *National Security Creep in Corporate Transactions*, 123 COLUM. L. REV. 549 (2023).

²⁸³ GREGORY SHAFFER, *EMERGING POWERS AND THE WORLD TRADING SYSTEM: THE PAST AND FUTURE OF INTERNATIONAL ECONOMIC LAW* (2021). Cf. JOHN IKENBERRY, *AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS* (2000).

²⁸⁴ ADAM TOOZE, *CRASHED: HOW A DECADE OF FINANCIAL CRISES CHANGED THE WORLD* (2018). The US-led invasions of Iraq and Afghan and its "war on terror" following the September 11, 2001, attacks also contributed to China's relative rise and US decline, creating groundwork for populist leaders that would challenge rule-of-law norms. See SPENCER ACKERMAN, *REIGN OF TERROR: HOW THE 9/11 ERA DESTABILIZED AMERICA AND PRODUCED TRUMP* xvii (2021) ("The mortar of birth-erism was the War on Terror . . .").

²⁸⁵ David H. Autor et al., *Importing Political Polarization? The Electoral Consequences of Rising Trade Exposure*, 110 AM. ECON. REV. 3139 (2020).

²⁸⁶ EVE DARIAN-SMITH, *GLOBAL BURNING: RISING ANTIDEMOCRACY AND THE CLIMATE CRISIS* (2022).

Leaders around the globe – from Modi in India, Duterte and then Marcos in the Philippines, Orbán in Hungary, Erdogan in Turkey, and (when in power) Trump in the United States – embrace a populism, which, following Jan Werner Müller, we conceptualize as a combination of anti-elitism and moralized anti-pluralism.²⁸⁷ Anti-elitism justifies populist challenges to institutional constraints since institutions – whether they be independent courts, agencies, the civil service, or media – allegedly have been populated and controlled by elites.²⁸⁸ A moralized anti-pluralism differentiates the “real people” from others, who tend to be minorities, migrants, and political opponents. Populists cast these “others” as immoral, disloyal, and corrupt.²⁸⁹ International institutions and civil society organizations are dismissed and attacked as foreign or “foreign agents.” The exclusionary politics of “Us” (the “real people”) versus “Them” (not “Us”) – with opponents and critics labeled as “enemies of the people” – puts serious strains on rule-of-law norms. “For my friends, everything; for my enemies, the law,” becomes the norm.²⁹⁰ Populist, nativist parties have shaped public agendas even when they are not elected to power, especially as regards migrants and policing.²⁹¹ The global COVID pandemic appears to have further emboldened many national governments to expand their powers relative to civil society²⁹² – a creeping authoritarianism that bodes further ill for rule-of-law protections. Montoya and Ponce show a strong statistical

²⁸⁷ JAN WERNER MÜLLER, *WHAT IS POPULISM?* (2016); see also PIPPA NORRIS & RONALD INGLEHART, *CULTURAL BACKLASH: TRUMP, BREXIT, AND AUTHORITARIAN POPULISM* (2019).

²⁸⁸ A “main institutional aspect of populism under this account is a frontal assault upon the separation of powers.” WOJCIECH SADURSKI, *A PANDEMIC OF POPULISTS* 16 (2022).

²⁸⁹ *Id.*

²⁹⁰ O’Donnell attributes this quote to Brazilian populist Getulio Dornelles Vargas. Guillermo O’Donnell, *Why the Rule of Law Matters*, 15 *J. DEMOCRACY* 32, 40 (2004). Others, however, attribute it to Oscar Benavides, president of Peru from 1933 to 1939.

²⁹¹ Nicola Lacey, *Populism and the Rule of Law*, in *THE CAMBRIDGE COMPANION TO THE RULE OF LAW*, *supra* note 12, at 458, 465.

²⁹² Ted Piccone, *Rule of Law Takes a Big Hit During COVID-19*, BROOKINGS (Oct. 18, 2021), <https://tinyurl.com/46ktu3av>; Frances Z. Brown, Saskia Brechenmacher & Thomas Carothers, *How Will the Coronavirus Reshape Democracy and Governance Globally?*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Apr. 6, 2020), <https://tinyurl.com/mwtpjucw>; Selam Gebrekidan, *For Autocrats, and Others, Coronavirus Is a Chance to Grab Even More Power*, N.Y. TIMES (Mar. 30, 2020), <https://tinyurl.com/4fntber9>. There is a clear distinction between responsible governments taking discretionary action to protect people from the risks of contagion, on the one hand, and the harnessing of the pandemic for self-serving authoritarian ends, on the other.

correlation between populist, anti-pluralist platforms and declines in the rule of law.²⁹³

The rise of populism and erosion of democracy within countries correlates with increased challenges to international institutions.²⁹⁴ For instance, US president Trump drove a populist, nativist agenda in which he undermined US governance norms, expressed admiration for authoritarian leaders and disdain for democratic ones, and sought repeatedly to block the transfer of power, including through pressuring election officials to “find” him enough votes, scheming to create fake, pro-Trump electors, and then rallying an attack on the US capitol, all as part of an attempted coup.²⁹⁵ In parallel, in line with his “America First” policies, Trump undercut international institutions and agreements. He withdrew the United States from the Paris Agreement on climate change, the Trans-Pacific Partnership, the Iran nuclear deal, the Open Skies Treaty, the Intermediate Nuclear Forces Treaty, and the Optional Protocol to the Vienna Convention on Diplomatic Relations, and he withdrew US participation in the Global Compact on Migration.²⁹⁶ He likewise withdrew, or initiated withdrawal, of the United States from the UN Human Rights Council, the World Health Organization, and the UN Economic, Social, and Cultural Organization (UNESCO), while neutering the World Trade Organization’s dispute settlement system, challenging and threatening to withdraw from NATO and the WTO, and sanctioning the Prosecutor for the International Criminal Court as if she were a terrorist threat.²⁹⁷ Similarly, within Europe, authoritarian regimes in Hungary and Poland took advantage of the consensual decision-making processes in the

²⁹³ See Chapter 3.

²⁹⁴ Voeten finds that populist governments were responsible for eighteen of twenty-eight state backlashes against international courts that he traces. Voeten, *supra* note 239.

²⁹⁵ Michael D. Shear & Stephanie Saul, *Trump, in Taped Call, Pressured Georgia Official to ‘Find’ Votes to Overturn Election*, N. Y. TIMES (Jan. 3, 2021), www.nytimes.com/2021/01/03/us/politics/trump-raffensperger-call-georgia.html; Luke Broadwater & Alan Feuer, *Panel Ties Trump to Fake Elector Plan, Mapping His Attack on Democracy*, N. Y. TIMES (June 21, 2022), www.nytimes.com/2022/06/21/us/politics/trump-pressure-state-officials.html.

²⁹⁶ Oona A. Hathaway, *Reengaging on Treaties and Other International Agreements (Part I): President Donald Trump’s Rejection of International Law*, JUST SECURITY (Oct. 2, 2020), <https://tinyurl.com/7zs5pue3>; Richard Haass, *Opinion, Trump’s Foreign Policy Doctrine? The Withdrawal Doctrine*, WASH. POST (May 27, 2020, 12:10 PM), <https://tinyurl.com/3pdr9fsx>.

²⁹⁷ Hylke Dijkstra et al., *Donald Trump and the Survival Strategies of International Organisations: When Can Institutional Actors Counter Existential Challenges?*, CAMBRIDGE REV. INT’L AFFS. 1, 1 (2022), www.tandfonline.com/doi/full/10.1080/09557571.2022.2136566.

European Union to bring some EU actions to a virtual halt.²⁹⁸ More generally, populism has led to reduced references in domestic courts to international law, further limiting international law's reach, such as its ability to provide normative resources for protecting minorities.²⁹⁹

Authoritarian leaders in Russia and China also have moved in totalitarian directions that have implications for international law and the normative resources that it provides. Xi Jinping has clamped down on independent voices in China and is extending his rule well into the future. In parallel, because China is the world's largest trading nation and provider of development finance, it exercises significant leverage over countries that are dependent on it for trade, investment, and finance to curtail international scrutiny and support of rule-of-law practices, while developing and harnessing international norms, such as those of anti-terrorism, for illiberal ends. Russia further illustrates the enmeshment of national and international developments for the rule of law. Its internal autocratic turn and its war of aggression against Ukraine interrelate. President Putin's fear of an internal threat to his rule helped spur his war on Ukraine, since Ukraine's democratization and ties with Europe facilitated the conveyance of liberal norms. In his televised address announcing Russia's invasion of Ukraine, for example, Putin blamed "the West" for its attack on Russia's traditional values, including through imposing attitudes that "are contrary to human nature" – referencing the extension of legal rights and cultural acceptance of LGBTQI peoples.³⁰⁰ Putin since has used the Ukraine war to shut down independent Russian media and "self-cleanse" Russia of opposition to his rule – labeling opponents "scum and traitors" that should be "spit out like a midge."³⁰¹ One of the fallouts of the Ukraine war is Russia's departure from the Council of Europe and withdrawal from the European Convention on Human Rights, curtailing the normative resources and international oversight they provide. In the process, Putin has upended European security and the settlement of Europe's borders.

²⁹⁸ Robert Csehi & Edit Zgut, "We Won't Let Brussels Dictate Us": *Euro-sceptic Populism in Hungary and Poland*, 22 *EUR. POL. & SOC'Y* 53 (2021); Yasmeen Serhan, *The Other Threat to Democracy in Europe*, *ATLANTIC* (Apr. 11, 2022), <https://tinyurl.com/bdfnmmmv>.

²⁹⁹ Tamar Hosovsky Brandes, *International Law in Domestic Courts in an Era of Populism*, 17 *INT'L J. CONST. L.* 576 (2019).

³⁰⁰ *Transcript of Vladimir Putin's Speech Announcing "Special Military Operation" in Ukraine*, *SYDNEY MORNING HERALD* (Feb. 24, 2022), <https://tinyurl.com/3r6hu6k5>.

³⁰¹ *Putin Vows to Rid Russia of 'Traitors' While Waging Ukraine War*, *BLOOMBERG* (Mar. 16, 2022), <https://tinyurl.com/5n6h4sbs>.

Overall, the combination and enmeshment of populist, authoritarian trends within states and shifts in global power toward authoritarian states will reshape international law and institutions, which, in turn, could further support authoritarian practices within states. In his foundational work on multilateralism, John Ruggie stressed the importance of a “permissive domestic environment” for multilateral cooperation.³⁰² He argued that the “post-World War II situation” reflected “less the fact of American *hegemony*,” than “of *American* hegemony.” He maintained, in turn, that “the durability of multilateral arrangements . . . is also a function of domestic environments.”³⁰³ In short, a decline of multilateralism and international promotion of the rule of law will echo changes in the domestic environment of powerful states, including within the United States. To play off the title of Ruggie’s book, *transnationalism matters*.³⁰⁴ It is the interaction of domestic and international factors that give rise to positive and negative cycles for the rule of law.

IV What Might Be Done?

At the national level, institutions can have resilience. Although we assessed challenges to the rule of law in Part III, these challenges are occurring within the context of transnational rule-of-law institutional developments over the last three decades that provide normative resources to those resisting authoritarian trends. Pou Giménez, for example, notes the importance of constitutional developments in Mexico and elsewhere in Latin America over the last three decades that gave rise to new institutions providing fora for professional and activist networks to resist executive encroachments on rule-of-law protections.³⁰⁵ In the United States, there was considerable resistance to the Trump administration’s decrees, including from civil servants within the executive branch.³⁰⁶ The American Civil Liberties Union alone filed over four hundred lawsuits against the administration, ranging from its ban on Muslims entering the United States to its separation of migrant children from their parents and placing them in cages.³⁰⁷

³⁰² JOHN RUGGIE, *Multilateralism: The Anatomy of an Institution*, in *MULTILATERALISM MATTERS: THE THEORY AND PRACTICE OF AN INSTITUTIONAL FORM* 8 (1993).

³⁰³ *Id.* at 33.

³⁰⁴ The title of Ruggie’s book is *Multilateralism Matters*.

³⁰⁵ See Chapter 10.

³⁰⁶ Jennifer Nou, *Civil Servant Disobedience*, 94 *CHI.-KENT L. REV.* 349 (2019).

³⁰⁷ *ACLU Has Filed 400 Legal Actions Against Trump Administration*, ACLU (Aug. 17, 2020), <https://tinyurl.com/y54r8s7h>.

International institutions also have resilience, and many of them support rule-of-law norms and practices.³⁰⁸ For example, the most active regional human rights courts – the ECtHR and the IACtHR – so far have withstood efforts by states to curtail their formal authority. Moreover, when international institutions have become complicit in rule-of-law violations, they have spurred regional, state, and civil society responses, as reflected in the *Kadi* line of cases and efforts to reform Security Council procedures.³⁰⁹ Nonetheless, the erosion of rule-of-law and democratic norms within states, combined with the economic and political rise of powerful authoritarian states, pose considerable challenges. What might be done to return to a virtuous transnational cycle that advances rule-of-law goals?

First, because national and international norms regarding the rule of law recursively interact, responses to the current negative cycle must occur at multiple levels, including domestically, regionally, and globally. Developments elsewhere matter for rule-of-law developments at home, as illustrated by the vicious and virtuous cycles of rule-of-law developments that this introductory chapter and the volume as a whole document. As Kwame Anthony Appiah writes, “[while] populist demagogues around the world exploit the churn of economic discontent, the danger is that the politics of engagement could give way to the politics of withdrawal.” Forgetting that “we are all citizens of the world – a small, warming, intensely vulnerable world – would be a reckless relaxation of vigilance.”³¹⁰ “Elsewhere,” Appiah stresses, “has never been more important.”³¹¹

The Biden administration actively reengaged the United States at the international level. It rejoined the UN Human Rights Council, UNESCO, the Paris Agreement on climate change, and the Migration Compact, among other organizations and treaties. In 2021, it hosted a “Summit for Democracy” to address the authoritarian challenge.³¹² In parallel, it

³⁰⁸ Scheppele illustrates the potential of the European Union, the European Convention on Human Rights, and the Venice Commission as checks against authoritarian developments in Hungary and Poland. See Chapter 7. See also Nicole Deitelhoff & Lisbeth Zimmermann, *Norms Under Challenge: Unpacking the Dynamics of Norm Robustness*, 4 J. GLOB. SEC. STUD. 2 (2019); Wayne Sandholtz, *Norm Contestation, Robustness, and Replacement*, 4 J. GLOB. SEC. STUD. 139 (2019); Madsen, Cebulak & Wiebusch, *supra* note 239, at 217.

³⁰⁹ See Chapter 6.

³¹⁰ Kwame Anthony Appiah, *The Importance of Elsewhere: In Defense of Cosmopolitanism*, FOREIGN AFFS. (Feb. 12, 2019), www.foreignaffairs.com/world/importance-elsewhere-cosmopolitanism-appiah.

³¹¹ *Id.*

³¹² Edward Wong, *Biden Puts Defense of Democracy at Center of Agenda, at Home and Abroad*, N.Y. TIMES (Sept. 6, 2022), www.nytimes.com/2022/09/06/us/politics/biden-democracy-threat.html.

launched a new Joint Transatlantic Agenda with the European Union that aimed to reinvigorate transatlantic cooperation and to counter China and Russia.³¹³ Russia's invasion of the Ukraine spurred transatlantic cooperation to levels not seen since the end of the Cold War. This new transatlantic agenda linked with the administration's efforts to develop a new transpacific governance framework with allies in Asia through an "Indo-Pacific Economic Framework."³¹⁴ Both involve predominantly soft law, in contrast to the Obama administration's earlier proposals for a Transatlantic Trade and Investment Partnership and a Trans-Pacific Partnership, which were to create a broad array of new binding rules backed by third-party dispute settlement. These initiatives are admirable in rallying governments to defend and promote democratic, rule-of-law values through bolstering old alliances and developing and engaging new ones.

Nonetheless, the administration's rhetoric and strategic initiatives pose risks. They could deepen nationalist reactions domestically in China and elsewhere and, in the process, empower authoritarian leaders who, viewing such alliances as threats, expand their powers in defense of "national security." They also risk dividing the world into opposing blocs, catalyzing new authoritarian alliances, such as between Russia and China. They thus could threaten the underlying Hobbesian task of securing order, trust, and peace through providing the conditions for cooperation.³¹⁵

Balancing the creation and invigoration of organized clubs of like-minded, democratic states as part of broader security alliances, on the one hand, with commitments to multilateral institutions and bilateral mechanisms to defuse conflicts and respond to global challenges, on the other hand, will be a key challenge for the future.³¹⁶ The United States needs to engage with China in and through international institutions and bilateral processes to address global and transnational risks, reduce conflict, and resolve disputes peacefully. Shaffer elsewhere proposed a framework for governing US–China relations in this vein across the three dimensions of economic relations, national security, and concerns

³¹³ Mark Pollack & Gregory Shaffer, *A New Transatlantic Agenda: A Defensive Turn*, MEDIUM (July 19, 2021), <https://tinyurl.com/yv4453pt>.

³¹⁴ Ana Swanson, *Biden Administration Outlines Scope of Asian Economic Pact*, N. Y. TIMES (Sept. 9, 2022), www.nytimes.com/2022/09/09/business/ipef-framework-asia-trade.html.

³¹⁵ Gregory Shaffer, *The Risks of an "Alliance of Democracies"*, MEDIUM (July 12, 2021), <https://tinyurl.com/5n92kwn7>.

³¹⁶ William Burke-White, *A Strategic Roadmap for Reentry: 2021 and Beyond*, BROOKINGS (Feb. 2021), www.brookings.edu/articles/a-strategic-roadmap-for-reentry-2021-and-beyond/.

over human rights, which will be necessary to manage and defuse conflict and create conditions for cooperation, especially when crises arise.³¹⁷ It provides a contrasting template to that pursued by the Trump and Biden administrations vis-à-vis China, although the Biden administration recognized the need to manage the US economic relationship with China in more tailored ways.³¹⁸

Second, much analysis of international law and institutions has focused on their relation to state practices because states are most frequently the direct subjects of international law. However, given the ability of transnational capital to exercise arbitrary power, and given that state and private power interact (including through the regulation, or lack of regulation, of private power), it is mistaken to assess international law and international rule-of-law concerns as only regarding states. Globalization processes arguably need to be reined in to equalize the bargaining power of transnational capital and labor, which raises the issue of arbitrary power exercised by corporations over workers. Before the industrial revolution, in the age of Adam Smith and his advocacy of free trade to enhance the wealth of nations, political theorists had better grounds to view market capitalism and trade liberalization as means to dismantle hierarchies and advance egalitarian prospects.³¹⁹ In contrast, the contemporary age of megalogopolists, billionaire capitalists, and precarious working conditions for mass labor call for new forms of regulation.³²⁰ Otherwise, there will be fertile ground for populist, exclusionary forces that challenge fundamental rule-of-law norms. The Biden administration's proclamation of a "worker-centered trade policy," its reframing of trade relations in terms of "resilience, sustainability, and inclusion," and its aim to coordinate tax policies to preserve the ability of states to tax high-wealth individuals and corporations and thus fund domestic policies to redress gaping inequalities need to be worked out.³²¹ Yet,

³¹⁷ Gregory Shaffer, *Governing the Interface of U.S.-China Relations*, 115 AM. J. INT'L L. 622 (2021).

³¹⁸ See, e.g., Dani Rodrik, *Don't Let Geopolitics Kill the World Economy*, PROJECT SYNDICATE (Nov. 10, 2022), <https://tinyurl.com/4peddur8>; Remarks by National Security Advisor Jake Sullivan on Renewing American Economic Leadership at the Brookings Institution, WHITE HOUSE (Apr. 27, 2023), <https://tinyurl.com/dfd2xdut>.

³¹⁹ ANDERSON, *supra* note 8, ch. 1.

³²⁰ *Id.* at 65–71 (noting the need for exit rights, rule-of-law constraints, constitutional rights, and enhanced worker voice within the workplace).

³²¹ U.S. TRADE REPRESENTATIVE, 2022 TRADE POLICY AGENDA & 2021 ANNUAL REPORT (2022), <https://tinyurl.com/42w56max>.

they reflect real concerns about the impact of market processes on society.

Democracies need to address tensions within liberalism, both at home and in international agreements, and, in particular, between political and economic liberalism.³²² In earlier theorizing, Hayek and others promoted international norms of economic liberalization to constrain national democratic choices regarding economic regulation.³²³ In contrast, more recently, following Karl Polanyi's classic account,³²⁴ the economist Dani Rodrik has stressed the trade-offs among economic globalization, national sovereignty, and democracy in terms of a "trilemma" – one could have any two of them but not all three, he contended.³²⁵ Rodrik stressed that "we need to place the requirements of liberal democracy ahead of those of international trade and investment," as trade and investment policy can undermine domestic social bargains and increase inequality.³²⁶ We agree with Rodrik in this regard. There is evidence that increased economic integration under a neoliberal economic model helped spur the rising inequality and job precarity that sparked populist and nationalist reactions.³²⁷ Studies show a correlation of higher inequality with acceptance of authoritarianism, as struggles over economic distribution become more salient.³²⁸

To respond to these challenges within liberalism, global governance institutions and norms should be recalibrated to facilitate greater protection for domestic economic policy space. The application of international economic law norms should be revisited to provide greater room for countries to ensure social inclusion, and thus preserve

³²² See, e.g., ISAIAH BERLIN, *LIBERTY* 216 (Henry Hardy ed., 2002); T.M. SCANLON, *WHAT WE OWE EACH OTHER* 78–107 (1998) (discussing the interaction of values, including liberty and equality).

³²³ FRIEDRICH HAYEK, *THE ROAD TO SERFDOM* (1944); QUINN SLOBODIAN, *GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM* (2018).

³²⁴ KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (1944).

³²⁵ DANI RODRIK, *STRAIGHT TALK ON TRADE: IDEAS FOR A SANE WORLD ECONOMY* (2017).

³²⁶ *Id.* at 12.

³²⁷ David H. Autor, David Dorn & Gordon H. Hanson, *The China Shock: Learning from Labor Market Adjustment to Large Changes in Trade*, 8 ANN. REV. ECON. 205 (2016); Autor et al., *supra* note 285; JACOB HACKER, *THE GREAT RISK SHIFT: THE NEW ECONOMIC INSECURITY AND THE DECLINE OF THE AMERICAN DREAM* (2014).

³²⁸ Adam Przeworski, *The Poor and the Viability of Democracy*, in *POVERTY, PARTICIPATION, AND DEMOCRACY: A GLOBAL PERSPECTIVE* 125, 125–134 (Anirudh Krishna ed., 2008).

economic liberalism from the risks of overreach. Domestic social welfare policies can be combined with policies that combat harmful tax avoidance and deter social dumping through trade.³²⁹ In this way, governments would enhance their ability to fund domestic initiatives, and capital would have greater incentives to work with domestic labor representatives and not move or threaten to move offshore to jurisdictions without protections. Such a shift does not signify a return to sovereignty-based norms, as advocated by economic nationalists, populists, and authoritarians. Transnational processes will remain critical for the advancement of economic and social rights, the coordination of policies to combat tax evasion and avoidance, and the bolstering of economic resilience and sustainability. These policies should be viewed as part of a broader complementary package in support of rule-of-law goals.

Finally, the rising challenges to democracy and the rule of law are more than economic. They also reflect cultural backlash against the relative success of liberal, pluralist norms from those who feel a loss of status or a sense that their ways of life are under threat.³³⁰ Immigration becomes an easy target, reflecting rising social cleavages in the United States and Europe.³³¹ Norms of social community, solidarity, and cooperation decline.³³² Minorities and foreigners become scapegoats, creating social conditions ripe for authoritarianism. Hannah Arendt's analysis of the rise of totalitarianism in the twentieth century is chillingly foreboding:

The preparation has succeeded when people have lost contact with their fellow men as well as the reality around them; for together with these contacts, men lose the capacity of both experience and thought. The ideal subject of totalitarian rule is not the convinced Nazi or the convinced Communist, but people for whom the distinction between fact and fiction (i.e., the reality of experience) and the distinction between true and false (i.e., the standards of thought) no longer exist It [totalitarianism] bases itself on loneliness, on the experience of not belonging to the world at all, which is among the most radical and desperate experiences of man.³³³

³²⁹ Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 2019 ILL. L. REV. 1.

³³⁰ PIPPA NORRIS & RONALD INGLEHART, CULTURAL BACKLASH: TRUMP, BREXIT, AND AUTHORITARIAN POPULISM 14 (2019).

³³¹ *Id.* at 18.

³³² ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2001).

³³³ ARENDT, *supra* note 4, at 474–75.

Today, populist, nativist politicians and partisan media capitalize on and stoke anxieties through a politics of fear, anger, and resentment,³³⁴ giving rise to Schmittian friend–enemy politics of social identity.³³⁵ Climate change, political repression, war, and other crises will spur further migration, potentially heightening social conflict.³³⁶ The policy implications are challenging. Economists generally maintain that societies economically benefit from increased migration, but the domestic politics continue to raise barriers, indeed physical walls.³³⁷ To start, policies addressing rising economic inequality and social precarity could help stem such cultural backlash. Yet, those policy changes also face political blockages.

It is not for this chapter to provide definitive responses to the rise of populism and the decline of the rule of law around the world. Our central aim is to show how international norms and institutions interact with domestic ones, and how they can do so in positive as well as in unintended and negative ways, including by exacerbating inequality, empowering populists, and thereby undermining rule-of-law goals. Policies to counter existing trends need to be adopted at both the domestic and international levels to advance rule-of-law objectives. At the national level, they need to be responsive to and calibrated for local contexts to ensure social and economic inclusion, local engagement, and thus legitimacy.

V Conclusion

History is not linear. It involves cycles of advances and retrenchments in light of ongoing struggles. Rule-of-law protections that temper the arbitrary exercise of power are under challenge globally. In contrast, rule by law – the deploying of legal rules to serve the interests of autocratic power-holders – is on the rise. One of the critical challenges is how to stabilize and then revitalize rule-of-law principles and institutions within countries where they are under assault. An interlinked challenge is to

³³⁴ Jean L. Cohen, *Populism and the Politics of Resentment*, 1 *JUS COGENS* 5 (2019).

³³⁵ THEDA SKOCPOL & VANESSA WILLIAMSON, *THE TEA PARTY AND THE REMAKING OF THE REPUBLICAN PARTY* 54–74 (2016). See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (1932) (defining the political in terms of the distinction of friend and enemy).

³³⁶ GAIA VINCE, *NOMAD CENTURY: HOW CLIMATE MIGRATION WILL RESHAPE OUR WORLD* (2022).

³³⁷ Beth Simmons & Michael Kenwick, *Border Orientation in a Globalizing World*, 66 *AM. J. POL. SCI.* 853 (2021).

reinforce and recalibrate regional and international legal norms and institutions, which are also under stress, in order to support the rule of law domestically.

To address these challenges, we must conceptualize and empirically study the rule of law in transnational context. Most rule-of-law scholarship does not engage transnational processes. The analytic framework of transnational legal ordering and transnational legal orders, in contrast, foregrounds them. The rule of law affects all substantive areas implicated by these processes, shaping legal practice and its consequences.

Although the concept of the rule of law applies ultimately to the protection of individuals from the arbitrary exercise of power, and thus is not focused on interstate relations *per se*, international law and international institutions are critical in an interconnected world. They directly and indirectly implicate rule-of-law practices in light of the normative and material resources that they provide. Challenges to the rule of law are part of broader domestic and international contests over governing norms and institutions, which have transnational implications. This book makes the case that trends at the national and international levels enmesh, and they can reinforce a turn toward or away from rule-of-law goals and practices. By expanding our understanding of these transnational dynamics, we hope to contribute to the assessment and recalibration of means to advance rule-of-law goals.