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SHOULD *ENTICK V. CARRINGTON* BE ON OUR RULE OF LAW RADAR?

A Review of A. Tomkins & P. Scott (eds.), *Entick v. Carrington: 250 Years of the Rule of Law*, Oxford, Hart Publishing, 2015

The question posed above is ambiguous. It could be asked in circumstances where *Entick v. Carrington*¹ is already on our Rule of Law radar or it could be asked in the opposite circumstance: it could relate to whether *Entick* should be added to our Rule of Law radar or, alternatively, whether it should be removed. In the recently published book *Entick v. Carrington: 250 Years of the Rule of Law*² the case's centrality to the Rule of Law is presupposed. Through answering both aspects of the question posed, I will ultimately conclude that although it may not have been on many Rule of Law radars there may exist sufficient justification for its addition.

I answer the titular question from a position where the case's appearance on my radar is a relatively recent event and in relation to the literature and debates associated with the conceptual content of the Rule of Law in the specific sense. It is this specific sense of the Rule of Law conceptual debates to which I refer in relation to the Rule of Law radar. I am aware of the widespread and frequent association of *Entick* with the Rule of Law in the context of constitutional law or public law more generally; especially in the UK common law tradition. The perspective adopted reflects my familiarity with the Rule of Law specific literature and it also reflects my relative ignorance of *Entick* before reading the book; something that may be the result of my being a non-UK trained lawyer. My examination of the relevance of the book and the case in relation to the Rule of Law specific literature, and from a position of relative non-familiarity with the case, will, I hope, provide a point of interest across all of these fields and will emphasise (or re-emphasise) the importance of the case and the relevance of the book.

I will take it to be the case that something should be on our Rule of Law « radar » if it is an important Rule of Law case. To be an important Rule of Law case it must have had an impact on the development of the field. Accordingly, an important Rule of Law case must contribute to the development of the Rule of Law. Of course, this position requires some broad idea of what is meant by “the Rule of Law”. I will, ever so briefly,

¹ *Entick v. Carrington*, 19 State Trials 1029 (1765) [referred to hereafter as « *Entick* »].

² A. TOMKINS & P. SCOTT (eds.), *Entick v. Carrington: 250 Years of the Rule of Law*, Oxford, Hart Publishing, 2015 [referred to hereafter as “the *Entick Book*” or, simply, “the book”].

stipulate what I mean by this in the final paragraph of this section. Then, after concluding *Entick* is capable of being an important Rule of Law case and, therefore, there exists justification for its inclusion on our Rule of Law radar, I will suggest some reasons why it has not traditionally been so included. Although I make reference to the content of the *Entick book* throughout, before concluding I highlight the important role the text may play in promoting *Entick* as a case worthy of inclusion on our Rule of Law radar.

It is useful, before any substantive examination, to sketch the background to the case. I can only hope to scratch the surface here; the early chapters of the book provide a far more detailed historical and contextual exegesis; this includes a substantial amount of background information relating to the key figures in the case provided by David Feldman, Tom Hickman and Jacob Rowbottom in Chapters 1-3. These chapters set the contextual landscape – political, legal and societal – for the case and the interrelated series of litigation of which it is a part. The three different perspectives from which the authors tackle the same conceptual challenge provide – when read together – a nuanced understanding of the case together with the people, society and politics of the period. Of particular utility in reading the rest of the book is Feldman’s fantastically detailed description of the case’s major (and minor) figures. Together, the three initial chapters of the book provide a crucial introduction to those not familiar with the case or the period; they provide an ideal way to start, and to understand, the other chapters in the book. Whilst *Entick* exists in the wider contextual framework outlined in those chapters, it can be described, in its most basic terms, as a case relating to the issuance of a search and seizure warrant by the Secretary of State. The warrant related to the publication of a profoundly anti-government newspaper and resulted in the search of and seizure of material from the house of John Entick – who was involved in the newspaper’s authoring – by several of the King’s messengers. The action was brought in trespass by John Entick against one of those messengers: Nathan Carrington. The warrant’s issuance could be seen as being for purposes collateral to the allegations of seditious libel on which it was based; perhaps for the purposes of intimidation or as a tool of delay. In amongst the other aspects of the rich and detailed judicial opinion, Lord Camden found that the Secretary of State could not authorise otherwise unlawful actions. Even in these basic terms, it will be of no surprise that the case can be seen, and is variously argued, to relate to various principles that include: the exercise and limits of public power and arbitrariness; the necessity of state action; individual and property rights; liberty and civil liberties; the freedom of the press; and, of most relevance here, the Rule of Law (broadly conceived). These issues and positions are addressed, argued and adopted – in different measures, and in different ways – by the eight contributors to the book.

Before going further, I must first address what, exactly, I mean by ‘the Rule of Law’. Of course, this is a massive question that cannot be answered here; a large portion of the Rule of Law-specific literature relates to the contested nature of the concept. To avoid becoming bogged in those debates I will, instead, stipulate what I take ‘the Rule of Law’ to mean for the purpose of these comments. In doing this, I provide what I hope to be an

unobjectionable and broad idea of the Rule of Law that will, despite the concept's contested status, facilitate a common point of reference. Accordingly, I will avoid including any highly contestable notions like human rights or democracy in this stipulation. I will also avoid adopting any particular theorist's Rule of Law desiderata or a hybrid list of desiderata. Instead, I adopt a simple meaning that relates to the potential function of the Rule of Law. I will take the Rule of Law to be a concept that relates to the control of arbitrary power. This aspect of the Rule of Law can be readily identified across canonical conceptions. Furthermore, and relevantly, this does not appear to contradict the positions taken by the *Entick Book's* contributors. The control of arbitrary power seems to be the most uncontroversial and frequently cited function of the Rule of Law. In the context of this examination, this adopted meaning provides an adequate way to (broadly) define potential Rule of Law-relevant material: I will consider the case to be relevant to the Rule of Law – and our Rule of Law radar – if it relates to the control of the imposition of arbitrary power.

SHOULD *ENTICK* BE ON THE RULE OF LAW RADAR?

It is not denied that *Entick* is a *generally* important case. In describing the case's relationship to the law of seditious libel, Tom Hickman seeks to associate the case with other great cases. He is not alone. The case is variously described by other contributors to the book as being « a great case » as well as « a seminal constitutional case³ » and it is referred to as being a landmark in the opening pages of the chapters by both Denis Baranger – outlining how *Entick* is relevant to liberty in the modern state – and Tom Mullen – who considers the impact and effect of *Entick* on Scots law⁴. The question of whether *Entick* actually *is* a landmark is specifically taken up as the focus of the chapter by Timothy Endicott. As it is couched in useful terms, and in my consideration of whether *Entick* should be considered an important Rule of Law case, I largely adopt – and modify only slightly – Endicott's characterisation of a landmark in relation to the common law: « A landmark [...] is a case that had an important impact on the development of the law⁵ ». I merely simplify this idea to one of “importance”. Before addressing the question posed in the title of this section, and notwithstanding the case's importance in constitutional or public law, a preliminary question must first be answered: Did *Entick* have an important impact on the development of the Rule of Law?

However, before considering *Entick's* potential importance, a more basic question must be answered: Is *Entick* a Rule of Law case? In answering this question, the *Entick Book* is, unsurprisingly, instructive. Not only does Endicott's chapter specifically address the case's status as a

³ *Ibid.*, p. 43, 162, 131.

⁴ *Ibid.*, p. 189, 207.

⁵ *Ibid.*, p. 110.

landmark, but Adam Tomkins also explores the nature of the case's authority. Tomkins states *Entick* is remembered amongst constitutional lawyers as being a leading authority on the Rule of Law⁶. His contribution focusses on defending the proposition – made by him in an earlier work – that in acting the executive must have a legal authority that permits its actions. Something of value will be lost, Tomkins suggests, if a proposition in these terms is *not* derived from *Entick*. This broad reading of the authority in *Entick* contrasts with the narrow reading adopted in the chapters by Timothy Endicott and Paul Scott outlined below. It could also be contrasted with a view put by Joseph Raz in an earlier work: « If government is, by definition, government authorized by law the rule of law seems to amount to an empty tautology, not a political ideal⁷ ». Tomkins's broad reading could be seen to be defending the thinner idea of rule *by* law. Yet, in considering the broad idea of the Rule of Law adopted herein, Tomkins's assessment suggests the case is at least capable of being included under the Rule of Law umbrella; at least by virtue of the potential for this sort of protection to be a part of the Rule of Law.

Endicott and Scott – much like Jacob Rowbottom – seem to view the case, and arguably any idea of the Rule of Law, through a constitutional lens; or, at least, through a lens that does not necessarily require adoption of a Rule of Law position (in the conceptual debates' sense). This constitutional – and not Rule of Law-specific – focus is clear. Rowbottom's chapter explores the case's association with the propaganda wars and the liberty of the press during the period. It starts by specifically associating *Entick* with the curriculum in constitutional law courses⁸. Endicott's focus is similarly constitutional. He specifically associates the case with the development of the law of the constitution and defends a position in which public authorities are limited by law, but have powers that are not specified by law⁹. Scott seeks to identify the contribution of *Entick* as being the leading case in relation to the right to property. He questions the reading of *Entick* as representing a procedural or formal conception of the Rule of Law and suggests a reading in those terms would be very generous¹⁰. In setting this position, and whilst he is sceptical of the benefits of such, Scott clearly accepts that *Entick* occupies a position as a seminal constitutional case¹¹. What is apparent from these positions – which seem capable of extension to the majority of the contributors – is that it is accepted that the case is a vitally important *constitutional law* case; or, in the very least, a generally important common law case. Yet, more is required to establish the case's Rule of Law status. To determine this, it is necessary to consider the case in

⁶ *Ibid.*, p. 161.

⁷ J. RAZ, *The Authority of Law: Essays on Law and Morality*, Oxford, Oxford University Press, p. 212–213.

⁸ *Entick Book, op. cit.*, p. 85.

⁹ *Ibid.*, p. 110.

¹⁰ *Ibid.*, p. 152-153.

¹¹ *Ibid.*, p. 131.

basic terms. Whilst this could be achieved by considering the case alone, I will do so by examining some of the issues specifically raised and explored by the book's contributors.

In considering the Rule of Law as relating to the prevention of the exercise of arbitrary power, the very nature of the case – as the assumption of a wide search and seizure power and its exercise, potentially for collateral purposes, against an individual critical of the government – seems to suggest a relation to this idea of the Rule of Law. But, again, more is required. A conclusion as to the importance of the case must properly rest on the nature of the opinion and the principles for which it stands. In this respect, what is most clear from the *Entick Book* is that the case can stand for many, many, things. Each of the authors derive a – sometimes subtly, sometimes substantially – different meaning from the case. Endicott, for example, sees the opinion as relating to Lord Camden's « most deliberate effort at accounting for public power and its limits¹² ». Notwithstanding Paul Scott's scepticism regarding viewing the case in terms of bare legality associated only with public law, the questions raised as to whether public bodies need authority or justification for certain actions – as addressed in some detail in Tomkins's chapter – appear capable of fitting within the broad Rule of Law meaning adopted. This is also borne out in Baranger's characterisation of the test applied in the case as being a formal one: was there an authorisation on the books for an exercise of power¹³? It is clear that arbitrariness is, amongst the many aspects of the case, one of the more constant and obvious aspects derived by the book's contributors. On the basis of this brief examination, notwithstanding the various different conceptions of the Rule of Law that are evident in the book – something which is unsurprising given the nature and contest associated with the concept – it is clear that, on the idea of the Rule of Law adopted herein, *Entick* can be seen as a Rule of Law case; or, in the very least, a case in which the Rule of Law has some relevance.

We can now consider whether *Entick* has had an important impact on the development of the Rule of Law. An obvious place to start – and one that is alluded to in several chapters – is the specific reference to *Entick* in Dicey's Rule of Law formulation. Dicey provides a single bare reference to *Entick* as authority for the proposition that « a secretary of state [...] and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person¹⁴ ». This proposition is included in relation to Dicey's second principle of the Rule of Law; the idea of legal equality:

We mean in the second place, when we speak of the « rule of law » as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or

¹² *Ibid.*, p. 109.

¹³ *Ibid.*, p. 194.

¹⁴ A.V. DICEY, *Introduction to the Study of the Law of the Constitution*, London/New York, Macmillan, 1889, p. 181 (internal references omitted).

condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals¹⁵.

Tomkins is correct when he suggests Dicey's bare reference to *Entick* operates as «an illustration of a principle rather than as authority for anything grander¹⁶». Although in the first Dicey extract above I have specifically focussed on «a secretary of state», Dicey also lists other positions of power that include a governor and a military officer. He provides specific citations for each¹⁷. An alternative case example could have been located as being an authority for the fact that the law applied equally to the Secretary of State¹⁸. Nevertheless, it is apparent that, at least in some small sense, Dicey considered *Entick* the most appropriate or relevant authority to cite. The selection of *Entick* particularly suggests the case was important in *some* respect to Dicey and his conception of the Rule of Law; hence, it was important in the development of *his* conception of the Rule of Law. Interestingly, Dicey does not specifically associate *Entick* with the exercise of arbitrary power. Arbitrary power is outlined as his first principle¹⁹. Several chapters of the book refer to and discuss Dicey's direct citation of the case in relation to legal equality – Dicey's second principle of the Rule of Law. Notwithstanding the absence of any direct citation by Dicey, Rowbottom – in his consideration of press freedom – suggests the principle in *Entick* is reflected in Dicey's first principle: as a view of the Rule of Law as the absence of arbitrary power²⁰. As a consequence of the meaning of the Rule of Law adopted herein, I agree with Rowbottom. The expansive idea of the Rule of Law as preventing the exercise of arbitrary power can follow from the prophylactic effect of the principle of legal equality. On this basis, *Entick* is capable of reflecting Dicey's first principle despite any specific or explicit allusion or connection made by Dicey between the case and that principle.

We can, at least, say Dicey was aware of the case and it was in his mind when formulating his Rule of Law ideas. Of course, this suggests only an impact on Dicey's conception of the Rule of Law; it does not determine whether, specifically at least, *Entick* has had an impact on the development of the concept of the Rule of Law. It can be said that, whilst Dicey's conception of the Rule of Law has been criticized, his conception has,

¹⁵ *Ibid.*, p. 180-181 (internal references omitted).

¹⁶ *Entick Book, op. cit.*, p. 162.

¹⁷ A.V. DICEY, *Introduction to the Study of the Law of the Constitution, op. cit.*, p. 181.

¹⁸ Of course, alternate cases in place of *Entick* – perhaps any of the number of earlier related pieces of litigation that are reflected upon in the book – could easily have facilitated this. Although, it is accepted that there exist some differences in relation to the general nature – or otherwise – of the warrants issued in those cases.

¹⁹ A.V. DICEY, *Introduction to the Study of the Law of the Constitution, op. cit.*, p. 175. Dicey puts it this way: «We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land».

²⁰ *Entick Book, op. cit.*, p. 85.

nevertheless, been influential in *some* sense in the development of the field of study associated with the Rule of Law; if nothing else, Dicey is frequently cited as being responsible for the popularization of the phrase *the Rule of Law*. Furthermore, the general principles he described regarding the prevention of arbitrary exercise of power and the application of the law to all equally remain recognizable Rule of Law ideas in almost any popular conception²¹. In this sense, there is some justification for suggesting *Entick* has, at least, indirectly impacted the development of the Rule of Law. Detailed assessment of the relative importance of *Entick* and Dicey's conception of the Rule of Law generally would be a fascinating process, but it is one that cannot sensibly or practically be undertaken here. For this reason, I will, sadly, have to be content with a non-definitive answer to the question: Did *Entick* have an important impact on the development of the Rule of Law? The answer is an equivocal "Maybe". As, although *Entick* has the potential of some – conceivably important – impact on the development of the Rule of Law, in answering the question posed in the title to this section, we cannot say definitively that *Entick* should be in important Rule of Law case and, hence, be included on the Rule of Law radar.

My comments in the opening paragraphs of this note suggest that *Entick* did not previously occupy a position on *my* Rule of Law radar. But has it been included on others' Rule of Law radars? Throughout the *Entick Book*, and as referred to above, there is reference to *Entick* being a key case in relation to constitutional law. I do not seek to challenge that position. But what of the more narrowly conceived Rule of Law literature? In the space afforded it is not possible to conduct any detailed consideration of that entire literature. Instead, by way of a very broad based test, I have attempted to identify *Entick* in three different Rule of Law texts from three different countries with three different points of view. The texts are those by Brian Tamanaha, Chris May and Jørgen Møller²². In taking this approach, I augment a similar review conducted by Tomkins in his chapter²³. Whilst Tamanaha's book is now over a decade old, this widely cited work provides six chapters detailing conceptions of the Rule of Law from Ancient Greece through to modern day. The texts by May and Møller, both published in 2014, include detailed backgrounds and introductions regarding the nature and definition of the Rule of Law as a concept. There is no mention of

²¹ This is not to suggest Dicey originated either idea; only that he caused widespread consideration of the same.

²² B.Z. TAMANAHA, *On the Rule of Law History, Politics, Theory*, Cambridge, Cambridge University Press, 2004; C. MAY, *The Rule of Law: the Common Sense of Global Politics*, Cheltenham, Edward Elgar, 2014; J. MØLLER & S.-E. SKAANING, *The Rule of Law: Definitions, Measures, Patterns and Causes*, Basingstoke, Palgrave Macmillan, 2014.

²³ *Entick Book*, *op. cit.*, 162. He finds that mention of *Entick* is also absent in the books by D.M. BEATTY, *The Ultimate Rule of Law*, Oxford, Oxford University Press, 2004; T. BINGHAM, *The Rule of Law*, London/New York, Allen Lane, 2010; D. DYZENHAUS, *Hard Cases in Wicked Legal Systems: Pathologies of Legality*, Oxford, Oxford University Press, 2010; D. DYZENHAUS, *The Constitution of Law Legality in a Time of Emergency*, Cambridge, Cambridge University Press, 2006.

Entick across the three texts²⁴. Whilst Dicey is frequently referred to and cited, a brief review suggests a general absence of specific reference to *Entick* across a variety of further secondary sources²⁵ as well as in canonical conceptions of the Rule of Law²⁶. In the course of this – all too – brief examination, only one mention was located in relation to a historical examination of the Rule of Law²⁷. This suggests that, even if *Entick* is known to authors engaged in the Rule of Law specific literature, the case itself does not occupy a position sufficient to show up on their radars²⁸.

The relative absence of reference to *Entick* could be seen as not especially surprising. Cases are not frequently cited in relation to the conceptual debates associated with the Rule of Law²⁹. Notwithstanding this, in circumstances where *Entick* has the *potential* to be a radar-worthy case, and where it was decided at a time where the operation of Rule of Law ideas – particularly across the Atlantic – were a key concern, we could consider why *Entick* has been largely forgotten, or overlooked, in relation to the Rule of Law. Perhaps it is the single bare citation of the case (without further elaboration or detail) by Dicey³⁰? Perhaps it is his association of *Entick* with his principle of legal equality and not with his idea of arbitrariness? Or, perhaps it is the large number of, often conflicting, propositions or positions that could be derived from *Entick* itself? Each of these appear to be viable potential reasons available from the above discussion, the case and the

²⁴ There is, in referencing Dicey, importance placed on the principles that can be attributed to *Entick*. For example, Tamanaha suggests that Dicey identified a mainstay of the Rule of Law as being that government officials could be brought before the common law courts by private citizens to answer for violations of the law (B.Z. TAMANAHA, *On the Rule of Law History, Politics, Theory, op. cit.*, p. 117).

²⁵ G. PALOMBELLA & N. WALKER, *Relocating the Rule of Law*, Oxford, Hart, 2009; P. COSTA, D. ZOLO & E. SANTORO (eds.), *The Rule of Law: History, Theory and Criticism*, Dordrecht, Springer, 2007; J.M. MARAVALL & A. PRZEWORSKI (eds.), *Democracy and the Rule of Law*, Cambridge, Cambridge University Press, 2003; F.L. NEUMANN, *The Rule of Law: Political Theory and the Legal System in Modern Society*, Leamington Spa, Berg, 1986.

²⁶ For example, L.L. FULLER, *The Morality of Law*, New Haven, Yale University Press, 1964; J. RAZ, *The Authority of Law: Essays on Law and Morality, op. cit.*; F.A. VON HAYEK, *The Road to Serfdom*, Chicago, University of Chicago Press, 1967; *Id.*, *The Constitution of Liberty*, Chicago, University of Chicago Press, 1960; *Id.*, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*, Chicago, University of Chicago Press, 1973.

²⁷ J.P. REID, *Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries*, DeKalb, Northern Illinois University Press, 2004, p. 22.

²⁸ By describing the position in this form, I do not suggest these authors did not know about or were not aware of the case; merely that it was insufficiently important in relation to the Rule of Law to be radar-worthy.

²⁹ This is not to say that cases are not cited. There are some cases – for example, *Dr Bonham's Case* or *Marbury v. Madison* – are frequently cited across the literature.

³⁰ However, Endicott takes the opposite view. That as the citation appears in the context of “the passage in Dicey that is actually read, [...] it has presented *Entick* to generations of lawyers as an exemplar of the rule of law” (*Entick Book, op. cit.*, p. 115).

Entick Book. One further potential reason, and the one that I favour³¹, flows from a further point that is raised in the book: *Entick* gained little notoriety before, and seems only to become a “great case” in the 20th century. This point is made by Tom Mullen in relation to *Entick*'s impact in Scots Law, as well as by Adam Tomkins and Timothy Endicott³². So it seems conceivable that – whilst no definitive work exists in relation to a statement of the Rule of Law, and the concept remains highly contested and contestable – *Entick* may have missed the conceptual boat by virtue of its delayed popularity. By the time the case gains notoriety, not only had the Rule of Law debate changed to reflect (in some instances) ideas associated with broader or thicker conceptions, the key thinkers in the Rule of Law tradition may have already formed their ideas without having previously had specific recourse to *Entick* in the context of the Rule of Law.

HAS THE *ENTICK BOOK* PLACED *ENTICK* ON THE RULE OF LAW RADAR?

Entick is established as a well know case in relation to the study of the law of the constitution – at least in relation to the English constitution and, arguably, in relation to some aspects of the US Constitution³³. It is also clear that there has been little attention given to *Entick* in the specific literature on the Rule of Law. In this context it is, in some respects, unfair to the book and its contributors to pose the question in this section's title. After all, it is palpably clear that the book did not set out to place *Entick* on our Rule of Law radar. Instead, the intent was to reflect on the potential disagreements that exist in relation to the interpretation of the case and to explore how the case manifests the ideal of the Rule of Law. In this respect, the book undoubtedly succeeds. The work, as a collection of different authors' positions regarding the context, impact and meaning of the decision, suits this purpose well. Further, even where the authors do not disagree and they cover the same or similar issues across various chapters, the account does not become repetitive or stale; even in taking broadly comparable positions or in describing similar events, the authors' contributions enhance, rather than detract from, the content. The various individual authors' positions shine through in terms that allow, and embrace, contradiction and disagreement. By presenting the authors' views in this way, the essence of the debates regarding the meaning and authority of *Entick* is evident and operates to promote the importance and relevance of the decision.

In terms where it is clear that the *Entick Book* has achieved its aim, the question heading this section is posed to explore whether the book can achieve *more*. After all, it has certainly placed *Entick* on *my* Rule of Law radar. My increased appreciation of the case, and the context in which it was

³¹ However, I make no attempt to specifically argue the point here.

³² *Entick Book*, *op. cit.*, p. 220, 162, 114.

³³ Both Endicott, Scott and Baranger stress this point by extracting portions of *Boyd v. United States*, 116 US 616 (1886) (*Entick Book*, *op. cit.*, p. 113, 132, 191).

decided, has informed my understanding of Rule of Law ideas not only in a period that was vital to issues associated with the control of arbitrary power (especially in relation to what is now the United States) but also in contextualising a period that lies at the mid-way point between important Rule of Law ideas associated with Hobbes and with Dicey. For anyone with an interest in Rule of Law ideas, the addition – or even heightened prevalence – of *Entick* on the Rule of Law radar that follows from a review of the book is of real benefit. Although the *Entick Book* did not set out to do so, I have no doubt that there will be others whose Rule of Law radar will be augmented as a result of this work.

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