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ARTICLE

The Rule of Lore in the Rule of Law: Putting the Problem of the Rule of Law in Context

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Abstract

In this article, I identify a number of commonly accepted assumptions from the literature associated with the Rule of Law and suggest that—whilst the assumptions are accepted as part of the conceptual narrative of the concept—the cogency of the assumptions falters when they are considered collectively. This article represents, in many respects, both a critique of current practices *and* a rallying cry in relation to future practices. Through illustrating that the form of conceptual change across canonical conceptions of the Rule of Law *can* impact the relative level of consistency in the assumptions that are used and relied on in the opening of so many Rule-of-Law-focused works, I demonstrate that there must—if we are to provide the strongest possible arguments relating to the contemporary idea of the Rule of Law—be consideration of the *actual* way in which change has occurred across conceptions. I argue that consideration of collective cogency is necessary for conceptual clarity and illustrate the essentiality of doing so by considering the assumptions in relation to two hypothetical mechanisms of change. This approach illustrates not only the general inconsistency, but also that inconsistency varies between the mechanisms. This variance leads to a fundamental problem: without the identification of the change mechanism that *has* operated across Rule of Law related ideas, there is no way to assess whether the Rule of Law's common assumptions are, or can be considered to be, consistent with one another. I also suggest one way to solve this problem.

Keywords Rule of Law · Assumption · Problem · Clarity · Context

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1 Introduction

In this article, I identify, and question the collective cogency of, a number of familiar and commonly accepted assumptions that form a recurring contemporary narrative in the Rule of Law literature: the Rule of Law is over 2000 years old; there have been a number of canonical Rule of Law ideas; contemporary ideas of the Rule of Law differ to earlier Rule of Law ideas; and, the Rule of Law is a highly, or essentially, contested concept. By illustrating that these assumptions could be seen as inconsistent if change across conceptions of the Rule of Law has occurred in particular way, and as there is little research into the *exact* nature of change across conceptions, I identify an important problem in the Rule of Law literature: without the clear identification of the actual change mechanism that *has* operated across Rule of Law related ideas—something that we do not yet have—there is no way to assess whether various common assumptions in the Rule of Law literature are, or can be, consistent with one another. In this respect, my argument sounds both a cautionary tale of using assumptions that *may* be inconsistent and acts as a call to investigate the nature of change across conceptions in order that the assumptions can, more clearly and accurately, achieve the aims for which they are commonly deployed.

I describe the assumptions as assumptions because they are generally cited as forming part of the conceptual backstory of the Rule of Law; they represent foundational, generally unexamined, beliefs about the Rule of Law on which more substantive arguments are based. The assumptions derive from both primary works that could be seen to form a canon of work associated with the concept—for example, accounts by Aristotle, Hobbes, Locke, Dicey, Hayek, and Fuller—and secondary literature that analyses that canon. Within this body of work the assumptions' collective cogency has not previously been considered. As further ideas are based on the assumptions—and where the assumptions are often provided with a view to establishing a shared understanding about the concept—I argue that consideration of this collective cogency is necessary for conceptual clarity. I expose the potential for inconsistency when the assumptions are considered together by considering their cogency in terms of two hypothetical (and extreme) mechanisms of change. The result is not only the identification of inconsistency generally, but also the finding that the inconsistency varies between the mechanisms. It is this variance that leads to the problem identified in this article's first paragraph. I suggest a contextual assessment of Rule of Law accounts as being one way that the problem can be solved. In circumstances where the concept is so often cited, referred to, and deployed in academic argument, yet where potentially inconsistent assumptions play a foundational role, enhanced clarity is undoubtedly both necessary and long overdue.

This paper is couched and expressed in necessarily abstract terms. My argument relates to the concept of the Rule of Law. Whilst this concept undoubtedly has practical applications and an operational function, my discussion does not directly relate to these aspects (although, as noted later in the paper, there may be some indirect effects). Not only do I consider only the abstract aspect of the

concept, but I also primarily explore the academic debates and discussions that relate to the meaning and nature of the abstract aspect of the concept as well as its relative change over time. It is because I am exploring the way in which the concept is discussed and the way in which is it viewed that my argument in this paper is necessarily abstract. In this respect, the paper only occasionally includes practical examples; however, even these frequently point to specific conceptions of the Rule of Law and not to its practical application in the world.

I cite a number of sources that identify, and rely on, various common assumptions in relation to the analysis of the Rule of Law. These citations are generally found in the opening paragraphs (or opening sentences) of the works cited. This is, as will become apparent, a clear and recurrent theme. The authors offer their statements to describe what the Rule of Law *is* and, relatedly, as an account of where the concept's origins lie. The foundational importance of this analytic approach is apparent from Martin Krygier's observation: 'It is common to start discussions of the rule of law by saying what it is before going on to ask what, if anything, it might be good for and worth…' (Krygier 2011, p. 65). In establishing an agreed, and agreeable, foundation for what the Rule of Law *is*, the assumptions—whilst relating to different characterisations of the concept—provide a shared understanding about the concept on which further arguments about its meaning or operation can be based. In this respect, the assumptions do a lot of—largely hidden—work. The assumptions each offer a relatively weak notion of what the Rule of Law is but, through their collective cogency, they purport to provide a strong base on which to structure a Rule of Law argument. The way in which these ideas come—or are brought—together reflects a consilience of inductions: where 'an Induction, obtained from one class of facts, coincides with an Induction, obtained from another different class. This consilience is a test of the truth of the Theory in which it occurs.'[1] In other words, if two (or more) independent notions lead to the same conclusion, this provides support for the wider theory; ideas, by their consilience, reinforce one another. The assumptions I identify reflect different—historical, analytical, or ontological—characteristics of the concept. To provide consistent support for the wider theory of the Rule of Law, the assumptions—when viewed as independent notions—would be expected to support the same conclusion. However, as I will illustrate, the assumptions do not and cannot come together as various inconsistencies result in their—ultimate—failure to provide a base on which to structure more substantive ideas.

Notwithstanding their foundational importance, the assumptions do not, in this respect, represent positions of considered argument. The statements reflect the most commonly endorsed positions relating to the concept of the Rule of Law in the Rule of Law literature; their existence or correctness is simply assumed. The common assumptions are *assumptions* not only because they play a crucial foundational role on which further arguments are constructed, but also because they are treated in those arguments as—often—unspoken aspects of the argument; there is frequently no argument—other than mere citation of canonical works—offered in support of the various statements. Of course, we must, to some

[1] Whewell (1848, p. 469). See also Wilson (1999, pp. 8–9).

degree, rely on works that have come before us; it would be impractical to suggest—and I do not intend to do so—that in every mention of, for example, Aristotle, a complete exegesis of his works should be undertaken. I highlight this issue only to illustrate that the common assumptions are used as background information and as a way of setting the scene for the discussion to come. By highlighting the assumptions' incompatibility—where our reliance on robust and consistent assumptions is advantageous—I expose the nature and scope of a problem inherent in the literature: that without identifying the way in which Rule of Law ideas have changed, there is no way to assess whether the common assumptions in the Rule of Law literature are, or can be, consistent with one another.

By stipulating two crude ways of conceiving a macro-process of change, I expose the potential for substantial inconsistencies across the assumptions and suggest that, if clarity is important, it is, therefore, necessary to identify the change mechanism that has operated. The problem arises when the assumptions are considered in terms of potential mechanisms of change. If it is accepted that there has been some form of change in relation to the idea of the Rule of Law—a position that must be accepted if the various works that form the Rule of Law literature relate to the same overarching family of ideas—the operative mechanism of change can impact the extent of any inconsistency across the common assumptions. To demonstrate this, I stipulate two hypothetical and extreme forms of conceptual change: *evolutionary*; and, *revolutionary*. When the assumptions are considered in terms of these forms of change, the nature of inconsistency varies considerably. In short, I demonstrate that the operation of either of the change mechanisms impacts the nature, extent, and frequency of the inconsistencies across the assumptions: if revolutionary change has occurred, the assumptions that form the foundation for a number of Rule of Law papers are largely inconsistent with one another. To facilitate the avoidance of the use of inconsistent assumptions in the future, the nature of change across conceptions must be identified.

It is useful to explain exactly what I mean by a 'mechanism of change'. In using this term, I mean the *process* by which change occurs or is brought about. In considering the way that I explore this idea in this paper, the mechanism in its simplest sense relates to the nature of the conceptual change that occurs between two (or more) conceptions of the Rule of Law. The operation of the mechanism is intended to reflect a number of questions regarding the change. These include: when two Rule of Law conceptions are different, in what way, if at all, do they relate to one another? Does one conception rely on another to take effect/operate? I intentionally do not specify whether the mechanism relates to human action or not. This is because—at some level—change in conceptions of the Rule of Law necessarily involves human agency as humans must posit a conception; however, it is not necessarily the case that a change in the way the Rule of Law is viewed is necessarily intended. If one author had no knowledge of a previous idea of the Rule of Law, this does not proscribe a contribution to the debate around the concept that forms the contemporary discussion of the Rule of Law. As will be touched upon below, many of the authors that are frequently relied upon in discussions about the concept of the Rule of Law do not appear to be responding to other earlier authors in that debate. Yet,

the conceptions that are put forward may still cause the idea of the Rule of Law to change in either an evolutionary or a revolutionary fashion.

Identification of the nature of the change will, then, provide a solution to the problem. A question remains, however, on how this should be achieved. By suggesting one possible solution I seek to avoid merely identifying the problem without even hinting at a solution. Whilst I explore this, albeit briefly, toward the end of my argument, it is relevant to note here that one way to achieve this is to identify precisely what (a particular conception of) the Rule of Law is (or, more properly, was) at the point at which the idea was stated. A closer examination of canonical Rule of Law ideas, in the context of their creation, will more clearly illustrate exactly what the Rule of Law was (for each canonical author) at that time and, thus, when compared to any subsequent canonical conception, the mechanism of change can be identified. Change can only be considered—and, hence, the problem identified in this article be answered—once this has happened. Before we can begin to explore the problem, however, some conceptual ground-clearing is required.

The Rule of Law spans a number of disciplines and is viewed in a discreet conceptual form within each. Further, it seems likely each individual in Rule of Law relevant fields may have his or her particular idea of what the Rule of Law is. So, to narrow the scope of this article, I only explore the body of work that looks to identify—or at least comment on—the precise nature of what the Rule of Law *is*. I do not explore the wide body of—practically or empirically focussed—work that seeks to identify or test the extent to which the Rule of Law can be measured in legal or political systems of the world. In this sense, defining the scope of this article is relatively straightforward. What is more complicated is the provision of a working definition or attachment of a meaning to the term *the Rule of Law*. As I criticise the wide body of literature that itself has seen much ink spilt in trying to define *the Rule of Law*, any superficial attempt to provide a specific definition seems to be both imprudent and arrogant. Focussing the conceptual scope is, however, necessary to provide *some* clarity. I do not offer a definition.[2] Instead, I simply identify one feature that the Rule of Law necessarily possesses: whatever else the Rule of Law may be, I take it to be an idea that relates to the normative constraint of the exercise of power. This broadly stated feature encompasses commonly stated Rule of Law-ideas whilst further narrowing the relative conceptual scope of the discussion and provides clarity for my argument.[3] To narrow the scope further, I consider the Rule

[2] For my view on the definition of the concept, see Burgess (2017a).

[3] By delineating the concept this way, I do not suggest that the Rule of Law should be considered in terms akin to a 'unit idea'. Instead, in circumstances where the Rule of Law was not used as a particular phrase by many of the authors considered to be canonical, some frame of reference is necessary in order to explore the ideas relevant to this overarching and broadly defined category. The intent is to use this broad idea of the Rule of Law to identify the various thoughts that fall into a particular conceptual sphere in order that these can subsequently be used to explore the nature of the similarity or differences between those ideas. This broader application does not, however, comprise the content of and is not explored in this paper.

of Law only in terms of its Anglo-American conception.[4] My reasons for doing so are three-fold: first, I do not consider the Rule of Law and the often associated continental ideas of, for example, the *Rechtsstaat* or the *Etat de droit*, as being directly comparable; second, sufficient space is not available for me to consider *all* of the various Rule of Law-relevant concepts here; and, third, the literature I critique is largely focussed on this same form.

Why, and for whom, is the problem I raise a problem? Why, and to whom, does my challenge matter? And, how is this paper likely—or intended—to change future work? These are valid and sensible questions to ask.[5] As my answers to the first and second questions overlap, I can deal with them together. The problem I raise is a problem for different people at various levels. As noted above, the problem means that there is no way to assess whether various common assumptions in the Rule of Law literature are, or can be, consistent with one another. In this sense, the problem directly impacts individuals that discuss the meaning of the Rule of Law with reference to the common assumptions. This would encompass the paradigmatic figures of this literature—like Brian Tamanaha, Martin Krygier, and Jeremy Waldron—as well as those of us that refer to their work and cite or use the common assumptions of the Rule of Law more generally. In addition, the relative unclarity that results from the problem also impacts the more practically based discussions of the Rule of Law. As the general abstract conceptual discussion blurs into, and can influence, the practical application, there is an indirect impact on those individuals that seek to apply an idea of the Rule of Law.

My answer to the third question—regarding how this paper is likely to change future work—also operates on two levels. At the first level, I hope that my argument will cause critical reflection on the use and application of the common assumptions in future work relating to the concept or conceptions of the Rule of Law. This follows from the fact that I intend only to raise the assumptions' potential inconsistency. In echoing my comment from this paper's first paragraph, my raising the problem (and the paper generally) is a call to investigate the nature of change across conceptions in order that the assumptions can more clearly and accurately achieve the aims for which they are commonly deployed. (Whilst I raise one possible solution to the problem I point-out, I do not suggest it is the *only* solution.) In this sense, the benefit that I hope flows from my argument is both that individuals working in this field do two things: critically evaluate practices that have defined discussions about the concept of the Rule of Law for at least the last couple of decades; and, facilitate the empowerment of those same individuals to establish new ways of considering the meaning and content of the Rule of Law. This abstract/theoretical reflection about the way in which the concept is described feeds into the second level of

[4] Here, my suggestion relates to the 'Anglo-American' consideration of the Rule of Law in the Rule of Law literature. In this respect, the contemporary idea of the Anglo-American Rule of Law—by virtue of the inclusion of the various canonical sources that I refer to later in the paper—is made up by a large number of sources that are not themselves either Anglo or American.

[5] I thank the anonymous reviewer for posing questions akin to these and for reminding me of the importance of providing answers to them.

operation (regarding the answer to the third question). At this level, after considering any changes in theoretical approaches there may be some indirect impact on the way that practitioners use and apply cognate approaches in considering the Rule of Law.

Before diving into my argument proper, a final comment is apposite. This article represents, in many respects, both a critique of current practices *and* a rallying cry in relation to future practices. Through illustrating that the form of conceptual change across canonical conceptions of the Rule of Law *can* impact the relative level of consistency in the assumptions that are used and relied on in the opening of so many Rule-of-Law-focused works, I demonstrate that there must—if we are to provide the strongest possible arguments relating to the contemporary idea of the Rule of Law—be consideration of the *actual* way in which change has occurred across conceptions. In other words, the fact that there is little consideration of the form or nature of change in ideas of the Rule of Law results in our reliance on potentially inconsistent assumptions. Where these assumptions play such a vital role in articles exploring the nature and content of the concept of the Rule of Law it is imperative that the assumptions relied upon set the strongest possible foundation. The avoidance of inconsistency—even potential inconsistency—is, therefore, not only highly desirable but also, I would suggest, is essential. It is on this basis, and for this reason, that I seek to explore and expose the potential for inconsistency across the assumptions that are used and, in closing, suggest—albeit briefly—one possible solution to the problem.

In what follows, In Sect. 2, I identify the common assumptions in the Rule of Law literature before, in Sect. 3, explaining why they are inconsistent. After providing a brief re-statement of the problem in Sect. 4, I very briefly suggest one potential way out of (or around) the problem in Sect. 5. Section 6 concludes.

2 What are the Assumptions of the Rule of Law?

'As political philosophers,' states Jeremy Waldron, 'we like to keep our armoury of concepts in good shape' (Waldron 2002, p. 138). Though not everyone engaged in conceptual analysis may self-identify as a political philosopher, Waldron's position is sensible. However, I will illustrate this is not being adhered to; the political philosophers' armoury is, instead, being neglected.[6]

In the body of literature in legal or political philosophy that considers exactly what the Rule of Law *is* or that relates to the immediate impact of the terms of definition of that concept ("*the Rule of Law literature*") there is, frequently in the opening paragraphs of the works, a common expository passage that serves as a proxy for

[6] This is a position that Waldron himself, at least in some respects, concedes. See, Waldron (2002, p. 138). Of course, strict maintenance through may not always be possible; Waldron goes on to point out there can be, to a point, a difference between the meaning of a concept like the Rule of Law 'on the streets' and that of its strict philosophical meaning. But, even if street level political philosophy is discounted, I have cause to doubt the truth of the initially stated position—at least insofar as it relates to the Rule of Law.

either a short-form literature review, a conceptual history, a definition of the concept itself, or as a summary of previous arguments. These assumptions are used to provide a foundation on which further arguments rest. They are used to strengthen the ideas of what the Rule of Law *is*. Whilst I explore the precise terms below, it will suffice here to state the assumptions briefly: first, the Rule of Law is over 2000 years old; second, there have been a number of canonical Rule of Law ideas; third, contemporary ideas of the Rule of Law differ to previous ideas of the Rule of Law; and, fourth, the Rule of Law is a highly, or essentially, contested concept.[7] These will be both familiar and recognisable to anyone with even a passing familiarity with debates regarding the content or nature of the Rule of Law. I do not suggest all of the Assumptions are present in *every* modern Rule of Law paper; nor do I suggest that my list contains an exhaustive account of ideas that could otherwise be considered as Common Assumptions. I do, however, suggest any contemporary account that omits *all* of the Assumptions would represent an outlier and that the Assumptions form a recurring narrative.[8] I draw on the examples below for illustration and where multiple Assumptions occur in a single work, for citational brevity, I have sought to utilise and refer to the same account regardless of the existence of alternative sources that could also have illustrated the same point. Through the invocation of the assumptions in the Rule of Law literature, and through the mutual reinforcement that could be said to exist when differing ideas are collectively cogent or consilient, the use of the assumptions is intended to provide a solid foundation—a platform—on which more substantive ideas about the Rule of Law can be constructed.

The Assumptions do not, however, necessarily come together; they are not consilient by virtue of the inconsistencies that arise and, therefore, they cannot provide a strong or stable foundation on which to structure further Rule of Law ideas. Despite the frequency of their invocation—and despite any suggestion that the concept of the Rule of Law should be kept in good shape—the Assumptions are not internally consistent.[9] There has been insufficient consideration of whether the Common Assumptions are correct or, indeed, whether they make sense when expressed together. In the following sub-sections I outline the precise way each of the Assumptions are expressed. I first do this without seeking to expose any inconsistencies. Then, in Sect. 3, I identify a point of commonality before explaining exactly why, and how, the inconsistencies arise.

[7] Collectively, I refer to these as *Common Assumptions* or *Assumptions* of the Rule of Law literature.

[8] Martin Krygier identified a separate (yet not inconsistent) set of common themes in the literature. He identifies various clichés of the Rule of Law that relate to the concept's: vogueishness and increasing popularity; promiscuity (as there are a number of potential commentators); and, contestability (in terms where it is 'so "essentially contested"') (Krygier 2016, p. 1).

[9] Here, I am not suggesting consistency across individual or disparate accounts is necessary. My suggestion relates not to different arguments but, instead, to different assumptions on which arguments are based. I expand on this below.

2.1 Assumption One: The Rule of Law has Existed for Over 2000 Years

In the Rule of Law literature, accounts frequently commence with a statement of the concept's historical origins. Many accounts point to Aristotle and suggest he was the originator of the idea.[10] This plays a central role in statements like these: 'The ideal of the rule of law, which can be traced back at least as far as Aristotle, is deeply embedded in the public political cultures of modern democratic societies' (Solum 1994, p. 121) and '[t]he concept of the rule of law embodies ideals that have figured in political and constitutional discourse at least since Aristotle…'[11] Attribution of the concept's classical origin has also been noted as a specific trend by others. In the opening sentence of his book, whilst pointing to necessary caution in doing so, Tamanaha acknowledges that: 'Many accounts of the rule of law identify its origins in classical Greek thought, quoting passages from Plato and Aristotle.'[12] The fact that there has been some debate as to the content of the Rule of Law, or that it has some different facets or formulations, is also put into Aristotelean terms by some.[13] A more general statement regarding the concept is also common. It is a point of agreement, or at least popular consensus, that the origin of the Rule of Law—as an initial formulation—can be traced, if not immediately to Aristotle (or any other individual), but certainly to the ancient or classical period.[14] From these limited examples, I hope it will be clear that it is possible to observe—and to do so without committing to the accuracy of the claims—that a common assumption exists in the literature that the Rule of Law is ancient and, probably, originated with Aristotle. In this sense, the classical origin of the concept forms the First Common Assumption of the Rule of Law.

[10] See, for example, Costa et al. (2007, p. 75). Some hint the concept is, potentially, older by suggesting the Rule of Law is 'at least' as old as Aristotle's account (Cass 2001, p. 1).

[11] Krygier (2014a, p. 46), there is occasionally some hesitancy in ascribing a particular start to the concept. For example, in relation to the idea of the law ruling as opposed to rule by men, this is described as being a point that is 'as old as Hobbes; maybe even as old as Aristotle' (Waldron 2007, p. 101). However, not too much should be read into this hesitancy as the same author also suggests the beginnings of the Rule of Law tradition and the associated ideals 'have resonated in our tradition for centuries—beginning with Aristotle' (Waldron 2012, p. 3).

[12] Tamanaha (2004, p. 7). In the second paragraph of his article, Fallon adopts a similar approach in stating 'Some have traced the modern ideal to Aristotle, who equated the Rule of Law with the rule of reason.' (Fallon 1997, p. 1). Whilst there may be different meanings attributable to the Rule of Law, at least one is stated as being attributable to Aristotle (Shklar 1987, p. 2).

[13] Rodriguez et al state suggest that theorists since the time of Aristotle have been interested in describing the Rule of Law in terms that 'withstand analytic scrutiny.' (Rodriguez et al. 2009, p. 1464) (citations omitted.) See also Shklar (1987, p. 2).

[14] Waldron suggests it has been a hugely important tradition for millennia (Waldron 2012, p. 4). And, in referring to an Aristotelean passage stating that law should govern, Møller and Skaaning state 'Theses sentences were written by Aristotle over two millennia ago (in Politics, 3.16), and they go to show that the ideal of the rule of law is ancient' (Møller and Skaaning 2014, p. 2). As part of a discussion related to the idea of a government of laws and not men, John Phillip Reid states: 'These words not only encapsulate the essence of rule-of-law, they have echoed over the centuries even back to classical times…' (Reid 2004, p. 5).

2.2 Assumption Two: Citation of Various—and Particular—Rule of Law Canons

Rule of Law accounts frequently invoke, relate, or refer to various canons of the concept. Here, I use 'canons' of the Rule of Law simply as a shorthand to describe the most-invoked Rule of Law authors' accounts referred to in the literature (and not in a way that suggests, or endorses, the accounts *should* be accorded more authority than any others). In giving this caveat, and in the exposition of this Assumption, I adopt a position that neither contradicts nor endorses Radin's statement that, in relation to the Rule of Law itself, '… there is no canonical formulation of its meaning…' (Radin 1989, p. 781). For the purposes of my argument, they represent the 'go to' authors common to many Rule of Law accounts. Of the philosophers' and political thinkers' conceptions frequently invoked or deployed, the field is substantial. Møller and Skaaning suggest '… listing the philosophers and political thinkers who have celebrated [the ideal of the Rule of Law] reads as a 'Who's Who?' of Western political thought: Plato, Aristotle, Locke, Montesquieu, Hume, Kant, Hayek, Habermas, and Rawls to name but a few.' (Møller and Skaaning 2014, p. 2). In identifying core Rule of Law thinkers whose accounts are frequently invoked, this list could also include Hobbes, Hume, Dicey, Fuller, Dworkin, Raz, Radin, Bingham, and Waldron. My identification of these thinkers does not result from any particular scientific rigour or empirical selection criteria. Instead, this, non-exclusive, list represents a list of 'usual suspects' recognisable to anyone familiar with the Rule of Law literature.[15] Whilst reliance on a single thinker's position is rare—especially given the frequently invoked contested nature of the concept explored below—there is, routinely, specific recognition provided to A. V. Dicey. Dicey's account of the Rule of Law has been referred to as being famous (May 2014, p. 34) the best known (Fallon 1997, p. 1) or the most influential (Solum 1994, p. 122). Reid—by way of criticism of Radin's sentiment that there is no canonical formulation of the Rule of Law (Radin 1989, p. 781)—suggests it was Dicey who cast the Rule of Law into canon.[16] Of course, Reid's statement exists in at least partial opposition to the position stated by Arndt: that the Rule of Law, whilst formulated differently to the Diceyan vision, was seen as something different for earlier thinkers.[17] This relative fame could be attributed to Dicey's popularisation of the phrase *the Rule of Law*.[18] However, Arndt's caution—that the Rule of Law, in the Diceyan form did not exist until the 1860s and that it meant 'very different things to Bracton, Coke, Locke and Dicey.' (Arndt 1957, p. 121)—should be kept in mind.[19] Despite the disputation,

[15] Reference is made to some, or all of these, in works by: Arndt (1957), Reid (2004, pp. 5–8), Sampford et al. (2006, p. 14), Krygier (2011, p. 65), Waldron (2011, p. 4, 2012, pp. 3–4, 2016).

[16] Reid (2004, pp. 7–8).

[17] Arndt (1957, p. 121).

[18] Of course, terms like 'the empire of laws and not of men' had been invoked in the mid-seventeenth century and, arguably, before; for example, in using this phrase, Harrington paraphrases an Aristotelean sentiment. See, for example, Harrington (1992, pp. 8–9). Waldron, too, recognises this: 'It is sometimes said that Dicey in 1885 was the first jurist to use the phrase "the Rule of Law." I don't think that's true, except in the most pedantic sense of the exact grammatical construction' (Waldron 2012, pp. 3–4).

[19] This point is also relevant to Assumption Three, below.

what is clear is that there are, and have been, a number of popular—or at least frequently invoked—accounts of what the Rule of Law *is*. These canonical accounts are cited, relied on, and referred to, in the literature in a way that suggests they are basic statements of the Rule of Law. This, therefore, represents the second Common Assumption of the Rule of Law.

2.3 Assumption Three: Contemporary Conceptions Differ to Historical Conceptions

In terms where a number of canonical accounts are provided in different terms over the course of more than 2000 years, it may seem trite to—specifically—recognise that contemporary conceptions of the Rule of Law differ from earlier conceptions. Nevertheless, it is important to do so as this obvious factor is also—specifically—recognised in the Rule of Law literature. Not infrequently are the generalised differences specifically stated; for example, extracting an example that relates to both Assumptions One and Two, Todd Zywicki states 'Dicey's characterization of the modern content of the rule of law may be distinguished from the ancient "classical" conception of the rule of law, such as found in Aristotle.'[20] Explicit reference is often made to the change or difference in conceptions over time.[21] Some authors make explicit, yet more oblique, reference to historical differences; for example: Fallon states '[t]he Rule of Law is a much celebrated, historic ideal, the precise meaning of which may be less clear today than ever before'.[22] Acknowledgement of the implicit change in the Rule of Law is apparent not only from the specific discussion in the literature, but also in the structure and commentary provided in various Rule of Law texts. For example, the concept's historical background is provided by Brian Tamanaha across the first six chapters of his book.[23] An apt description of the position taken in relation to the Rule of Law is that it is a historic ideal—which could be taken to mean earlier ideas have some point of difference to contemporary ideas[24]—or in terms where there has been a 'historical evolution' (Taiwo 1999, p. 152). As a

[20] Zywicki (2003, p. 3). Shklar also contrasts and compares the specific differences between a number of historical conceptions in the opening paragraphs of her frequently cited work (Shklar 1987, pp. 1–3) [Zywicki references Shklar's work in relation to identifying the differences between the ancient and modern ideas of the Rule of Law (Zywicki 2003, n. 5)].

[21] Reid (2004, pp. 3–4). This also extends to differences between conceptions at various points in the past; for example, Arndt specifically states Dicey's conception cannot be traced back to conceptual origins in the middle ages or, even, to Locke. See, for example, Arndt (1957, p. 117).

[22] Fallon (1997, p. 1). Further, Krygier describes the impact of the differences in conceptions over time in this way: 'The rule of law is today more talked about in more places by more people than perhaps ever in its history, but that does not mean it is any clearer in meaning or significance, or better understood' (Krygier 2014b, p. 77). Krygier also suggests the concept's recent rise to prominence and the variety of conceptions, results in it being 'rendered increasingly murky what the concept might mean, what the phenomenon might be, and why anyone should care' (Krygier 2016, p. 1). For an illustration of the different historical approaches to Rule of Law conceptions, see the special issue devoted to the operation and applications of the Rule of Law through history (Walker and Burgess 2017).

[23] Tamanaha (2004). Christopher May characterises Tamanaha's account as describing a 'historically shifting norm' (May 2014, p. 37). Further implicit reference to the change in the conception is apparent through Reid's hope to identify how the Rule of Law 'once functioned' (Reid 2004, pp. 3–4).

[24] Radin (1989, p. 781).

further illustration of a point of difference, the modern trend toward the incorporation of 'thick' ideas into the Rule of Law—in particular notions of human rights and democracy[25]—also differs substantially in comparison to Rule of Law ideas produced by earlier thinkers. In these terms without committing to the truth-value of the stated positions—there can be little doubt that the dominant assumption in the Rule of Law literature is that the Rule of Law, or at least conceptions of the Rule of Law, have varied over time. These differences are evident in either ideas associated with the concept itself or with the canons' conceptions of the same. This, then, provides our Third Common Assumption of the Rule of Law.

2.4 Assumption Four: The Rule of Law is a Highly (or, Even, Essentially) Contested Concept

There is an accepted or at least acknowledged ambiguity or imprecision in the statement or articulation of the Rule of Law. This much is likely apparent from the various examples provided above. In the paragraph opening his book, Reid describes the idea of the Rule of Law in these delightful terms:

> … we are standing on a slippery slope. The ground is not only slick, it is covered with the grease of jurisprudential ambiguity and the treacherous underfooting of imprecise definition. "Rule of law" is an expression both praised and ridiculed by adherents of opposite political philosophies, and it is a principle claimed as the lodestar for widely differing legal theories. (Reid 2004, p. 3).

It is useful to, once again, specifically state what may, nevertheless, be obvious for the purposes of evidencing the Common Assumptions: Conceptions of the Rule of Law are not only long lasting, commonly invoked, and varied, but also are frequently pitched in opposition to one another. Whilst some deny an element of contest by suggesting there exists a fairly well understood conceptual core,[26] the large number of conceptions is readily acknowledged by many.[27] These conceptions are 'often conflicting and not infrequently rather confused'.[28] This has led to the suggestion that the very idea of the Rule of Law is—itself, and in the least—deeply contested.[29] There is increasingly a common thread in the literature that suggests an acceptance that the concept may be properly characterised as being essentially contested (in the Galliean sense) (Gallie 1955). Waldron's (2002) paper[30] is generally

[25] Ideas in these terms are not explored here in preference of a conceptually cleaner and clearer examination. An exploration and outline of formal and substantive ideas can be found in Craig (1997).

[26] Zywicki (2003, p. 3). See also Bedner (2010, pp. 50–51), Grant (2016, p. 5) and Chesterman (2008, p. 342).

[27] This has been put in these terms: '… the rule of law may not be a single concept at all; rather, it may be more accurate to understand the ideal of the rule of law as a set of ideals connected more by family resemblance than by a unifying conceptual structure' (Solum 1994, p. 121).

[28] Marmor (2004, p. 1).

[29] Radin (1989, p. 781).

[30] Waldron (2002) [which, in turn, references the suggestion of essential contestability by Fallon (1997)].

cited in support of this position.[31] Some are more cautious. Krygier states 'Like many other important moral, political and legal ideals, among them democracy, justice and liberty, [the Rule of Law's] meaning, scope, conditions and significance are all highly, perhaps essentially contested.'[32] Some commentators, as I do here, simply report on the adoption or relative acceptance of this characterisation in the literature.[33] Others follow this approach of merely reporting on the trend.[34] One notably absent reference to Waldron's ever-popular categorisation of the Rule of Law as *essentially* contested comes from Waldron himself. In a recently authored Rule of Law entry for the Stanford Encyclopedia of Philosophy, Waldron outlines—in a section entitled *The Contestedness of the Rule of Law*—the contestation prevalent in the literature but makes no reference to the concept as being *essentially* contested.[35]

This all adds up to a general acceptance that the concept is at least (generally) contested. What is clear is that there appears to be an *ongoing* contest between the various Rule of Law ideas. A number of Rule of Law-ideas are postulated in terms that differ in their precise terms from one another yet remain connected by virtue of: the idea's author's explicit intention to contribute to the Rule of Law discussion; or, alternatively, though a subsequent discussion that seeks to include earlier ideas—in which no explicit reference is made to the Rule of Law or any other Rule of Law theories per se—into the subsequent Rule of Law discussion. Whether this situation results in essential contestability—in the truly Galliean sense—appears to, itself, be contested. In essence, there remains a continued debate as to the meaning of the concept across both time and geography (Chesterman 2008, p. 340). Whilst early accounts associated with Rule of Law ideas infrequently, if at all, relate their ideas to the precise context of one another—for example, there is no explicit mention of either the Rule of Law or Hobbes's accounts of that idea by Locke—there is explicit engagement and discussion across contemporary writers. For example, after acknowledging Hayek's definition as 'one of the clearest and most powerful formulations of the ideal of the rule of law', Raz uses his critique of Hayek as a springboard into his own formulation of the idea.[36] Furthermore, it will be apparent from

[31] For example see Staton (2012, p. 235), Krygier (2016, p. 1). In conjunction with sentiments that the Rule of Law's contestedness 'strongly indicate[s] that the Rule of Law is an essentially contested concept' see Møller and Skaaning (2014, p. 7). Regarding the idea that that 'the rule of law seems to be an essentially contested concept' see Carlin and Sarsfield (2012, p. 125), Møller and Skaaning (2012, p. 136). See also, Staton (2012, p. 235) (acknowledging the contested nature of the concept—in the Waldronian sense—is a concern in the literature.).

[32] Krygier (2014a, p. 1) (citation omitted).

[33] Tamanaha states simply that 'Legal theorists have called it an 'essentially contested concept'.' (Tamanaha 2012, p. 232).

[34] For example, by stating: 'Theorists since Aristotle have been primarily interested in fashioning a coherent description of [the Rule of Law] that can withstand analytic scrutiny. Nonetheless, there are those who believe this to be a fool's errand – that the rule of law is an "essentially contested concept."'(Rodriguez et al. 2009, p. 1464) (citations omitted).

[35] Waldron (2016). I do not suggest Waldron rejects or resiles from his earlier position. It does, however, seem that, for him at least, the question of *essential* contestedness is not sufficiently accepted—despite the widespread citation and adoption of his own position—to warrant inclusion in an encyclopedia entry.

[36] Raz (2009, p. 210). For Hayek's definition, see von Hayek (2007, p. 112).

the contemporaneity of the citations relating to the contested nature of the concept, the contest—or at least the popularity of citing the contest as continuing—subsists.

It is, then, clear that there are a number of different conceptions associated with the concept of the Rule of Law either at a specific point in history—in comparing a single historical conception to one from the present—or in relation to its contemporary conception. The accuracy and/or appropriateness of the *essential* contestability remains a topic that is debated and explored in the literature and the very existence of the debate, itself, forms part of the literature. It is on this basis that the observation of the contested status of the Rule of Law comprises our fourth Common Assumption.

3 Why are the Assumptions Inconsistent?

Even on the basis of my brief examination, it is apparent that a number of very different, often opposing, conceptions have been presented, accepted, cited, and applied in the Rule of Law literature. The four Assumptions are frequently stated across the literature and presented without principled argument; they are accepted as part of the Rule of Law's conceptual narrative. Notwithstanding this acceptance and frequency of presentation, I will, in Sect. 3.2, outline why the Assumptions' use creates inconsistencies in the account. To make this point, it is, however, useful to first address a preliminary question: is it even *possible* for the Assumptions—where they are characteristically distinct and could be seen as relating to very different aspects of the Rule of Law—to be sensibly considered as being consistent or inconsistent with one another? To provide a positive answer to this question—and before going on to illustrate that the Assumptions are not, in fact, consistent—I consider the opposing question: are the Assumptions *too different* to be considered as being consistent or inconsistent?

Where the assumptions could be classified as relating to historical, analytical, or ontological characteristics of the Rule of Law, it could be suggested that it is not appropriate to assess their consistency as they relate to very different aspects of the concept.[37] Should this be the case, attempts to locate consistency could be seen as akin to assessing whether the quality of a novel together with the kind of tree used to make the paper on which the text is printed are consistent; whilst both could be seen as reflecting the quality of the book (more generally), and whilst both may be *separately* relevant to its quality, there is no reason to expect or require consistency between the characteristics. The Assumptions, however and notwithstanding their different characteristics, should not be viewed in this way. It is possible to assess their consistency by virtue of the fact that they are each being used to *collectively* illustrate what the Rule of Law is; the Assumptions are *together* being used to provide a conceptual background and to support a particular view of the concept. In the book example, the parallel is in value: *both* the words and the paper stock impact the book's value. Value draws the characteristics together in a way that may require

[37] I am grateful to Andrew Lang (University of Edinburgh) for suggesting expansion of this point.

some level of consistency. In returning to the Assumptions, by virtue of their being brought together in this particular endeavor, their differences in character can be viewed together and can sensibly be assessed in terms of consistency/inconsistency. Further, where the Assumptions are collectively being used in a way that promotes consilience, the collective cogency of the Assumptions is necessary for conceptual clarity. Before I outline why the Assumptions' use creates inconsistencies in the account generally, it is useful to first pause to identify the broad theme revealed in the Assumptions or, to put it another way, to attempt to reconcile the Assumptions into a collective sentiment.

3.1 Change (Over Time and by Thinker) in Rule of Law Ideas

The fundamental point of relative agreement evident when the Assumptions are considered together is *change*. This could be put something like this: ideas of what the Rule of Law *is*—and the use of those ideas—have varied over time.[38] This is most apparent in Common Assumption Three.[39] However, it is also a necessary feature across the other three Assumptions. The fact that there are a number of Rule of Law conceptions and no definitive—agreed—statement of exactly what it *is*, speaks not only to the fact that there is a difference across time and across each author's conception, but also to the fact that there has been some form of change over time. So, to say that the idea of the Rule of Law has changed over time appears to be—when the Common Assumptions are considered individually—a relatively uncontroversial notion.[40] Notwithstanding this fundamental point of relative agreement, problems creep in if we consider the assumptions in terms of different mechanisms of change. If we simply accept that there has been some change in the conceptions, it is a logical extension to question or enquire as to the nature of the change. Here, I do not intend to refer to the *micro*-mechanics of change (i.e. the influences on each canon's author's precise formulation of his or her conception). What I mean is the more general idea of change that *could* occur: the *macro*-mechanics. I adopt and explore this idea purely as a tool to illustrate the importance of understanding the form of the change that has occurred; because, as I will illustrate, differing forms of change can impact levels of consistency between the Assumptions. At this macro-level, there are various ways to describe change. I consider only two—relatively binary and extreme

[38] This observation is, of course, far from revolutionary and has been noted by a number of authors. For example, Bedner states: 'Rule of law definitions seem bound to vary over time, place, context, and from author to author.' (Bedner 2010, p. 48) (citation omitted).

[39] Assumption Three: Contemporary Conceptions Differ to Historical Conceptions.

[40] This statement does, of course, presuppose to some extent that the various thinkers were talking about the same thing; something that, in the context of the examination of the Rule of Law literature, is also an uncontroversial idea. Whilst it will become apparent that there are difficulties with this characterisation—not least because few canonical accounts refer to '*the Rule of Law*'—it is clear is that, over time, individual thinkers' conceptions have changed. It is relevant to note here that I am making no claims as to the actual existence of a broad category of the Rule of Law as a concept—I am merely reporting on the accepted position in the literature wherein it seems to be uncontentious that the canons' ideas relate to some broad concept of the Rule of Law.

hypothetical—mechanisms: *evolutionary change* and *revolutionary change*. I do not, however, suggest either mechanism *did* operate. I also do not suggest that various intermediate or mixed forms of change do not exist or did not actually operate. I do, however, suggest that by exploring these two relatively crude macro-processes of change, the potential for inconsistencies across the Rule of Law Assumptions can be illuminated. This, in turn, will lead to my suggestion that it is essential that the actual—not merely the hypothetical—form of change is understood. First, however, I must explain exactly what I mean by the terms *evolutionary change* and *revolutionary change*.

Evolutionary change describes a change that occurs in the way that the Rule of Law is conceived that necessarily relates to, follows on from, or expands a prior—but not only immediately prior—conception. Change in this way means the idea of the Rule of Law could be seen as a single diachronically conceived concept, the nature and meaning of which changes over time; earlier conceptions of the Rule of Law would be necessarily relevant to subsequent conceptions: the Rule of Law could be seen in terms akin to a continuing tradition.[41] Evolutionary change is, perhaps, best understood when contrasted with revolutionary change. Revolutionary change describes discreet, unrelated, iterations of the Rule of Law as paradigm shifting events: conceptual revolutions in thought that fundamentally alter or change the way a concept is perceived. In this idea, subsequent ideas are *not* necessarily reliant on earlier ideas; later ideas implicitly or explicitly supplant earlier ones.[42]

The conception of change as being either evolutionary or revolutionary covers the field in a binary sense. As evolutionary change *necessarily* relates to a previous idea, change is either evolutionary or it is not; it is not evolutionary *without* a necessary connection to prior ideas. In the latter case, 'change' would be revolutionary.[43] Even without further consideration, it could be said that, should change be conceived as being revolutionary, there is no need to rely on prior ideas of the Rule of Law when positing a new (revolutionary) Rule of Law idea; indeed, it may make little sense to do so if any subsequent position is adopted.[44]

Two things must be clarified. The first relates to the nature of (evolutionary change's) 'necessary' connection. The second relates to variations 'across' a time period. In addressing the former, the *necessary* aspect relates to a connection that would result in a fundamentally different (subsequent) conception if the prior conception did not exist. Necessity, here, has two components that must be satisfied at

[41] It is in this sense that, in relation to the Rule of Law tradition, Martin Krygier applies the metaphor of the Argonauts' ship remaining the Argonauts' ship notwithstanding the fact that, over the course of a voyage, barely any original part of the ship survives (Krygier 2015, p. 11). In drawing this comparison, and relating the tradition of the Rule of Law to that of the Common Law, Krygier extracts (Hale 1820, p. 84).

[42] Here, I have in mind the Kuhnian idea that the defining characteristic of—for Kuhn, scientific—revolutions, relates to the rejection of a prior time-honored theory, a shift in the nature of the problems available for scrutiny, and a transformation of the imagination (Kuhn 2012, p. 6).

[43] Whilst this does not account for how to categorise the very first conception, this will not impact the assessment herein.

[44] In this respect, I have in mind something Kuhn's idea of irreconcilability. See Kuhn (2012).

separate times: first, is the requirement for a connection that is more than merely incidental—a canon's mere use of the same language or turn of phrase would not be sufficient in this respect (whilst it *may* suggest their work relates to the same ideas as that of the former thinker); the second requires that the connection be sufficient to have augmented the conceptual toolkit available to the subsequent canonical author.[45] For example, the fact that Hobbes's *Leviathan* temporally precedes Locke's *Two Treaties* and the fact that Locke may have, or even did, read *Leviathan* would not be enough to establish a necessary connection; neither fact necessarily relates to the creation or operation of Locke's Rule of Law-relevant ideas.

In relation to the augmentation/identification of a conceptual toolkit, the problems of establishing influence are well known.[46] However, the methodology I propose, in some respects, avoids these. A detailed exegesis of conceptions sufficient to exemplify a *true* necessary connection is not possible in an article of this length. Whilst this would be essential when more micro-level changes are considered, one is not required for the brief macro-changes explored here.[47] As my analysis considers both mechanisms of change, there is no need to consider or worry (at this stage) about which mechanism of change *may* have operated in individual conceptions. For this reason, in relation to this macro-examination, the basic, stipulative, definition of *necessary* provided above is, for now at least, sufficient to differentiate the two mechanisms as separate, opposing, binary methods of change that cover the field.

One further thing requires clarification: the nature of variations 'across' a time period. Here, I mean only to describe the existence of two (or more) ideas at distinct points between which there is an intervening period. I do not mean to suggest that beyond this the ideas must be related nor that there must be a conceptual connection between them.[48] Instead, 'across' merely reflects a temporal separation between the ideas.

3.2 Inconsistencies in the Assumptions

We now have four Assumptions—each relating either directly to individual conceptions or to the categorisation of the conceptions together—and two mechanisms of

[45] The question to be asked is whether the subsequent canon's work could have had the same meaning if the former canon's work had not been produced. Or, putting it another way, by asking whether the subsequent work's meaning relies on the (prior author's) augmentation of the subsequent thinker's conceptual toolkit.

[46] There are well known statements of the difficulties of establishing and illustrating a level of influence by one thinker over another; one of the most well-known accounts is provided by Skinner (1966). However, Oakley provides a convincing exposition of the benefits of the idea (Oakley 1999, chap. 5) ('Anxieties of Influence:' Skinner, Figgis, Conciliarism and Early-Modern Constitutionalism). Oakley's account is, in some sense, acknowledged by Skinner in later works (Skinner 2002, p. 75).

[47] Nevertheless, in Sect. 4, I suggest and briefly explore contextualising the canons as one possible solution. This solution differentiates canons' conceptions as being either a solution to that (canon's) period's problems or whether, alternatively, the canon's 'solution' is provided in response to or in consequence of something else.

[48] (To do so would, of course, presuppose some form of necessary connection.) In this sense, my suggestion shares some common ground with Armitage's recent work (Armitage 2012).

change—*evolutionary* and *revolutionary* relating to the change in Rule of Law ideas over time. Is there a difference in the Assumptions' collective cogency if we categorise change as being either evolutionary or revolutionary? Do the Assumptions make sense under both mechanisms? I suggest the former question should be positively answered but the latter should not; the operation of each mechanism fundamentally impacts the nature, extent, and frequency of the inconsistencies in the Assumptions.

If it is accepted that there has been some form of change in relation to the idea of the Rule of Law, the mechanism of change—whatever that may have been—can impact the nature of inconsistency across the Assumptions. There are, conceivably, a number of different ways to explore inconsistencies across the Assumptions. I do so via a two-stage comparison: the first considers whether the Assumptions *themselves* are compatible. For example, whether Assumption One is consistent with Assumption Two, and whether Assumption Two is consistent with Assumption Three, etc. I describe these as *Assumption Pairs*. The second stage considers whether the Assumptions' and the Assumption Pairs' consistency is impacted when considered in terms of the two change mechanisms. In taking this approach, I do not describe *every* possible pairing of Assumptions. I also do not deny there are various instances of consistency between Assumptions. To make apparent the scope of inconsistency, I simply describe the most obvious inconsistencies and, then, outline the problems that follow. By doing so I illustrate that, regardless of the change mechanism's operation, various inconsistencies subsist; yet, crucially, the nature and extent of inconsistency varies depending on the operative mechanism of change.

To illustrate this, in the following sub-sections, I: show that—outside of any consideration of a process of change—the Assumption Pairs (in isolation) are generally compatible; illustrate that there are no blatant inconsistencies when the Assumptions or Assumption Pairs are considered in terms of evolutionary change; and, demonstrate that substantial inconsistencies result when either the Assumptions or Assumption Pairs are considered in terms of revolutionary change. This illustrates the essentiality of identifying the way in which change in Rule of Law conceptions *has* occurred. (In this respect, I do not suggest an evolutionary change mechanism should be adopted or accepted simply because it results in a more compatible set of Assumptions.)

3.2.1 Assumption Pairs: General Compatibility

The Assumption pairs do not *immediately* contradict one another. This superficial compatibility should, in circumstances where the Assumptions are so frequently invoked, be no surprise. For example, Assumption One and Assumption Four[49] can sit comfortably side by side; the Rule of Law can conceivably have existed for a long period whilst, over that duration, its precise boundaries have been contested. Notwithstanding this general compatibility, *some* tension can be identified between

[49] Assumption One: that the Rule of Law has existed for over 2000 years. Assumption Four: the Rule of Law is a highly or essentially contested concept.

Assumptions One and Three.[50] The existence of different Rule of Law ideas over time may suggest a lack of conceptual consistency; but this is not immediately reflected in the idea that the Rule of Law has existed for two millennia.[51] Nevertheless, despite this minor tension, the various Assumptions are, at least broadly, compatible.

3.2.2 Evolutionary Change: No Obvious Inconsistency

When *individual* Assumptions are considered in terms of the mechanism of evolutionary change there is no obvious inconsistency. For example, when considering Assumption Two,[52] it is appropriate that there would be citation of previous Rule of Law canons in circumstances where each Rule of Law idea necessarily relies on earlier ideas of the Rule of Law. This can largely be said for each of the other Assumptions in relation to evolutionary change. The same result obtains when the Assumption Pairs are considered in evolutionary change terms. By way of a brief example, when viewed this way, there is no immediate inconsistency between Assumptions Three and Four.[53] The obvious way (essential?) contestability could arise is as a result of evolving ideas of the concept over time giving rise to competing ideas at a later stage.[54] There is even one way in which consideration of the mechanism of evolutionary change can *improve* the Assumptions' relative relationship: The slight tension between Assumptions One and Three noted in the paragraph above, appears to be either avoided or lessened. If the two millennia old Rule of Law has evolved into contemporary ideas, differences would be expected. By pitching different conceptions at opposite temporal ends of a process of conceptual evolution, there is some remedial effect by considering change in terms of an evolutionary mechanism.[55]

Whilst there are no obvious inconsistencies, there is one, somewhat, strained relationship between evolutionary change and the Assumption Pair One and Four.[56] The assumptions pull in (slightly) different conceptual directions and evolution provides an unsatisfactory reconciliation. It is only if the Rule of Law is accepted as an overarching concept that it can be said to have *existed* for this extended time, yet the contest between ideas—especially if seen as essentially contested—requires several ideas to exist at the *same* conceptual moment. It could be suggested that the various

[50] Assumption One: that the Rule of Law has existed for over 2000 years. Assumption Three: contemporary Rule of Law ideas differ from older ideas.

[51] This may be reconciled through considering separately and differentiating *the concept* of the Rule of Law and various *conceptions* of the same.

[52] Assumption Two: a number of canons of the Rule of Law exist and are frequently cited.

[53] Assumption Three: contemporary Rule of Law ideas differ from older ideas. Assumption Four: the Rule of Law is a highly or essentially contested concept.

[54] Assuming, of course, that the earlier ideas—or, at least, some aspects of them—are not completely debunked or overridden by subsequent ones; something that has, undoubtedly, happened with certain ideas associated with the Rule of Law.

[55] As will become apparent, this remedial effect is not something that occurs in respect of revolutionary change.

[56] Assumption One: that the Rule of Law has existed for over 2000 years. Assumption Four: the Rule of Law is a highly or essentially contested concept.

contemporary and contemporaneous ideas of the Rule of Law may have resulted from the evolution itself; yet, there is some strain placed on that relationship. Nevertheless, there is, on the whole, an intuitively appealing link between the mechanism of evolutionary change and both the Assumptions and Assumption Pairs. Any slight tensions, however, pale into insignificance when compared to those flowing from the revolutionary relationships.

3.2.3 Revolutionary Change: Substantial Inconsistency

The overwhelming suggestion thus far is that there is compatibility or, at least, no substantial *in*compatibility between the Assumptions and Assumption Pairs. Whilst this can be said for some relationships regarding the revolutionary mechanism, the majority of revolutionary change-relationships result in various forms of incompatibility: Two inconsistencies result from considering each of Assumptions One and Two individually; and further inconsistencies result from Assumption Pairs: One/Two; One/Three; One/Four; and Two/Four.

It is useful to first point to two additional ambiguities. I identify them this way as a conflict may arise depending on the relative position adopted. Both ambiguities involve considering the Rule of Law as a contested concept (Assumption Four) in revolutionary change-terms. The first relates to the comparison of that Assumption alone; the second relates to its pairing with Assumption Three.[57] It could be said that there is no incompatibility as a contested concept does not—in terms of revolutionary change—necessarily require a connection to prior ideas. However, it could also be said that there must be an overarching conceptual category in which those conceptions exist. If the Rule of Law is viewed in these terms, there seems to be no revolutionary change in relation to any overarching ideal of the concept itself. In considering the Assumption Pair (of Assumptions Three/Four) in revolutionary terms, there is an additional tension resulting from the requirement that contemporary ideas relate to an *individual* conception of the Rule of Law, whereas the contested notion points more toward the overarching concept or classification of the Rule of Law. Whilst these relative ambiguities could conceivably be explained away, some level of tension subsists.

As to the inconsistencies, the first relates to the individual Assumptions and revolutionary change. These particularly relate to the need to refer to or reference either the long-term existence of the Rule of Law (Assumption One), or the citation of canons (Assumption Two). If a Rule of Law conception has no necessary relationship to any previous conception, there is, pursuant to revolutionary change, no need to refer to things that have gone before. This does not mean that the mere mention of a history is, of itself, incorrect. The point is simply that in describing what the Rule of Law *is* (in revolutionary change-terms) there is no need to do this and, hence, there exists a relative level of inconsistency.

[57] Assumption Three: contemporary Rule of Law ideas differ from older ideas.

A similar inconsistency occurs when various Assumption Pairs—including Assumption Four and, firstly, Assumption Two and, secondly, Assumption One[58]—are considered in terms of revolutionary change. The issues related to Assumption Four outlined above are compounded by the association of the related ideas in either Assumptions One and Two. When viewed in revolutionary terms, there is a fundamental inconsistency between asserting that an idea has existed for some time and that there is benefit in citing its canons. If the idea is not necessarily connected to what has come before, the reference to an idea being old must relate to *that* idea and would have no conceptual relationship to any modern idea. Accordingly, there is, once again, little benefit or need for a thinker or commentator to relate their position to earlier ideas or conceptions that pre-date the particular one adopted. Two further inconsistencies arise in relation to revolutionary change. Both relate to pairings with Assumption One. The first with Assumption Two and the second with Assumption Three. For the former pairing, once again, the purpose of citation of earlier canons seems irrelevant. In relation to the latter—the idea of a revolutionary change that comports with contemporary ideas being different to those in the past—the Assumptions could be seen as being largely inconsistent with the long-term existence of a single idea.

4 What is the Problem?

What is apparent is that there are a number of inconsistencies. However, even if I have not provided a sufficiently convincing argument in respect of *all* of the instances of inconsistency, for the purposes of the problem identified below all that needs to be established is that there is a relative *difference* in the nature and scope of the inconsistencies across the two change mechanisms. Regardless of the persuasiveness of my arguments in relation to particular inconsistencies, this relative difference does, I think, remain obvious.

As a result of the differences in levels of inconsistency when different change mechanisms are considered, the problem that exists in the Rule of Law literature is this: without the clear identification of the *actual* change mechanism that has operated across ideas of the Rule of Law—something that we do not yet have—there is no way to assess whether the Assumptions are, or can be, compatible with one another. When I suggest that 'we do not yet have' the *actual* change mechanism, I do not mean that I have not yet stated or stipulated it. What I mean is that there is precious little consideration of the form or nature of change in the idea of the Rule of Law across conceptions. Whilst it is accepted that there has been change, the form of change—from conception to conception—has not previously been considered to be important. By exploring the extreme hypothetical mechanisms of change in the previous part, I aimed to show that the form of change *can* impact the relative level

[58] Assumption Four: the Rule of Law is a highly or essentially contested concept. Assumption Two: a number of canons of the Rule of Law exist and are frequently cited. Assumption One: that the Rule of Law has existed for over 2000 years.

of consistency in the Assumptions. In circumstances where the Assumptions play such a vital role in articles and research that explore the meaning, nature, and content of the Rule of Law, it is imperative that the assumptions used reflect and provide the strongest possible foundation. On this basis, it *is* important, notwithstanding the prior lack of consideration, to explore and consider the *actual* way in which change has occurred across conceptions.

The substantial inconsistencies are largely, although not exclusively, clustered around the idea of revolutionary change. This is not to suggest that the evolutionary view of change should be considered the 'correct' idea or true reflection of the mechanism of Rule of Law change.[59] This clustering simply indicates that the *way* in which change is conceived—or *actually* occurred—is relevant to the relative appropriateness of the statement/use of the Assumptions in the literature. Identifying the actual mechanism of change will enhance the conceptual clarity in the Rule of Law literature and will assist in identifying which approaches and Assumptions should be abandoned. This brief article is not the place to solve this problem as this requires an assessment of the change in Rule of Law ideas over time to ascertain whether the operative mechanism was either evolutionary or revolutionary. I do, however, want to suggest (in exceedingly brief terms) one way this could be achieved.

5 Is There a Solution?

The solution to the problem posed at the start of this article—that the operation, instance, and extent of inconsistencies cannot be clarified without the relevant and operative mechanism of change being identified—can, obviously, be solved through identifying the mechanism of change that *has* occurred across various Rule of Law accounts. One way to do this is to identify precisely what (a particular conception of) the Rule of Law is (or, more properly, was) at each individual point in time under consideration and then assess the difference between the individual points to define the boundaries of the operation of the mechanism of change. The Rule of Law literature spends surprisingly little time, and includes little analysis, in this regard. This absence is one of the reasons why the Assumptions, and the inconsistencies outlined above, exist. In this section, I suggest a contextual examination of canonical Rule of Law ideas will illustrate exactly what the Rule of Law was (for each author) and, when compared to a subsequent canonical conception, will enable the mechanism of change—as a result of any necessary reliance on a prior idea—to be identified.

The methodology proposed below is not completely revolutionary[60]—but it does suggest a novel solution to a hitherto unanswered problem. A detailed literature explores the context in which many of the texts that form the canon of Rule of Law were authored; yet this does not include focus on the Rule of Law itself. The two strands of literature—the contextualist examination of various periods (and the

[59] This conclusion cannot follow from the macro- level change considered here.

[60] I expand on this below. For a broadly similar idea and methodology regarding serial contextualism (relating to the concept of Civil War) see Armitage (2012).

impact on canonical authors), and the Rule of Law literature relating to the conceptual content of the Rule of Law—have not been brought together. This is to the detriment of the solution to the problem outlined here. To address this, the suggested methodology provides a new way to consider Rule of Law ideas in a way that will, hopefully, be appealing and intuitive. This is not to say that the operation of one process of change in the past requires the same to occur in the future nor is it to say that only one mechanism of change has occurred across *all* conceptions of the Rule of Law. Nevertheless, identifying a particular change mechanism between individual pairs of accounts—especially those that follow one another in time—would be useful and would identify the change mechanism between *those* accounts. The individual consideration and identification of change mechanisms would be, in this limited respect, useful in bringing *some* conceptual clarity to the Rule of Law literature. If we fail to do this, we will be taken no further in addressing the problem identified. Change across the periods can only be considered—and, hence, the problem identified be answered—once this has happened. Two questions follow from this simple account: first, how can we assess—in terms of the Rule of Law—exactly what the concept was for a particular canon at a particular time? And, second, how can we assess the nature of the change across different times? I address each in turn before offering a brief example of the methodology.

First, however, it is useful to say a little more about the nature of the solution that I propose. Whilst I will refine the idea in the next sub-section, the solution can broadly be described as reflecting ideas often associated with the Cambridge School of intellectual history.[61] More particularly, and as noted above, the approach I suggest has more in common with a recent methodology suggested by David Armitage.[62] Armitage describes the idea in this way:

> The outcome of an openly admitted and consistently pursued serial contextualism would be what I have called a history in ideas. I take this to be a genre of intellectual history in which episodes of contestation over meaning form the steppingstones in a transtemporal narrative constructed over a span of time extending over decades, if not centuries.[63]

The parallel with my approach can most closely be seen in Armitage's examination of civil war. He explores several periods in order to identify the meaning—and the difference in meaning—attributed to the concept of 'civil war' in various historical periods. (Armitage 2017) I suggest that the concept of the Rule of Law can be examined in precisely the same way. In considering the concept in this way, it is possible to come to a solution to the problem that I have highlighted.

As I note in the paragraphs immediately above, the methodology I propose is neither wholly revolutionary, nor is it solely applicable to the Rule of Law. In these

[61] Quentin Skinner's work on the history of ideas is frequently invoked in relation to this approach. See, for example, Skinner (1969, 1988).

[62] Armitage suggests a history *in* ideas as a way to compare the change in conceptions over time (Armitage 2012, 2017).

[63] Armitage (2012, p. 499).

circumstances, there is no reason why the same methodology could not be used in relation to any number of other concepts that may experience similar issues of unclarity. In this sense, although my identifying the problem may be of general relevance or benefit to various actors engaged in the Rule of Law field (broadly conceived), the use of this sort of methodology as a solution *may* extend far beyond this single concept. (Armitage's application of a cognate idea illustrates this point.) There is also—at least—one other benefit that may follow from adopting this methodology. Through the act of conducting a contextual examination *around* some of the thinkers that form the canon of Rule of Law thought, *other* thinkers' positions may be unearthed that may provide substantial use and/or benefit. This may facilitate a move *away* from the great thinkers and it may also allow some previously forgotten ideas of the Rule of Law to be unearthed and reapplied.[64] This will, hopefully, become apparent in the example I provide in Sect. 5.3 below.

5.1 How Can We Assess What the Rule of Law is/was for a Particular Canonical Author?

I provide only one possible answer—briefly, and without making the bolder claim that this methodology is necessarily paramount—based on a single uncomplicated premise: a canonical author's idea of the Rule of Law represents his or her solution to Rule of Law-relevant problems perceptible by the relevant author at that time. The requirement that a mechanism of change be distinguished in order to enhance conceptual clarity imposes some (somewhat) unusual constraints on the choice of appropriate methodology. In adopting the methodology below, I use a number of broad-based ideas to suggest a way to ultimately bring conceptual clarity to the problem associated with the identification of which Assumptions should be retained. The selective adoption of methodologies will allow a clarity to be brought to the problem in a way that does not do violence to the theorists' ideas.[65] Should my methodology be criticised for cherry-picking, no real defence can be mounted other than to point to the usefulness of the methodology in addressing the problem identified. A further complication cannot be ignored: many of the canons of the Rule of Law did not use the phrase *the Rule of Law*. This bars simple identification of a linguistic concept through the identification of a particular phrase.[66] It is for this reason that a hybrid

[64] For the issues associated with forgetting aspects of the Rule of Law, see Burgess (2017b). In relation to the issues addressed in this paragraph and the few preceding it, I am indebted to the anonymous reviewer for reminding me of their importance.

[65] In adopting this methodology, I do not wholly endorse, or criticise any particular theorist's method. For example, whilst Skinner's various methodologies and his aim to establish what an author was doing are both relevant and useful, linguistic contextualism is not adopted in its entirety. In addition, whilst Collingwood's logic of question and answers is of principal relevance, the wider gamut of his ideas is not endorsed.

[66] In this sense, the charting of the transformation of a particular enunciated concept—for example, 'liberty' or 'state'—requires a different examination to that which is required in relation to the Rule of Law literature.

methodology is suggested. Nevertheless, I do not abandon fundamental ideas associated with contextualist historical approaches that may otherwise be useful.

Through this approach, it is, then, the precise meaning, interpretation, and operation of the problem (in relation to *that* author) that necessitates an appreciation of the context in which the author's solution is offered. The conception itself could be seen as part of a dialogue (of sorts) as the societal position and the Rule of Law conceptions exist as part of a problem/solution relationship.[67] By considering canonical Rule of Law ideas as solutions to the author's society's problems, it is possible to illustrate more precisely what the Rule of Law was at the point of writing. Collingwood helpfully puts it this way:

> If you cannot tell what a proposition means unless you know what question it is meant to answer, you will mistake its meaning if you make a mistake about that question. One symptom of mistaking the meaning of a proposition is thinking that it contradicts another proposition which in fact it does not contradict. No two propositions, I saw, can contradict one another unless they are answers to the same question.[68]

In adopting this idea, it seems that we can only properly understand a (Rule of Law-relevant) solution if we understand the correlative (Rule of Law-relevant) problem.[69] This approach has the advantage of providing *two* perspectives from which to consider the nature of change: the solution's, and the problem's. This approach also facilitates refinement of any methodology based solely on consideration of the Rule of Law (as a solution *sans* problem) and provides increased precision in identifying the true nature and meaning of any conception. Further, by identifying a meaning behind the text that extends beyond merely examining the words used we are more able to satisfy the basic hermeneutic idea, and to more finely differentiate the various Rule of Law ideas. By adopting the proposed methodology, it becomes possible to contrast two Rule of Law solutions, ostensibly postulated in the *same* terms, as a result of the fact that they respond to *different* problems. (Collingwood 1939, p. 33) This then raises the question of how to assess change across conceptions/periods.

[67] The Rule of Law has itself previously been described as a solution concept (Waldron 2002, p. 158). (However, it should be noted that Waldron makes this assertion in terms where he considers the problem to be identifiable—of how to make law rule, rather than men—whilst it remains the case that we do not know how to solve it. I do not accept that this is actually—or, at least, solely—the problem to which the Rule of Law conceptions relate.) See also Reynolds (1989, p. 5) and Krygier (2014c, p. 327). For the extension of the problem/solution approach in relation to the international Rule of Law, see Ian Hurd's work (Hurd 2015, 2017) and my own contribution (Burgess 2019).

[68] Collingwood (1939, p. 33).

[69] This relates and refers to Collingwood's characterisation in similar—but non-Rule of Law—terms in Collingwood (1939, chap. V). In relation to the importance of the idea of origins of the Rule of Law, see Burgess (2017b).

5.2 How Can We Assess the Nature of the Change Across Different Times?

In locating change in evolutionary or revolutionary terms, it will be recalled that the key determinant is whether there is, in a subsequent conception, any necessary connection to a prior conception. Identification of this connection is paramount. My exploration requires the connection to be more than merely incidental in terms that would result in a fundamentally different (subsequent) conception if the prior conception does not or did not exist. Change is relatively easy to assess in relation to a single well-defined concept or thing over time. Simple examination of a thing at t_1 and t_2 would reveal the nature of the change—in the simple sense of—across those two points. With a concept or idea that is notoriously ill defined and where the canons may not specifically discuss '*the Rule of Law*', this is not so easy a proposition. However, putting aside for the moment any very real practical complications and difficulties that may inhere, the general categorisation of canonical accounts within the broad definition of the Rule of Law adopted here—that the Rule of Law relates to the normative constraint upon the exercise of power—would be possible (if not analytically ideal). So, in this sense, and in encompassing the idea of *necessity* expanded on above, two separate ideas of the Rule of Law—at t_1 and t_2—can be compared and contrasted to establish whether a necessary connection exists. This will, in turn, establish whether the difference between the two can be conceived as being evolutionary or revolutionary.

This comparison of multiple thinkers' positions across greater periods of time could be conducted sequentially. However, it is accepted that, in doing so, an allowance must be made for the potential that any subsequent thinker could be influenced by *any* one of the prior thinkers (and not only the thinker that immediately precedes him or her in time.)[70] In short, examining pairs of Rule of Law accounts will yield substantial analytic benefits.[71] Sequential comparison of other canonical Rule of Law ideas, and the identification of the differences associated with necessary connections between *each* of those ideas, will enable the location of the boundaries of the mechanism of change that operated across a wide spectrum of Rule of Law ideas.

5.3 A Brief Example of the Methodology

I offer only one example of the way in which the methodology outlined above could be applied: the relationship between Hobbes's and Locke's Rule of Law ideas. In doing so, I do not suggest this is the only way in which the context of *all* canons of the Rule of Law can be interrogated; the nature of each account will determine the precise application of the methodology. Hobbes's and Locke's most famous, and most Rule of Law-relevant works—*Leviathan* and *Two Treatises of*

[70] This approach, whilst covering an extended period, should not be conceived as a *longue durée* approach per se. However, as noted, the approach shares common ground with the idea of *serial contextualism* described by Armitage (2012, pp. 497–499).

[71] For one view of the drawbacks of not adopting a historical view of accounts, see Burgess (2017b).

Government—were authored only around three decades apart, and both authors were writing for similarly situated audiences. Yet, despite these similarities, the contexts differ substantially. The socio-political climate in English society shifted dramatically between the 1650s and the 1680s, with various constitutional upheavals and transfers of power. One way to expose the problems to which each of the authors were responding would be to consider the voluminous pamphleteer literature.[72] This literature, as popularly available and—at times—polemically focused political arguments, provides a strong indicator of some of the issues that existed in the societies at the time that both Hobbes and Locke were writing. By considering the two authors' ideas as solutions to the problems contained within the pamphlets, it is possible to distinguish and disambiguate aspects of the accounts from one another and to more clearly understand and appreciate the two authors' meanings. Space precludes any further exposition of this example in this paper. Additional exploration must await future papers.

6 Conclusion

The collective cogency of several fundamental assumptions within the Rule of Law literature has not previously been considered. When it is, a problem emerges that reveals the potential for substantial unclarity within that body of work. The collective cogency of the Assumptions within the Rule of Law literature falters when they are considered in terms of different mechanisms of change, and the level of inconsistency varies when different mechanisms of change are considered. This results in unclarity. The majority of this article has been devoted to demonstrating the existence of this inconsistency and to illustrating that—to avoid this inconsistency and, hence, the unclarity—it is necessary to identify the relevant mechanism of change across Rule of Law ideas. I have suggested one way to do this: by viewing each canonical conception in the context of its authoring; as a solution to problems that can be associated with the society in which the canonical author was writing. Doing so will ensure that the wider problem identified at the start of this article can be solved. Accordingly, to avoid ongoing reliance on potentially inconsistent Assumptions, and to enhance clarity in the Rule of Law debate, the assessment of Rule of Law ideas in a way that achieves this end is essential.

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[72] My own research has extended this methodology in these terms and will form the focus of future work. However, I appreciated the anonymous reviewer's comments that pointed in the same direction as this, in some small way, indicates the benefits of this form of application.

several critical points. In addition, Prof. Claudio Michelon's various requests for ever greater clarity have also provided substantial assistance. Last, but by no means least, I received a suite of enormously helpful reviewer comments that—I think—have resulted in a much clearer exposition of my point. If I have missed the mark in any respect, any errors or inconsistencies that remain are my own.

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