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### Neglecting the history of the Rule of Law

**Citation for published version:**

Burgess, P 2017, 'Neglecting the history of the Rule of Law: (Unintended) Conceptual eugenics', *Hague Journal on the Rule of Law*, pp. 1-15. <https://doi.org/10.1007/s40803-017-0057-y>

**Digital Object Identifier (DOI):**

[10.1007/s40803-017-0057-y](https://doi.org/10.1007/s40803-017-0057-y)

**Link:**

[Link to publication record in Edinburgh Research Explorer](#)

**Document Version:**

Publisher's PDF, also known as Version of record

**Published In:**

Hague Journal on the Rule of Law

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# Neglecting the History of the Rule of Law: (Unintended) Conceptual Eugenics

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**Abstract** In this short paper I provide a justificatory argument for the importance of the endeavour exemplified by the papers that comprise the remainder of this special issue. I suggest that consideration and assessment of the origins of the concept of the Rule of Law not only matters, but also that it is a practice that is often neglected. Further, I suggest our failure to take account of the origins of the Rule of Law—by continuing to simply innovate around the idea of the contemporary understanding of the concept—limits the concept’s future development and will, potentially, not reflect faithfully the ideas from which our contemporary understanding of the concept is ultimately derived. As a result of this failure, we risk the (unintentional) imposition of a selective approach in the interpretation and application of the concept of the Rule of Law in the future. Increasing our focus on the origins of the Rule of Law will not only illuminate the rationale for and behind the operation of the concept, but it will also expose aspects of the concept that are no longer considered or included—in contemporary conceptions of the idea—and will ensure our future solutions are not curtailed.

**Keywords** Rule of Law · History · Origin · Path dependence

As asserted in the opening sentence of this paper: origins matter. This paper’s origin can be traced to a workshop held at the University of Edinburgh in May, 2016. Since that time, my initial ideas have been modified and improved by a number of individuals. I have been fortunate enough to read the work of the four authors contributing to this special issue in advance of putting pen to paper and their ideas have shaped the arguments I present. In addition, I have been fortunate enough to receive comments, thoughts, suggestions and a great deal of encouragement from my co-editor Neil Walker as well as from Brian Tamanaha, Martin Krygier and Ronald Janse. The precise formulation of my argument has also been greatly improved by several discussions with Lucas Miotto. Despite all of the assistance I have been afforded, any errors or omissions originate with and should be attributed to me alone.

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Origins matter. In our everyday life—both consciously and subconsciously—we value things based on their origin. We may do this in various ways and in a variety of settings: in our selection of food; in electing the school our children should attend; in the identification of which dog we should buy or which racehorse to bet on; or, in deciding which paper we should advance to the top of our reading pile. This assessment may be for moral reasons (the purchase of a Fairtrade or similarly ethically sourced food item), for financial or quality based reasons (in sourcing an animal with a known pedigree), or in relation to a prior or perceived level of academic rigour (regarding a school or a known academic journal.) Yet, it is clear that, whilst origins matter, consideration of origins *can* be applied for wrong reasons. Assessment of the value inherent in origins can also be, and has been, controversially used in structuring eugenics programmes and in all aspects of racism. As is well known, however, the virtue of any tool's use—and this is something I will return to—should not be marred by its use for potentially evil ends (Raz 2009). Of course, regardless of how or for what purpose it occurs, in each of these examples there is some consideration of a perceived level of value. In some circumstances—and in many of the circumstances that I will outline here—this value can take the form of an enhanced perception of the legitimacy of the *thing* being considered. In this short paper I provide a justificatory argument for the importance of the endeavour exemplified by the other papers comprising this special issue. In making this argument, I suggest that consideration and assessment of the origins of the concept of the Rule of Law not only matters, but also that it is a practice that is often neglected. Further, I suggest, neglecting the origins of the various frequently cited conceptions of the Rule of Law has the potential to result in (unintended) conceptual eugenics.

Do we know anything about the Rule of Law's origins? Do we write about the concept's origins? Of course we do. And we do it frequently. In journals and books relating to the Rule of Law, particularly when focus is placed on the concept itself, it is not uncommon—in fact it is actually quite common—to see in the opening sentences, paragraphs or pages a statement or synopsis of the concept's history. In this respect, the history of the Rule of Law occupies a principal position in the literature regarding the concept's content and meaning; yet, arguably, it does not occupy a position of principle. By this, I mean that reference is made to conceptions that are frequently associated with the Rule of Law, in (broadly) chronological order, by way, it seems, of illustrating what the concept of the Rule of Law is or was through some form of progression or, at least, through some sort of 'history'.

Why the scare quotes? The method frequently adopted is 'history', and not history proper, as it simply provides a review of the most frequently mentioned Rule of Law authors, who just so happen to be the authors of texts produced in the historical past. In effect, the 'history' provided is used as an intellectual narrative for or a conceptual back-story to the idea. This approach, whilst useful in some contexts, has the potential to substantially misrepresent or misinterpret the authors' meaning. This is the case as an interpretation outside of an understanding of the context in which the text was created risks importing a meaning that is fundamentally different to that intended by the author. I do not suggest that we cannot use an earlier idea to innovate in our own time—as doing so may be essential

should a new problem arise. What I do, however, suggest is that there should not be a distortion of the original ideas. In these terms, the practice of history, as a particular method, is not a principle that is generally applied to the analysis or consideration of Rule of Law-relevant texts in the Rule of Law literature.<sup>1</sup> This results in the reliance on superficial references to past Rule of Law authors that result in a misleading appreciation of the history of the concept. Accounts that take a more rounded historical approach to the evolution of the concept of the Rule of Law are few and far between. By illustrating this relative neglect, both in this paper and in introducing the arguments made in the papers in this special issue, my hope is that the significance of the historical approach to and consideration of the concept of the Rule of Law can be enhanced.

There are many examples of ‘history’ in the Rule of Law literature. I will mention only a couple here. Many accounts commence by citing Aristotle as the originator of the idea, or by hinting at older origins by suggesting the Rule of Law is ‘at least’ as old as Aristotle’s account.<sup>2</sup> It is also frequently taken as a standard position that the concept has ancient roots. Møller and Skaaning state, in relation to an oft quoted Aristotelean passage stating that law should govern, “[t]hese 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). My identification of a trend of reference to ancient origins is hardly revelatory. In opening his book, and whilst pointing to necessary caution in doing so, Brian Tamanaha acknowledges: “Many accounts of the rule of law identify its origins in classical Greek thought...”<sup>3</sup> Consideration of origins is not, of course, limited to the citation of ancient sources. Authors in the Rule of Law literature will frequently go on to cite various ‘usual suspects’ of the Rule of Law: authors whose accounts frequently also happen to be ‘historical’ in the sense that they were authored in either the recent or more distant past. My own, non-scientifically derived and non-exclusive, list of historical Rule of Law usual suspects would include: Aristotle, Hobbes, Locke, Dicey, Hayek, Fuller, Dworkin, and Raz. A slightly different, though not contradictory, list of Rule of Law usual suspects has been described as forming “... a ‘Who’s Who?’ of Western political thought...” (Møller and Skaaning 2014). Whilst more names could be added, these names—and reference to these authors in this way—will likely be readily recognisable to anyone even broadly familiar with the literature relating to the concept of the Rule of Law. By referencing these thinkers, and in acknowledging that many of them hail from the dim and distant past, the origins of the concept of the Rule of Law are frequently either implicitly or explicitly alluded to. Whilst explicit reference can take the form of a statement that the nature or content of the concept has changed over time,<sup>4</sup> a

<sup>1</sup> There are, of course, a number of fields of research in different disciplines—history included—that relate to the Rule of Law in the broadest sense; whilst I do not discount this contribution—in fact, as will be seen, I both welcome and encourage it—I will, in this paper, confine my comments mainly to the more narrowly defined ideas associated with the *concept* of the Rule of Law.

<sup>2</sup> Solum (1994, p. 121), Cass (2001, p. 1), Costa et al. (2007, p. 75), Krygier (2014a, p. 46), Waldron (2016).

<sup>3</sup> Tamanaha (2004, p. 7). See also, Sempill (2015) and Canevaro this issue.

<sup>4</sup> Reid (2004).

more oblique reference to historical differences can also be seen. For example, a relative difference between present and past conceptions is apparent in the statement “...the precise meaning of [the Rule of Law] may be less clear today than ever before” (Fallon 1997). The connection between history and the Rule of Law is also apparent in descriptions of the concept that either suggest earlier ideas have some point of difference from contemporary ideas,<sup>5</sup> or in terms where there has been an acknowledged “historical evolution” (Taiwo 1999).

But why do we do this? Why are so many valuable words used up, so frequently, in the opening of so many books and papers related to the Rule of Law if it is simply to restate things that are already well known? There could, of course, be many reasons: to satisfy general academic curiosity in the reader; to provide a level of rigour to the argument, claim or assumption being made; to avoid any suggestion that the author is claiming to be proposing a new and previously unstated concept; or, to make clear the precise nature of the Rule of Law that is being discussed—for example, through using previous thinkers’ positions to clarify whether a thin or thick conception will be preferred. Another possible reason to focus on, or at least allude to, the concept’s history and its origin is to suggest there is something of enduring worth in the concept itself. After all, one could take the position that as it has been used, applied and thought of by many thinkers in the past, there is value in continuing to think about and apply the concept in the present. (Of course, there are inherent logical problems in applying this rationale; the mere idea that a thought or a position is or was seen as sound, authoritative or important in times gone by does not mean the idea should be considered a useful or valid point of discussion now or in the future. Yet, nonetheless, the fact that there has been previous thought and academic debate in an area is frequently used as a basis for further interjection). One final reason—one that is interrelated to all of those just outlined—is that the statement and allusion to origins adds, in some form, legitimacy to the nature and form of the argument being made. The bolstering of legitimacy in this way could relate to the acknowledgement that the argument being proposed in the work is not *totally* original; and I do not mean this in a negative sense. What I mean is that the argument being made is the continuation of a string of intellectual thought or a chain of ideas that is—at least by the author seeking to bolster the legitimacy—seen as bringing ideas together within a single tradition. It is in this way that ideas that have come before are modified, expanded and potentially improved upon through reapplication. In this sense, legitimacy comes from the support and extension of a previously made, and (perhaps) generally accepted, argument that is already considered as being valuable. In doing this, we take up and use—and innovate with—the conceptual toolkit that is available to us.

But, there can be problems with this approach: do we know—and do we care—exactly where (or when) the tools came from? What, exactly, were the tools originally intended to be used for? Why are *these* tools in *this* box? And, what was the intention of the person who originally deposited them? It is only through answering these questions that the origins of the concept of the Rule of Law—and, hence, the value that the concept has for our present problems and in its present

<sup>5</sup> Radin (1989, p. 781).

application—can properly be understood and, further, that our future problem solving ability be fully retained.

It is this active consideration of the concept's origins that runs the risk of being neglected. It was this perceived neglect that inspired the workshop for which several of the papers in this issue were authored. I will come back to this—and to the papers—in a moment. First, by expanding the toolbox analogy, I want to outline why the neglect of the concept's origins—as the under-appreciation of the tools currently available to us—can, potentially, have dire consequences.

## 1 Our Conceptual Toolbox

By virtue of the vast array of Rule of Law thinkers—as the usual suspects of the Rule of Law literature—that have come before us, we have a truly massive assortment of tools that can be applied to our own respective projects. We can, of course, apply the available tools in whatever way we want. But, what I want to suggest is that—even if we are going to, eventually, use the tool in a completely new way—we must be aware of, understand, and appreciate the original purpose or intent behind the tool's existence. As, if we do not understand fully the origins of the various Rule of Law conceptions, then we will not be able to apply the Rule of Law to our contemporary problems in the most effective way.<sup>6</sup> Before going any further, through the use of a very brief, and broadly stated point, I want to illustrate one way in which origins, and the use and amendment of a conceptual tool in the present, can be relevant to the concept of the Rule of Law. Whilst some exceptions exist,<sup>7</sup> contemporary ideas of the Rule of Law are intimately intertwined with the idea of the state.<sup>8</sup> The modern-day view and application of the concept of the Rule of Law—as some sort of normative constraint upon the exercise of power—is nestled within a state-centric paradigm. However, many of the usual suspects of the Rule of Law formulated their ideas in times when this state-centric paradigm either did not exist, or was not as all-consuming an idea—with respect to the way in which the concept of the Rule of Law operates—as it is now. For this to be apparent, it is not necessary to extend our view back to the city states of Ancient Greece. Fundamental differences in the nature, role and extent of the state apparatus can be seen even in the relatively recent past. In AV Dicey's late 19th century England, the fears he expresses for the decline of the Rule of Law are offered in a context very different to that which exists today. Dicey's Rule of Law idea calls for: the absence of arbitrary power on the part of the government; equal application of the law (meaning no individual is above the law and all are subject to the law); and, judicial decisions to be privileged (as general principles of the constitution result from

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<sup>6</sup> This point echoes one previously made by Krygier—in referring to Cotterrell's work and their shared views on the Rule of Law—that, in relation to the origin of Rule of Law ideas, “one learns something, sometimes lots, from exploring those circumstances” (Krygier 2014b, p. 328). See also, Cotterrell (2003).

<sup>7</sup> See, for example, Austin and Klimchuk (2014). See also Sempill, this issue.

<sup>8</sup> For an account of the Rule of Law's significance for the limited government tradition, see Sempill (2015).

judicial decisions).<sup>9</sup> Dicey's perceived erosion of the Rule of Law, and the accompanying rise in the welfare state, underscores the problem that he seeks to solve. In framing his Rule of Law ideas, and in particular ideas associated with the absence of arbitrary power and the equal application of the law, Dicey sees the rise of the administrative state as the (Rule of Law) problem. Accordingly, his (Rule of Law) solution is particularly focussed on this problem—in this sense, it is clear Dicey's Rule of Law solution was provided with a particular agenda in mind. (I will return to this point in a moment.) The importance of reading Dicey in context, and in relation to the changes in society over time, is not new. A compelling case for doing so was made by Lawson in 1959.<sup>10</sup> In the same year, Lawson's comment was referred to by E.C.S. Wade in the preface to the 10th edition of Dicey's work.<sup>11</sup> However, the context of Dicey's perceived problem is different to the present-day situation. The 19th century expansion of the state and its apparatus that provided the motivation for Dicey's fear and his Rule of Law problem seems quaint when compared to the scope of the administrative regime that is embodied by modern western democratic states that professes adherence to the Rule of Law. For Dicey, the present situation would be anathema to the existence of the Rule of Law. The attempt to return to a situation that would reflect and embody a Diceyan Rule of Law state would now, in the face of the modern administrative state, be impossible.

It is possible to look to an even more recent example to illustrate that—in situations where a Rule of Law idea is proffered with a particular agenda in mind—the context of an idea's formulation is crucial in the understanding, and potential re-application, of that idea. Like Dicey, Hayek—writing in 1944—provides a popular and widely cited account of the Rule of Law. And, like Dicey, that account was focussed on pressing a particular agenda. Hayek's work can be seen as an attack on socialism. State coercion is, for him, a fundamental issue that can be tempered only by the actions of a limited government being predictable. Nationalisation and state control of resources in the United Kingdom during World War II also give rise to a fear in Hayek that those measures may continue after the war.<sup>12</sup> For Hayek, this problem could be solved by constraining the government's actions and by allowing an individual to plan around state action and, therefore, avoid coercion. In this respect, and whilst Hayek sees himself as engaged in a different project to Dicey,<sup>13</sup> both thinkers' projects reflect their fears of the rise of the social welfare state and the decline of the Rule of Law in the United Kingdom.

I do not suggest the early 21st century is devoid of problems associated with the fear of totalitarian or arbitrary rule or the coercion of the populous through the imposition of unknowable sanctions. But, in circumstances where Dicey and Hayek's fears relate to problems of a fundamentally different nature and character

<sup>9</sup> Dicey (1889, pp. 175, 180 and 183).

<sup>10</sup> Lawson (1959a), (b).

<sup>11</sup> Dicey (1979).

<sup>12</sup> von Hayek (2007, p. 11).

<sup>13</sup> In a footnote to his oft cited definition of the Rule of Law, Hayek suggests “[l]argely as a result of Dicey's work the term [the Rule of Law] has, however, in England acquired a narrower technical meaning that does not concern us here.” von Hayek (2007, p. 112).



than those which exist today, their solutions must be viewed in a way that acknowledges and recognises that difference. Given this fundamental difference between socio-political environments in which Rule of Law conceptions may have been authored and those in which they are applied in modern society, an increased awareness of the conceptions' origins appears to be justified. As I will illustrate, consideration of these differences is necessary in order to avoid the loss of solutions to future—Rule of Law-relevant—problems.

I commenced this section with a brief allusion to a tool based analogy. Let us deepen this a little further. Around the world, there are many butter knives that have been press-ganged into service as pseudo flat-head screwdrivers; and there are many flat-head screwdrivers that have been used to open—and sometimes stir—tins of paint (which may explain why the knife was needed for the screw in the first place!) I am not suggesting that the use of these things is wrong—each innovative re-application clearly served a present need. The re-application of a tool in this new way can often achieve, precisely, the desired effect. In this sense, the innovation could even be construed as a good thing. But, what happens when the original purpose is lost or forgotten? What happens when the knife (as a screwdriver) is not returned to the cutlery drawer and, instead, is placed in our (actual) toolbox? Is the tin-opening, and now paint-covered, screwdriver still able to be used effectively as a screwdriver? It seems conceivable that, despite these tools' original purpose—the purpose for which they were originally made before being innovatively re-purposed—can be obscured by the new function. This is certainly not a problem in some respects. After all, even if the screwdriver's function is lost or forgotten, a *new* tool—in the shape of our knife (as a screwdriver)—now exists to tackle any similar screwdriving jobs that may arise in the future. But, if the original purpose—and the connection between that purpose and the original problem that it was designed to solve—is forgotten, then *something* is lost: the original solution to the original problem as addressed by *that* tool. One argument against this could be that this isn't really a problem if *another* tool can provide an adequate solution to the original problem. After all, in our example, the knife replaces the lost function of the flat-head screwdriver and is able to solve the immediate problem that arose. Yet, whilst there are undoubtedly situations in which a knife *can* provide an almost identical solution and act as a replacement, there are circumstances where a knife simply cannot achieve the same result as a screwdriver. Think, for example, of a situation where the screw is recessed. Should a problem of this kind arise in the future, then, as the function of the screwdriver (as a screwdriver) has been lost, we are left without a solution. (Or, in the least, we are required to innovate from scratch to come up with a solution.) This may not be—at the time of the initial innovation that relates to the repurposing of the butter knife and related abandonment of the screwdriver—immediately apparent. It may be some time before the need that cannot be satisfied by the new tool—but could have been satisfied by the old tool—arises. My point is that, at the moment when the old tool is abandoned, any potentially unique problem solving utility that it may have had is also lost. In effect, our choice of problem solving solutions in the future is restricted by virtue of



alternative solutions being lost or driven out.<sup>14</sup> It is only by *actively* considering the purpose for which a tool exists and the purpose for which it was originally employed and deposited in the toolbox that we can hope to maintain and understand the tool's application in the past and in the present as well as in the future. Doing otherwise seems to deprive us of potentially useful solutions. (I will return to this point later.)

Through the use of this somewhat extended analogy, I hoped to illustrate two things. First, innovating in the use of our toolkit is not a bad thing—in fact, it can lead to solutions that would not, otherwise, have been contemplated had the tools been used solely for the purpose for which they were originally created. Innovation may, in fact, become essential should the original tool not work in the same way (for example, if the underlying problem changes.) Further, innovating in a way that does not distort the originally posited ideas provides a way to maximise our potential—by not curtailing available options—to deal with new problems. Second, understanding the history of our conceptual toolbox is essential to ensuring that we do not lose solutions that may otherwise have proven useful in relation to our current and future problems. Of course, these things are not mutually exclusive. Both could be achieved at the same time. In bringing the analogy back to the topic at hand, it is relevant, then, to ask at least two questions: Are both being achieved in relation to the concept of the Rule of Law? And, does the inclusion of a history or back-story at the start of so many papers satisfy this requirement? I think that the answer to both questions is, currently, 'no'. Whilst innovation in the application and use of the concept is undoubtedly taking place, there seems to be an under-appreciation of the purpose, meaning and relevance of the Rule of Law ideas posited in the past. Putting this another—more positive—way, there is considerable scope for research to be conducted into the original meaning of the Rule of Law solutions that are so frequently alluded to when the concept is being considered. But, is this practical?

I do not suggest that the origins of every Rule of Law conception must be chased down every rabbit hole in every inquiry. Attempting to do so would, of course, be impractical. However, my suggestion that there should be an increased focus on the history and origins of Rule of Law conceptions more generally *is* practical; or, at least, it is achievable practically. There is a burgeoning interest in the connections between theory and history in the law. Recent work suggests there are distinct advantages that may result from a dialogue between the two sub-disciplines (of legal theory and legal history),<sup>15</sup> or in the critical re-evaluation of the law as the product of a historical evolution (Tamanaha 2017). A more specific version of this general trend would benefit greatly the academic pursuits associated with the concept of the Rule of Law. The exploration, in a more rigorously historical sense, of the various frequently cited Rule of Law positions' origins would ensure that the original

<sup>14</sup> For a similar sentiment, see Krygier (2014b, p. 330).

<sup>15</sup> Del Mar and Lobban (2016). Although, whilst a dialogue is undoubtedly encouraged, I have previously suggested the proposed exchange illustrated by the contributions to this text may provide—slightly—more benefit to legal theorists than legal historians (Burgess 2017).

meanings of those concepts could, if lost, be rediscovered or, if known, be more deeply appreciated.

Whilst this endeavour may be worthwhile, I do not suggest that this is a project that can be easily realised. Of course, the pursuit of history is, of itself, a massive and complicated discipline. Each of the Rule of Law usual suspects referred to above—plus many others—by virtue of being members of the ‘Who’s Who?’ of Western political thought<sup>16</sup> has already been the subject of an entire industry of academic production across a variety of disciplines. However, as the works cited immediately above illustrate, there is scope for a Rule of Law-relevant dialogue to be expanded upon. In this sense, there can be benefits afforded even through appreciating and applying the range of basic forms of historical inquiry that are available. Whilst each of the papers in this special issue was sourced through a desire to increase the understanding and appreciation of the meaning of the Rule of Law, and although the workshop to which most of them relate was hosted at a Law School, it is worth noting that of the four authors, only one is currently based at a Law School. Of course, as the Rule of Law is a concept that shuns arbitrarily imposed disciplinary boundaries, this should be no great surprise. But it also serves to illustrate that cross- or inter-disciplinary exploration of the topic is both possible and, dare I say, interesting.

On this basis alone, the pursuit seems worthwhile. Whilst, for example, aspects of archival research may prove both unattractive and impractical for some, other ways of ‘doing’ history may be more familiar to the (non-historian) lawyer’s skill set. Various approaches to textual analysis or conceptual and intellectual history may provide sufficiently robust yet practically achievable methodologies to facilitate a project of the sort imagined (for a non-historian). Taking this sort of approach—or any approach that affords a level of heightened historical appreciation of the ideas associated with the concept of the Rule of Law—even at the level of an individual paper, provides a way to ensure that the solutions initially proposed are not forgotten, and that subsequent innovative uses do not ultimately prevent the reapplication of original uses in the future. The four papers in this special issue illustrate four ways of thinking about the Rule of Law in greater historical depth across four different historical periods.

In returning briefly to the analogy above, the ultimate result of this increased focus will be to afford clarity as to why a particular tool is included within the toolbox; or, in other words, the meaning and intention behind the tool’s inclusion will be illuminated. What’s more, it seems conceivable that an increased focus on the history of the various Rule of Law conceptions will not only illuminate what *is* in the toolbox, but it may also illuminate what *is not* presently accepted as being in the box (but perhaps was intended to be included by original thinkers.) After all, there are frequently—even with widely cited conceptions of the Rule of Law— aspects of the thinker’s original idea that are often neglected in contemporary application; for example, Dicey’s third principle—that judicial decisions are to be privileged (as general principles of the constitution result from judicial decisions)—is often neglected when Dicey’s conception is applied more generally.

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<sup>16</sup> See, Møller and Skaaning (2014) *supra*, page 4, and associated text.

In considering the colouring of our way of thinking about the Rule of Law—as a result of the current, state-centric, paradigm introduced at the start of this section—it seems there could be ideas—associated with the earlier, pre-state-centric, paradigms—that have been practically forgotten (insofar as their application in a Rule of Law-sense) that could, nevertheless, prove useful when applied to contemporary problems.<sup>17</sup> For example, ideas that may have been neglected as a result of their relative unnecessaryness or unimportance in a state-centric paradigm could have particular relevance to the contemporary application of the concept in a similarly non-state based sphere (for example, in international law). By considering—or reconsidering—the Rule of Law in this way, the start of a relationship—or, more specifically, an inter-relationship—between the usual suspects’ conceptions begins to form.

## 2 Paths (Historically) Taken, and Those Not Taken

The phrase ‘*it is what it is*’, could easily—although, perhaps, not very helpfully—be applied to current approaches to the concept of the Rule of Law; however, the same cannot really be said for the slightly modified phrase form ‘*it is what it was*’. Merely understanding the origin of the Rule of Law with respect to the differences between a *single* point in the past, and another single point—perhaps the present—seems, somewhat, unsatisfactory if the Rule of Law is viewed, as it is by many, as a continuing tradition.(Krygier 1986; Garrison 2014) A lot can happen between *then* and *now*. As noted earlier, ideas about the Rule of Law have changed as various aspects have fallen into and out of favour. Furthermore, at each intervening point, any new thinker has the potential to innovate in relation to the meaning of the concept of the Rule of Law for *that* thinker at *that* time through the application of and in relation to the Rule of Law conceptual toolkit that is available to him or her at *that* time. (Here, and for the purpose of this discussion, I sidestep the—admittedly difficult—issue relating to establishing the nature and extent of influence of one thinker’s work over another’s.<sup>18</sup>) This would mean that at any stage, and for any thinker, meanings of previous ideas could be retained, changed or lost. This could be compounded as, say, an early thinker’s ideas are re-interpreted by a subsequent thinker and these re-interpretations are themselves re-interpreted by a later thinker. At each stage, the same options to retain, change or lose the earlier meaning exists. As each of the subsequent thinkers could be acting in response to a new or different problem, and/or be acting with his/her own agenda, this renders the task of plotting the overall history of the Rule of Law substantial (to say the least).

Further, should there be some form of continual re-invention of the conceptual toolkit through time, path dependency may impact the eventual outcomes.<sup>19</sup> In this

<sup>17</sup> This is a point addressed by Jørgen Møller in relation to the Rule of Law’s origins in the middle ages. See, Møller this issue.

<sup>18</sup> See, for example, Skinner (1966). For a convincing exposition of the benefits of the idea, see Oakley (1999).

<sup>19</sup> For a similar consideration of ideas of this sort, see Møller, this issue. doi: [10.1007/s40803-017-0053-2](https://doi.org/10.1007/s40803-017-0053-2).

sense, the existence of a prior conceptual toolkit, and the consideration of change across ideas of the Rule of Law through history, may enable a determination to be made as to whether path dependent processes have operated over time.<sup>20</sup> One way of seeing and understanding path dependency is in these terms: “A *path-dependent* sequence of [...] changes is one of which important influences upon the eventual outcome can be exerted by temporally remote events, including happenings dominated by chance elements rather than systematic forces.”<sup>21</sup> For the sake of clarity, and as it has been used in previous Rule of Law relevant analyses, (Ferris 2012) it is also relevant to mention Douglass North’s definition of the same idea. North’s idea is not—in the context of this paper—incompatible with the definition outlined above. North views path dependence in terms of “the constraints on the choice set in the present that are derived from historical experiences of the past”.<sup>22</sup> Both of these views reflect the sense that decisions in the past can be considered as influencing not only presently available choices, but also the outcomes that may ultimately be available in the future as each choice that is made by an innovating Rule of Law thinker has the potential to impact the nature of the choices available to the ‘next’ thinker; and it is this ‘next’ or future thinker that applies the Rule of Law concept—now, potentially, slightly modified as a result of the retention, change or loss options that were available to the earlier thinker—that is available to him or her. And so, the process goes on.

Yet, these intricacies are lost—as, potentially, are various specific aspects of conceptions that may have been rejected along the way—if a simple ‘then’ and ‘now’ approach is taken to previous Rule of Law ideas. To fully appreciate the complexities of the concept of the Rule of Law—and even to fully justify the correct use of the statement ‘*it is what it is*’—it is necessary to explore and understand that ‘*it is (also) what it was*’; which, when considered in more path dependent terms, may more accurately be stated as ‘*it is (also) what it is as a result of what it was*’.<sup>23</sup> Through engaging with the historical ideas that underpin the origins and intent behind each of the usual suspects’ Rule of Law accounts—and by more accurately understanding what they were—this process can, at least, be started.

### 3 The Papers in this Special Issue

The four other papers included in this special issue represent a modest step in increasing the focus on the history—and understanding the historical origins—of ideas that can be included under the broad banner of the concept of the Rule of Law. Three of the papers (Canevaro, McKnight and Møller) formed part of a Workshop

<sup>20</sup> In relation to the ideas of path dependence generally, see David (1985), Page (2006), Ferris (2012).

<sup>21</sup> David (1985, p. 332) (emphasis in original). See also (Rose (2010, p. 103), where it is stated: “The basic notion is that where you start determines where you end up and that you may have ended up somewhere else had you started at a different place.”

<sup>22</sup> See, for example, North (1999). The Northian analysis is explored and applied in Ferris (2012). See also, consideration of North’s ideas in terms of Law and Development in Faundez (2016).

<sup>23</sup> I am grateful to Martin Krygier for making this point.

held at Edinburgh Law School, in the University of Edinburgh in May 2016, entitled *The Rule of Law: Operation and Applications Through History*. The other paper (Sempill) was generously contributed specifically for this issue. The papers, each focus on Rule of Law ideas in a different historical period: Ancient Greece (Canevaro); Ancient Rome (McKnight); the Middle Ages (Møller); and the Early Modern (Sempill.) And, as the authors are drawn from a variety of institutional backgrounds—coming from departments of Classics and History, Political Science, and Law in universities spread across four countries—the selection was intended not only to represent temporal and geographical differences, but also differences in academic approach. Accordingly, no claim is made here that the methodologies, perspectives and approaches in the papers represent the *only* way to approach the issue of how to historically interrogate the Rule of Law. In fact, this could not be the case as each author tackles the challenge in his or her own unique way. By presenting the papers in this form—in effect as an, all too brief, snapshot of Rule of Law ideas across a vast swathe of time—differences in the individual conceptions of the Rule of Law explored by each author can be seen. No specific effort is made in the papers—or here—to connect the relative points or positions. This is intentional. Doing so would require a far broader undertaking; although its achievement—by, perhaps, conducting a detailed study of a particular moment in history relevant to Rule of Law ideas—would afford an interesting way to consider the potential path dependant nature of the concept.<sup>24</sup>

Yet, despite the differences in approach that are taken, there are similarities and common threads between and amongst the papers. One overarching idea—unsurprising in the context of my comments above—is that origins matter. Each of the papers could be said to illustrate the importance of understanding earlier ideas and the application of ideas associated with—what would now fall under the banner of—the Rule of Law. More specifically, the papers each relate the idea that, no matter how well accepted a particular prevailing idea may be, there is always scope for enhancing or nuancing that idea when the origins or intent behind a particular position is considered. This can most obviously be the case when a thinker's original intention is not reflected in the final outcome. Mirko Canevaro's argument illustrates this point well.<sup>25</sup> He demonstrates how a particular Rule of Law idea can be established with an initial purpose in mind, but this can ultimately morph and crystallise into something much broader and very different. In doing so, he argues that the prevention of the exercise of arbitrary power becomes a broader measure of legitimacy across Greek city states. A similar idea of change can also be seen in Liz McKnight's paper.<sup>26</sup> Through exploring Cicero's arguments, McKnight illustrates that the intent behind the creation of a particular legal institution in Ancient Rome—in recognisably Rule of Law terms—resulted in alternative and unintended

<sup>24</sup> A broadly similar idea—that of serial contextualism as a *history in ideas*—has recently been advocated by David Armitage (2012). See also the application of this idea to a similarly debated and ancient concept—that of civil war—in Armitage (2017).

<sup>25</sup> [Canevaro, this issue. doi:10.1007/s40803-017-0054-1].

<sup>26</sup> [McKnight, this issue. doi:10.1007/s40803-017-0056-z].

consequences that would—in many respects—contravene both the intention behind the institutions' formation and any (modern) recognisable Rule of Law idea.

Whilst the two remaining papers focus on more recent periods, between them they still span more than a thousand years. In his paper, Jørgen Møller argues that we should critically evaluate the widely accepted position regarding the Rule of Law's origins in the High Middle Ages.<sup>27</sup> As the most obvious reflection of ideas of path dependency included in the special issue, he suggests that the origins should more properly be traced back to earlier origins and events in the Early Middle Ages. In doing so, he suggests that the later period merely serves to legitimise what had already been put in place. A similar idea—that the acceptance of the dominant paradigm may blind us to otherwise illuminating applications of Rule of Law-relevant ideas—can be seen in Julian Sempill's paper.<sup>28</sup> The prevailing wisdom that ideas of the Rule of Law operate principally in relation to exercises of state power as a Lockean expression of limited government—and not in relation to the existence and application of arbitrary power in the employee/employer relationship—is, Sempill argues, too narrow a perspective. In effect, the dominant Rule of Law paradigm distracts our attention from other instances of the operation of the Rule of Law's nemesis: arbitrary power.

#### 4 (Unintended) Conceptual Eugenics

In concluding this brief paper, I return—one last time—to the toolbox analogy. As noted above, the use and innovative re-use of tools that we currently have in the toolbox for the solution of problems that we currently have is all well and good, but we are potentially missing something if we fail to consider both the intention behind the tools' current inclusion in the box and, relatedly, the reasons why other tools are not (or are no longer) in the box. In the same way, increasing our focus on the origins of ideas associated with the Rule of Law will not only illuminate the rationale for and behind the contemporary operation of the concept, but it will also illustrate aspects of the concept that are no longer included. In returning to the example given above, this could—in the simplest sense—result in the relative unshackling of Rule of Law ideas from the state-centric system in which the contemporary concept cannot—otherwise—be disentangled. Consideration of the original or earlier intentions and motivations that generated ideas we now accept as part of the dominant Rule of Law paradigm may, in this sense, prove to be both useful and, in some respects, essential in avoiding future dire conceptual consequences.

What dire consequences could follow? One that I can think of relates to the subtitle of this paper: (*Unintended*) *Conceptual Eugenics*. If it is the case that there is some form of path dependent operation to the Rule of Law—meaning that our present choices are derived from, and to some degree influenced by, experiences of the past—then we neglect origins at our peril. Should we fail to take account of the

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<sup>27</sup> [Møller, this issue. doi:[10.1007/s40803-017-0053-2](https://doi.org/10.1007/s40803-017-0053-2)].

<sup>28</sup> [Sempill, this issue. doi:[10.1007/s40803-017-0058-x](https://doi.org/10.1007/s40803-017-0058-x)].

origins of the concept—by continuing to simply innovate around the idea of the concept that we presently have and by overlooking both the meaning and context behind the current concept and those ideas that we no longer see—then future development of the Rule of Law will be impoverished and will, potentially, not be faithful to the ideas from which it is ultimately derived. To be clear, I am not suggesting we must simply accept the earlier accounts as they were written. What I do suggest is that we must understand the accounts in order to ensure that any acceptance, change or modification—by way of the contemporary application of those older ideas—does not unintentionally impoverish the options available to us or to future thinkers. Doing so—and in taking steps to better understand the origins of the Rule of Law ideas—will better enable us to innovate in ways that allow responses to both current *and* future problems. In other words, whilst we are free to consider, accept and reject various aspects of earlier thought, our intellectual obligation is to not distort or misrepresent those earlier ideas.<sup>29</sup> By failing to appreciate its origins today, we risk the (unintentional) imposition of a selective approach—a too selective approach, possibly—in the interpretation and application of the concept in the future.

Today's failure to take account of the past restricts the potential options available to us in the future. Furthermore, this process may not be the result of a conscious choice; the selections that we have available in respect of future solutions may—as a result of our current neglect—become increasingly restricted as a result of the simple acceptance of the dominant paradigm and our failure to examine the concept's origins. In effect, the consequence of our neglect is the unintentional pre-selection—or limitation—of the potential future Rule of Law solutions that are available. To summarise: origins matter.

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<sup>29</sup> I am grateful to Brian Tamanaha for stressing the importance of this clarification.



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