**Justice, Coordination, and Legal Certainty:
A Rawlsian Functionalist Defense of the Rule of Law**

Christopher D. Boom and Chad Van Schoelandt
Department of Philosophy
Tulane University
cboom@tulane.edu & cvanscho@tulane.edu

1. **Introduction**
	1. **Background—**
		1. Little attention paid to Rawls’s views on rule of law [ROL]
		2. Yet Rawls consistently insisted on importance of ROL for justice
			1. ROL’s protections are basic liberties/rights (*Political Liberalism* 291), condition of decent civilizations (*Law of Peoples* 113), “essential” and “urgent” object of public justification (*Justice as Fairness* 28)
		3. And Rawls’s position conflicts with mainstream view in jurisprudence
			1. Most legal philosophers deny conformity with ROL on traditional, “thin” or “formal” conception like Rawls’s is *intrinsically* - as opposed to merely *instrumentally* - valuable
	2. **Our Aim:** defend ROL as traditionally conceived (à la Rawls) within Rawlsian Functionalist account of justice
		1. Rawlsian Functionalism: for Rawls, justice has function of providing members of a society with workable tool for adjudicating disputes and facilitating social cooperation
		2. We argue—
			1. For justice to fulfill its function of adjudicating disputes, it must reliably lead to a coordination of interpersonal expectations among a society’s members
			2. In diverse contemporary liberal societies, reliable coordination of interpersonal expectations requires existence of law
			3. Compliance with ROL traditionally conceived as ideal of legal certainty necessary for law to reliably coordinate interpersonal expectations
			4. Insofar as a conception of ROL fails to yield legal certainty, it fails *qua* conception of ROL in a Rawlsian theory of justice
	3. **Overview—**
		1. Introduce Rawlsian Functionalism
		2. Examine how functionalist considerations underlie Rawls’s account of law in *A Theory of Justice*
		3. Demonstrate these considerations similarly underlie account of ROL
		4. Review implications for a Rawlsian conception of ROL
		5. Critique Ronald Dworkin’s revisionist conception of ROL
2. **Rawlsian Functionalism**[[1]](#footnote-1)
	1. Justice has function of providing members of a society with workable tool for adjudicating disputes and facilitating social cooperation
	2. Insofar as given conception of justice would fail to fulfill this function, that conception is defective *qua* conception of justice
	3. For conception of justice to serve function of adjudicating disputes, it must reliably lead to coordination of interpersonal expectations; otherwise, members of society would lack assurance that attempts to act justly will be reciprocated
		1. Deeper significance: members of society thereby participate in ongoing system of social cooperation guided by shared sense of justice rather than mere coercion
	4. Adequacy of a given conception of justice thus crucially depends on being able to provide assurance of mutual compliance with conception
	5. Since merely abstract principles of justice unlikely to coordinate expectations among diverse members of contemporary liberal societies, a conception of justice must gain greater determinacy through embodiment in concrete social institutions
	6. Most importantly, a conception of justice which satisfies justice’s function must be made determinate through *legal* institutions with recognized power to authoritatively express demands of just conduct within society
3. **Law in Rawls’s *A Theory of Justice***[[2]](#footnote-2)\*
	1. Rawls’s def of legal system: **“**a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation”
	2. Three aspects of Rawls’s account of law to notice for our purposes
		1. Law *defined by* function of “regulating . . . conduct and providing the framework for social cooperation”
			1. Hence for Rawls “rules would not be a legal system, [if] they would not serve to organize social behavior”
		2. Law has privileged status among society’s institutions, possessing “final authority” in territory and “defin[ing] the basic structure within which the pursuit of all other activities takes place”
		3. Coercive nature of law: law both employs coercion and claims monopoly over “at least the more extreme forms of coercion”
	3. These features consistent with, and supportive of, Rawlsian Functionalist understanding of justice
		1. By definition, law serves justice’s function of regulating disputes and promoting cooperation
		2. Law’s ultimate, comprehensive authority ensures sense of justice able to adjudicate disputes in all aspects of social life
		3. Law’s coercive means and monopoly over coercion enhances mutual assurance that disputes will in fact be adjudicated according to sense of justice
			1. “Hobbes’s Thesis”: “[a]lthough men know that they share a common sense of Justice and that each wants to adhere to the existing arrangements, they may nevertheless lack full confidence in one another”; so “existence of effective penal machinery serves as men’s security to one another”
	4. Yet Rawls recognized law’s coercive nature gives rise to hazard: prospect of coercion can produce chilling effect on individual’s pursuit of her ends
		1. If “[t]he boundaries of our liberty are uncertain,” then “liberty is restricted by reasonable fear of its exercise”
	5. Enter ROL
4. **The Rule of Law as the Ideal of Legal Certainty**
	1. According to Rawls, ROLapplication of “formal” justice to legal system
		1. “[F]ormal justice, *the regular and impartial administration of public rules*, becomes the rule of law when applied to the legal system.”
		2. Contrast with “substantive” justice (is content of rules just?)
		3. Rawls recognized formal justice, and thus ROL, can conflict with substantive justice. In some such cases, it may be better to disregard formal justice. Yet “it is often better” to apply existing public rules, for this will give those subject to the rules “some security” because they will “at least know what is demanded and they can try to protect themselves accordingly.” (*TJ* §10)
	2. ROL consists in those principles which “would be followed by any system of rules which perfectly embodied the idea of a legal system.”
		1. Namely, ought-implies-can, *Nullum crimen sine lege,* treating like cases alike, procedural (“natural”) justice
	3. Common element is to ensure that members of society can be “confident in the possession and exercise of [their] freedoms.”
		1. “Knowing what things [law] penalizes and knowing that these are within their power to do or not to do, citizens can draw up their plans accordingly. One who complies with the announced rules need never fear an infringement of his liberty.”
	4. In other words, distinctive function of ROL is to assure that members of a society can be certain whether their, and others’, actions will be determined permissible, prohibited, or mandatory by legal institutions *before* those institutions declare them as such
5. **Legal Certainty and the Coordination of Expectations**
	1. ROL as traditionally conceived thus plays important role in Rawlsian Functionalist account of justice, ensuring that members of a society not only possess the interpersonal expectations necessary for a conception of justice to successfully adjudicate disputes, but that those expectations are *secure*
	2. Thus not only can members of a society pursue their own divergent aims within an ongoing system of social cooperation guided by sense of justice rather than mere coercion, but so long as they conform to the law they can be confident that participating in that system will not impede their pursuit of their aims
	3. Moreover, importance of ROL is enhanced if we are correct that a reliable coordination of interpersonal expectations cannot occur in a diverse contemporary liberal society absent the institution of law
	4. Thus if our understanding of what Rawlsian Functionalist account of justice requires is correct, a conception of ROL which would fail to yield legal certainty is defective *qua* conception of ROL. For adherence to that conception would thereby fail to satisfy the function of law and therefore justice
6. **Rawls *contra* Dworkin**
	1. Among legal philosophers, Dworkin most prominent Rawlsian
		1. See, e.g., “The Original Position” (1973), “Rawls and the Law” (2004), *Justice for Hedgehogs* 63-66 (2011)
	2. Yet like most legal philosophers, Dworkin rejected intrinsic value of legal certainty, and thus the traditional conception of ROL
		1. See, e.g., “Philosophy, Morality, and Law” (1965), “Political Judges and the Rule of Law” (1977), “The Rule of Law”
	3. Dworkin instead opted for “thick” or “substantive” conception of ROL on which conformity with ROL consists in adjudicating disputes in accord with the rights parties possess as a matter of independent moral truth
		1. See, e.g., “Political Judges and the Rule of Law” and “The Rule of Law”
	4. And the upshot of such a conception of ROL is that it cannot yield legal certainty, for any putatively legal rule is always subject to rejection as failing to accurately reflect moral rights (cf. Scott Shapiro, *Legality*, ch. 9)
	5. Yet if we are correct, Dworkin’s position conflicts with the functionalism at the core of the Rawlsian project
7. **Three Takeaways**
	1. Supports functionalist reading of Rawls by revealing functionalist considerations underlying Rawls’s account of law and ROL
	2. Situates Rawls’s account of ROL within his (functionalist) theory of justice
	3. Demonstrates importance for ROL as traditionally conceived for a genuinely Rawlsian theory of justice
1. Van Schoelandt, “Rawlsian Functionalism, Coordination, and the Priority of Institutions” [↑](#footnote-ref-1)
2. \* Except where indicated otherwise, all quotes below are to §38 of *A Theory of Justice*, Rev. Ed. [*TJ*] [↑](#footnote-ref-2)