

# THE RATIONALIZATION OF POLICY: ON THE RELATION BETWEEN DEMOCRACY AND THE RULE OF LAW

*Ofer Raban\**

*What is the nature of the relation between democracy and the rule of law? Why did the two develop more or less simultaneously in the West, and why do we tend to conjoin them when describing good government? After all, the two are theoretically distinct: a non-democratic regime may operate with a robust rule of law (think of 18th Century England), and a democratically-elected government may flout rule of law principles (think of Russia or Turkey or Pakistan). And yet, there seems to be some mutual reinforcement—perhaps even interdependence—between these two systems of political organization. This article will survey some common explanations for the confluence of democracy and the rule of law, and will then propose one of its own—namely, that the two complement each other in the rationalization of government power.*

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| INTRODUCTION . . . . .  | 46 |
| I. THE MERGER OF CIVIL AND POLITICAL LIBERTIES AS<br>AN EXPLANATION FOR THE INTERDEPENDENCE OF<br>DEMOCRACY AND THE RULE OF LAW . . . . . | 48 |
| II. THE RATIONALIZATION OF POLICY . . . . .   | 52 |
| A. Democracy . . . . .  | 53 |
| B. Rule of Law . . . . .  | 55 |
| C. Checkerboard Statutes . . . . .  | 55 |
| D. The Rationality Requirement . . . . .  | 56 |
| E. The Rationality Requirement and the Rule<br>of Law . . . . .   | 61 |
| F. Ramifications . . . . .  | 63 |
| CONCLUSION . . . . .  | 65 |

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\* Associate Professor of Law, Elmer Sahlstrom Senior Fellow, University of Oregon. J.D., Harvard Law School. D.Phil., Oxford University. I would like to thank the participants at the law faculty forums at the University of Warsaw, and at Adam Mickiewicz University.

## INTRODUCTION

Democracy requires that political power be held by representatives elected in free and regularly scheduled elections.<sup>1</sup> The rule of law requires that political power be exercised through generally applicable rules, announced in advance, and applied uniformly and impartially.<sup>2</sup> These two distinct systems of political organization have become inseparable in descriptions of good governance. Academics, politicians, political commentators, and U.N. declarations all regularly join the concepts of democracy and the rule of law.<sup>3</sup> Yet, democracy and the rule of law are theoretically independent, and the relation between them may be neither necessary nor simple. Reduced to its essence, democracy is concerned with the method of selecting the holders of political power, while the rule of law is concerned with the method by which political power is exercised. Thus, a non-democratic regime may operate with a robust rule of law,<sup>4</sup> and a political system

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1. See generally FRANK HENDRIKS, *VITAL DEMOCRACY: A THEORY OF DEMOCRACY IN ACTION* 22 (2010) (examining variations on the basic concept of democracy and contrasting four basic forms of democratic government). Needless to say, this thin definition is subject to various competing interpretations. Cf. AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996) (defining democracy as a deliberative process consisting of the three principles of reciprocity, publicity, and accountability); Larry Diamond & Leonardo Morlino, *Introduction to ASSESSING THE QUALITY OF DEMOCRACY* x–ix (Larry Diamond & Leonardo Morlino eds., 2005) (defining democracy as requiring at a minimum: universal adult suffrage; recurring, free, and fair elections; more than one competitive political party; and alternative sources of information).

2. See, e.g., JAMES ROLAND PENNOCK, *ADMINISTRATION AND THE RULE OF LAW* 15 (1941) (“In its most general significance, this is simply the principle that governments shall regulate the conduct of their subjects only through laws of general application, known to all, applied impartially, and not retroactively.”). This thin definition is similarly subjected to various competing interpretations. Cf. BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 91–113 (2004) (analyzing and comparing six formulations of the rule of law); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1175–81 (1989); Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137, 157 (2002) (arguing that rule of law is a form of contestation about the practicability of law being in charge in a society).

3. See, e.g., G.A. Res. 67/1, ¶ 5, U.N. Doc. A/RES/67/1 (Nov. 30, 2012) (reaffirming that “human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations.”); Timothy Garton Ash, *A Little Democracy is a Dangerous Thing—So Let’s Have More of It*, THE GUARDIAN (Aug. 2, 2006), <http://www.theguardian.com/commentisfree/2006/aug/03/usa.syria>; *Expertise, Rule of Law*, DEUTSCHE GESELLSCHAFT FÜR INTERNATIONALE ZUSAMMENARBEIT, <https://www.giz.de/expertise/html/1944.html> (last visited Mar. 30, 2015).

4. See generally JOHN PHILLIP REID, *Law’s Umpire, in RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* 68 (2004) (describing the development and state of rule of law in eighteenth-century England); Simon Devereaux, *The Promulgation of the Statutes in Late Hanoverian Britain, in*

governed by electoral majorities may flout fundamental rule of law principles.<sup>5</sup> Indeed, some claim that there is a veritable conflict between the rule of law and democracy insofar as the rule of law constrains the policy options of electoral majorities.<sup>6</sup> It is at least conceivable that democracy and the rule of law bring their own contributions to good governance, but that they are not interdependent.

And yet, there is no denying that, as a matter of brute fact, lack of democracy goes hand in hand with a lax rule of law, while strong democracies tend to possess a robust rule of law.<sup>7</sup> And so the question arises:

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THE BRITISH AND THEIR LAWS IN THE EIGHTEENTH CENTURY 80 (David Lemmings ed., 2005) (examining the strengthening of centralized state power in England by the regular and systemic application of statutes). A more controversial example is Chile under the rule of President Augusto Pinochet. See Robert Barros, *Dictatorship and the Rule of Law: Rules and Military Power in Pinochet's Chile*, in DEMOCRACY AND THE RULE OF LAW 188 (José María Maravall & Adam Przeworski eds., 2003); Edward C. Snyder, *The Dirty Legal War: Human Rights and the Rule of Law in Chile 1973–1995*, 2 TULSA J. COMP. & INT'L L. 253 (1995).

5. Examples include contemporary Pakistan and Russia. See *The State of Human Rights and the Rule of Law in Russia: U.S. Policy Options: Hearing Before the S. Subcomm. on European Affairs of the Comm. on Foreign Relations*, 112th Cong. 51 (2011); Gabriela Knaul, Special Rapporteur on the Independence of Judges and Lawyers, Office of the High Comm'r for Human Rights, Preliminary Observations on the Official Visit to the Russian Federation (Apr. 25, 2013), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13264&LangID=E> (detailing “direct or indirect threats and improper interferences and pressures on the judiciary”). But see, e.g., *Uncommon Knowledge with Peter Robinson: DEMOCRACY NOW? Democracy Versus the Rule of Law*, THE HOOVER INST. (June 24, 2003), <http://www.hoover.org/multimedia/uncommon-knowledge/26968> (“Larry Diamond: Russia's not a democracy today. Peter Robinson: Not even by your minimal standards? Larry Diamond: No, absolutely not.”).

6. See, e.g., Brian Z. Tamanaha, *The Dark Side of the Relationship Between the Rule of Law and Liberalism*, 3 N.Y.U. J.L. & LIBERTY 516, 517 (2008) (“The rule of law, liberalism, and democracy are often thought to make a happy triumvirate, but their relationship, particularly with respect to democracy, is marked by antagonism.”); Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, SING. J. LEGAL STUD., 232–47 (2012) (discussing the distinctiveness of democracy and the rule of law).

7. Cf. Arch Puddington, *Freedom in the World 2013: Democratic Breakthroughs in the Balance*, FREEDOM HOUSE 14–19, [http://www.freedomhouse.org/sites/default/files/FIW%202013%20Booklet\\_0.pdf](http://www.freedomhouse.org/sites/default/files/FIW%202013%20Booklet_0.pdf) (last visited Mar. 30, 2015) (rating 195 countries and territories based in part on whether each country or territory is an electoral democracy and on each country or territory's implementation of rule of law values); Mark David Agrast et al., *Rule of Law Index: 2012–2013*, THE WORLD JUSTICE PROJECT, [http://www.worldjusticeproject.org/sites/default/files/WJP\\_Index\\_Report\\_2012.pdf](http://www.worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf) (last visited Mar. 30, 2015) (ranking 97 countries on their adherence to various dimensions of rule of law).

what can explain this correlation, indeed this apparent interdependence?<sup>8</sup>

## I.

### THE MERGER OF CIVIL AND POLITICAL LIBERTIES AS AN EXPLANATION FOR THE INTERDEPENDENCE OF DEMOCRACY AND THE RULE OF LAW

One common explanation for the interdependence between democracy and the rule of law associates democracy with an extensive array of civil rights that, in turn, can only be protected through a robust rule of law. According to this thesis, democracy, properly conceived, protects practically all the individual freedoms ordinarily associated with political liberalism—including freedom of expression, freedom of religion, protection of private property, and protection from government interference in the private sphere.<sup>9</sup> This equation of democracy with liberal democracy is so common that it often appears as an unelaborated assumption, or at most with the stipulation that it employs a “thick”—as opposed to a “thin”—definition of democracy;<sup>10</sup> but the equation has, of course, theoretical underpinnings.

One argument derives the whole gamut of liberal freedoms from the idea of free electoral choice. Electoral choice obviously requires wide freedoms of thought and expression, and a robust right of association; but it also requires the ability to explore and practice alternative lifestyles and alternative politics. Thus, real electoral choice requires tolerance toward lifestyles that are different than the dominant one. For example, if a government suppresses homosexuality or unionization, neither may become the subject of real political choice. Democracy therefore entails not only the freedom of theoretical discourse, but also some freedom to practice alternative forms of social and polit-

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8. One source for the correlation between strong democracies and a strong rule of law is the requirement that democracies operate by way of transparent and known laws—if only because the electorate must be advised of the actions of its government if it is to make an informed electoral choice. Transparency is also a requirement of the rule of law: legal rules must be promulgated and announced in advance of their operation. Still, it would be odd if the rule of law’s connection to democracy were reduced to the mere requirement of transparency.

9. Steven Levitsky & Lucan Way, *Assessing the Quality of Democracy*, J. DEMOCRACY 51, 51 (2002) (providing an exposition of democracy as encompassing the principles of liberalism).

10. See, e.g., Diamond & Morlino, *supra* note 1, at xi (“[T]he three main goals of an ideal democracy [are] political and civil freedom, popular sovereignty (control over public policies and the officials who make them), and political equality (in these rights and powers) . . .”).

ical lives.<sup>11</sup> Toleration for pluralism is a prerequisite for real political choice and is therefore a requirement of democracy itself; and countries that lack such pluralistic tolerance are not real democracies, even if they hold regularly scheduled elections.<sup>12</sup>

An alternative argument—made by Ronald Dworkin, among others—links democracy with extensive civil liberties by arguing that democracy (which sees all individuals as equal depositories of political power) is based on an assumption of moral equality among individuals, and that that assumption translates into an entitlement to equal regard from the state.<sup>13</sup> In pluralistic societies, such equal regard means respect for the different lifestyles of individuals, which are protected through liberal-style civil rights and liberties. Thus, homosexuality cannot be made criminal in a true democracy because moral equality, itself a bedrock assumption of democracy, means that the lifestyle choices of homosexuals must be respected as much as the lifestyle choices of fundamentalist Christians. Individual rights are the corollary of the moral equality that democracy presumes.

Naturally, these claims raise some formidable theoretical difficulties—most importantly, drawing the distinction between lifestyles or ideological choices that society must respect and those it may suppress (a difficulty that affects liberalism in general). For our purposes, it is enough to note that however one draws that line, if democracy must commit to respecting such a gamut of rights and liberties, then the link between democracy and the rule of law is direct and necessary. To be effective, such freedoms must be protected as legal rights and supported by a robust rule of law. Indeed, practices such as homosexuality or religious heresy, which may be deeply offensive to the majority,

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11. See, e.g., *Democracy Barometer at a Glance*, DEMOCRACYBAROMETER.ORG, [http://www.democracybarometer.org/concept\\_en.html](http://www.democracybarometer.org/concept_en.html) (last visited Mar. 30, 2015) (“The existence and guarantee of individual liberties is the most important prerequisite for democratic self- and co-determination. Individual liberties primarily secure the inviolability of the private sphere. . . . [One] aspect of individual liberties [is] the right to free conduct of life. . . . [T]hese measures [encompass] constitutional provisions guaranteeing the free conduct of life and the effective implementation and impact of these rights.” (emphasis omitted)).

12. Cf. ALBERT WEALE, *Democracy, Rights and Constitutionalism*, in DEMOCRACY 181, 189–206 (2d ed. 2007) (explaining how constitutional rights aid the practice of democracy); *Human Rights and Elections: A Handbook on the Legal, Technical and Human Rights Aspects of Elections* 6–10, U.N. Doc. HR/P/PT/2 (1994), available at <http://www.ohchr.org/Documents/Publications/training2en.pdf> (listing rights the United Nations deems crucial in assuring free, fair, and genuine elections, including freedom of opinion, freedom of expression, freedom of association, and freedom from discrimination).

13. See RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 212 (2000).

must be secured and protected through a legal system anchored to a robust rule of law. As one commentator put it, “In the absence of the rule of law, contemporary constitutional democracy would be impossible.”<sup>14</sup> Once we accept the idea that a real democracy means a series of civil liberties, the rule of law becomes essential for democracy. Indeed the rule of law has always been considered a necessary ingredient of liberalism.<sup>15</sup>

In short, according to this thesis there may be a rule of law without democracy, but there can be no democracy without a rule of law. The rule of law is a constitutive element of democracy.<sup>16</sup>

But must a democracy include protection for a whole gamut of civil liberties?<sup>17</sup> That claim may take the concept of a democracy too

14. Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1307 (2001); see also Guillermo O’Donnell, *Why the Rule of Law Matters*, in *ASSESSING THE QUALITY OF DEMOCRACY* 3, 3 (Larry Diamond & Leonardo Morlino eds., 2005) (“The rule of law is among the essential pillars upon which any high-quality democracy rests. . . . Without a vigorous rule of law . . . rights are not safe and the equality and dignity of all citizens are at risk.”).

15. See, e.g., F.A. HAYEK, *THE ROAD TO SERFDOM* 81–82 (1944) (“The Rule of Law was consciously evolved only during the liberal age and is one of its greatest achievements, not only as a safeguard but as the legal embodiment of freedom.”).

16. This may explain why ancient Greece was not only the cradle of democracy, but also the cradle of liberalism and the rule of law. See F.A. HAYEK, *NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS* 122 (1978) (“The first people who had clearly formulated the ideal of individual liberty were the ancient Greeks and particularly the Athenians during the classical period of the fifth and fourth centuries BC. The denial by some nineteenth century writers that the ancient knew individual liberty in the modern sense is clearly disproved by such episodes as when the Athenian general at the moment of supreme danger during the Sicilian expedition reminded the soldiers that they were fighting for a country which left them ‘unfettered discretion to live as they pleased.’”); THUCYDIDES, *THE HISTORY OF THE PELOPONNESIAN WAR*, bk. II at 37 (Richard Crawley trans., Barnes & Noble 2006) (n.d.) (“If we look to the laws, they afford equal justice to all in their private differences . . . . [I]f a man is able to serve the state, he is not hindered by the obscurity of his condition. The freedom we enjoy in our government extends also to our ordinary life. There, far from exercising a jealous surveillance over each other, we do not feel called upon to be angry with our neighbour for doing what he likes.”); Fred D. Miller, Jr., *The Rule of Law in Ancient Greek Thought*, in *THE RULE OF LAW IN COMPARATIVE PERSPECTIVE* 11, 11–18 (Mortimer Sellers & Tadeusz Tomaszewski eds., 2010) (evaluating the rule of law in Ancient Greece).

17. In fact, many see a veritable inconsistency between democracy and liberalism. See, e.g., GILMAN MARSTON OSTRANDER, *THE RIGHTS OF MAN IN AMERICA, 1606–1861*, at viii (2d ed. 1969) (“American democracy contain[s] an inherent inconsistency . . . . The basic . . . tenets of individual liberty on the one hand and majority rule on the other are logically incompatible.”); RICHARD A. POSNER, *OVERCOMING LAW* 25–26 (1995) (arguing that liberalism “is in tension with democracy”); Donald Elfenbein, *The Myth of Conservatism as a Constitutional Philosophy*, 71 IOWA L. REV. 401, 458–79 (1986) (describing the tension between liberalism and democracy in American political theory and constitutional scholarship).

far. It is true that democracies must commit themselves to some basic freedoms guaranteeing meaningful elections, including substantial freedom of speech and assembly. However, free and open elections can take place without the full gamut of liberal rights, which give individuals maximum liberty not only in the political sphere but also in the private sphere.<sup>18</sup> It may be both practically and philosophically justified to distinguish between democracy and liberalism, and to recognize that a country might be democratic even if it is not liberal.<sup>19</sup> As Friedrich Hayek put it, “Liberalism is concerned with the functions of government and particularly with the limitation of all its powers. Democracy, on the other hand, is concerned with the question of who is to direct government.”<sup>20</sup> The two offer solutions to different problems. The very expression “the tyranny of the majority” is an implicit recognition of this fact, and suppression of the freedoms of ethnic or religious minorities is a recurrent problem with some democratically elected regimes.<sup>21</sup> It is not surprising that the concept of “illiberal democracy” is regularly used in the literature.<sup>22</sup>

We need not resolve this question here. My main ambition is not to supplant this well-known thesis on the interdependence of democracy and the rule of law, but to offer another possible explanation for that interdependence. My explanation links democracy and the rule of law through their impetus toward the rationalization of policy. Both these systems of political organization combine to impose standards of rationality and reasonableness on the exercise of government power.<sup>23</sup>

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18. See, e.g., Bruce Ledewitz, *The Promise of Democracy: The Future of Freedom: Illiberal Democracy at Home and Abroad*, 32 *CAP. U. L. REV.* 407, 432 (2003) (book review).

19. See Wolfgang Merkel, *Embedded and Defective Democracies*, 11 *DEMOCRATIZATION* 33 (2004) (noting that “electoral democracies,” which lack other rights typically associated with democracies, can be stable regimes).

20. HAYEK, *supra* note 16, at 142–43.

21. See, e.g., Andreas Harsono, Op-Ed., *No Model for Muslim Democracy*, N.Y. TIMES, May 21, 2012, <http://www.nytimes.com/2012/05/22/opinion/no-model-for-muslim-democracy.html> (“While Indonesia has made great strides in consolidating a stable, democratic government after five decades of authoritarian rule, the country is by no means a bastion of tolerance. The rights of religious and ethnic minorities are routinely trampled. While Indonesia’s Constitution protects freedom of religion, regulations against blasphemy and proselytizing are routinely used to prosecute atheists, Bahais, Christians, Shiites, Sufis and members of the Ahmadiyya faith — a Muslim sect declared to be deviant in many Islamic countries. By 2010, Indonesia had over 150 religiously motivated regulations restricting minorities’ rights.”).

22. See generally FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* (2007) (examining different types of democracies around the world).

23. I use the terms “rationality” and “reasonableness” in a non-technical sense and as synonyms, and I contrast their meaning with the sort of arbitrariness and lack of

## II.

## THE RATIONALIZATION OF POLICY

In 2013, the *New York Times* published an opinion piece by the Chinese novelist Yu Hua, titled “In China, Power Is Arrogant.”<sup>24</sup> The short piece criticized the arbitrariness of Chinese legislation and is reproduced here almost in its entirety:

In late 2010, Chinese customs officials imposed an import tax of 1,000 yuan (about \$150 then) on every iPad brought into the country. Ignoring the fact that iPads differ in features and prices, officials set a single tariff: 20 percent of the tablet’s listed 5,000-yuan value. People who paid 3,000 yuan for an iPad in Hong Kong—where smartphones and other electronics are much cheaper than on the mainland—were charged the same tariff. Even Chinese tourists returning home with their own iPads, bought in China, were taxed!

. . . If the central government’s decrees are opaque, local authorities’ can be downright ridiculous. In 2001, hospital officials in the southern city of Shenzhen specified that nurses should show precisely eight teeth when smiling. In 2003, Hunan Province, in central China, stipulated that the breasts of female candidates for civil-service positions should be symmetrical. The next year, public safety officials in the northern city of Harbin ruled that policemen whose waistlines exceeded 36 inches had to go. In 2006, transportation officials in Zhejiang Province, just south of Shanghai, banned employees from sporting facial hair. The following year, in an effort to reduce the school-dropout rate, Pinghe County in Fujian Province, on the southeast coast, decreed that a junior high school diploma was required to marry.

Several of these rules have since been revoked, but their wacky and arbitrary nature demonstrates the arrogance of power in China. One can imagine all too easily their creators—sitting in comfortable armchairs, drinking high-grade tea and smoking fine cigarettes—discussing the issues at hand as if they were purely intellectual abstractions, never considering how ordinary people might react. That people will be unhappy is no cause for concern because, for so long, the power of the state has trampled on individual rights. Only when rules are so onerous that they stir actual protest do higher-ups take notice: “You guys are just making a mess of things,” they’ll tell their bureaucrat underlings. “This is not good

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justifications evident in Ronald Dworkin’s examples of checkerboard statutes. For more, see *infra* Parts II.A–D.

24. See Yu Hua, Op-Ed., *In China, Power Is Arrogant*, N.Y. TIMES, May 8, 2013, <http://www.nytimes.com/2013/05/09/opinion/you-in-china-power-is-arrogant.html>.



for social stability.” The rules are then quietly rescinded—sometimes.<sup>25</sup>

The obvious insinuation of Hua’s criticism is that a democracy with a robust rule of law would not produce such arbitrary policies. That seems to be true. The question is why.

### A. *Democracy*

The fact that policymakers can be kicked out of office on a regular schedule provides important incentives for the rationalization of government power. First, nothing inspires more indignation than an irrational or a wholly unjustified sacrifice. Granted, people may resent perfectly justified sacrifices as well; but to paraphrase Justice Oliver Wendell Holmes, even a dog knows the difference between being kicked for a good reason and for no reason at all.<sup>26</sup> What’s more, and almost by definition, there is usually little to be gained from arbitrary policies—either because of the lack of a fit between a reasonable policy goal and the means employed, or because the goal itself is unreasonable.<sup>27</sup> (Think, for example, of requiring that nurses show eight teeth, or restricting public service employment to women with symmetrical breasts.) Admittedly, all governments, whether democratic or not, wish to avoid popular indignation; but only in a democracy is this wish tested by regularly scheduled elections.<sup>28</sup> Tolerance for arbitrariness is therefore much lower in democratic regimes. As the op-ed explains, in China “only when rules are so onerous that they stir actual protest do higher-ups take notice.”<sup>29</sup> But rules that do not stir actual protests may easily increase the chances of an electoral defeat.

Second, representative democracy is based on negotiations among the representatives of competing interests. In principle, everyone is seated at the table when policy is made. While some see this aggregation of different and potentially contradictory interests as a recipe for disjointed and incoherent policies,<sup>30</sup> the opposite is a more

25. *Id.*

26. In explaining the distinction between intentional and unintentional torts, Justice Oliver Wendell Holmes had famously noted that “even a dog distinguishes between being stumbled over and being kicked.” OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 3 (1881).

27. See Yu, *supra* note 24.

28. *But see* BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* 1–2 (2007) (challenging the notion that voters are rational).

29. Yu, *supra* note 24.

30. Such conclusions are said to derive, *inter alia*, from public choice theory, since a centerpiece of public choice is the idea that while individuals are coherent and rational, a collective of individuals may well be incoherent as it aggregates its prefer-

likely outcome. Since the purpose is to arrive at solutions that are acceptable to as many interests as possible while creating the least resentment (if only because today's legislative enemies are tomorrow's allies), the impetus is toward the reduction of arbitrariness and the crafting of rational compromises.<sup>31</sup> Lawmakers justify proposed policies to those affected, and make accommodations so as to reduce opposition or garner support.<sup>32</sup> Legislators wishing to criminalize suicides may carve out an exception for the terminally ill; and those wishing to ban marijuana may opt to accommodate its medical use. The attempt to bring as many people as possible under one's legislative umbrella means greater rationality. Indeed, the tendency of democratic negotiations over policy-making to improve the rationality of government policies takes center stage in theories of "deliberative democracy"—which see the rationality of the legislative discourse as constitutive of a real democracy.<sup>33</sup>

In short, given the inherent illegitimacy of arbitrary policies, the fact that there is usually little to be gained from them, and the natural impetus of democratic policy-making to maximize consensus, arbitrary or irrational policies would be the first to go. This is not to say, of course, that majorities may not desire, and sometimes obtain, unreasonable or arbitrary policy goals—especially policies affecting minorities.<sup>34</sup> But such instances are less likely in a setting where representatives of these minorities are part of the policy-making process, and where elected officials hammer out policies on a myriad of

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ences. See, e.g., KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963); DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* (1958); DENNIS C. MUELLER, *PUBLIC CHOICE* (Phyllis Deane & Mark Perlman eds., 1979). It should be noted, however, that some public choice theorists dispute this orthodoxy and have focused on institutional mechanisms that help produce coherent policies, notwithstanding the problems plaguing the combination of voting preferences. See generally MAXWELL L. STEARNS & TODD J. ZYWICKI, *PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW* (2009); Daniel A. Farber, *Public Choice Theory and Legal Institutions* (UC Berkeley, Public Law Research Paper No. 2396056, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2396056](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2396056).

31. See, e.g., J. Roland Pennock, *Responsiveness, Responsibility, and Majority Rule*, 46 AM. POL. SCI. REV. 790, 802 (1952) ("Now it seems clear that the legislative process we have just described involves considerable pains to achieve action that is responsible in the sense of being explicable, rationally supportable. Decision follows only after there has been ample opportunity for investigation and deliberation.").

32. See Dennis F. Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11 ANN. REV. POLI. SCI. 497 (2008) (reviewing empirical studies examining legislative deliberations).

33. See, e.g., STEPHEN HOLMES, *PASSIONS AND CONSTRAINT* 33 (1997); Jürgen Habermas, *Popular Sovereignty as Procedure*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* 45 (James Bohman & William Rehg eds., 1997).

34. For example, the prohibition on same-sex marriage.

issues with ever-changing legislative coalitions. No system is fool-proof of irrational or arbitrary policies. The question is what system produces less of those.

### B. Rule of Law

Assuming that democracy does indeed increase the rationalization of policy, in what way does the rule of law do that? Why can't the rule of law serve both rational and arbitrary policies with equal proficiency?

The answer cannot simply be that laws must be framed as *general rules*. While resolving issues on a case-by-case basis may entail the most basic forms of inconsistency and self-contradiction, arbitrary policies can also be framed as generally applicable rules. Indeed, the Chinese policies delineated above are all formulated as such (for example, no marriage license without high school diploma, only eight teeth when smiling, symmetrical breasts).<sup>35</sup>

One answer is that the rule of law advances rationality by insisting on reconciling legal requirements with one another (coherence is an aspect of rationality), and by requiring that laws be publicly promulgated (since governments are loathe to publicize their arbitrary use of power, and would therefore reduce their arbitrariness if forced to operate in the public eye).<sup>36</sup> But the rule of law also advances the rationalization of policy in the most direct of ways. I will argue that the sort of arbitrary Chinese policies delineated above directly violate the principle of equality before the law, itself a part of the rule of law. To see how this is so, we should revisit a seemingly simple, but in fact profound, question raised by Ronald Dworkin in his seminal *Law's Empire*.

### C. Checkerboard Statutes

In *Law's Empire*, Dworkin posed the following questions:

Do the people of North Dakota disagree whether justice requires compensation for product defects that manufacturers could not reasonably have prevented? Then why should their legislature not impose this "strict" liability on manufacturers of automobiles but not on manufacturers of washing machines? Do the people of Alabama disagree about the morality of racial discrimination? Why should their legislature not forbid racial discrimination on buses but permit it in restaurants? Do the British divide on the morality of

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35. See Yu, *supra* note 24. Again, in what way does the rule of law prevent arbitrariness?

36. LON L. FULLER, THE MORALITY OF LAW 46–88 (1964).

abortions? Why should Parliament not make abortions criminal for pregnant women who were born in even years but not for those born in odd ones?<sup>37</sup>

We all feel, of course, that these legislative suggestions are unacceptable; the question is why, and whether it has anything to do with the rule of law.

Dworkin believed that the reason we reject checkerboard statutes resides in a hitherto unnoticed requirement of our law—that our laws must all be congruent with one “scheme of justice” or one “set of moral principles.”<sup>38</sup> The problem with checkerboard statutes, said Dworkin, is that they apply two different moral schemes to the issue before them—that is, one moral scheme that approves abortions and another that does not.<sup>39</sup> He then postulated that the requirement that laws be congruent with one “scheme of justice” pertained to the entire body of laws, no matter how different these laws’ subject matter: all legal requirements must ultimately correspond with one and the same moral scheme.<sup>40</sup> He named this requirement “integrity” and claimed that checkerboard statutes were but a local violation of this broader requirement.<sup>41</sup>

Dworkin’s hypothesis is ingenious, but the correct answer, I think, is both simpler and broader in scope. And it concerns the relation between law and rationality, rather than between law and morality.

#### D. *The Rationality Requirement*

So what distinguishes a checkerboard statute, such as a statute making abortion criminal to women born in even but not odd years, from a *non*-checkerboard statute, such as a statute making abortions criminal for all women except those impregnated by rape?<sup>42</sup> It seems clear that the principal difference between the two is our ability to perceive a justification for treating the differentiated classes differently in the case of the rape exemption<sup>43</sup>—i.e., women impregnated

37. RONALD DWORKIN, *LAW’S EMPIRE* 178 (1986).

38. *Id.* at 179; *see also id.* at 183–84 (“The most natural explanation of why we oppose checkerboard statutes appeals to [integrity]: we say that a state that adopts these internal compromises is acting in an unprincipled way . . . [I]t must endorse principles to justify part of what it has done that it must reject to justify the rest.”).

39. *Id.* at 178–84.

40. *Id.*

41. *Id.*

42. *See id.* at 179.

43. *See* J. Allison Strickland, *Rape Exceptions in Post-Webster Antiabortion Legislation: A Practical Analysis*, 26 *COLUM. J.L. & SOC. PROBS.* 163, 173–75 (1992) (exploring the justifications for the rape exemption in abortion bans).

by rape lack responsibility for the pregnancy, and the expected newborn would be particularly unwanted—but we perceive no justification for the exemption for women born in odd years. We do not necessarily *endorse* the justification we perceive. We may think, for instance, that rape does *not* justify an abortion. Still, we see that this statute has some rational justification underlying the distinction it makes. Thus, it seems that we expect a justification as to why statutes treat the differentiated categories differently, and with checkerboard statutes there seems to be none. Checkerboard statutes prescribe one legal requirement to one class and a different legal requirement to a second class, while the difference between the two classes fails to explain the difference in treatment.<sup>44</sup>

In other words, checkerboard statutes violate the “equality before the law” principle—the requirement that the similarly situated be treated similarly.<sup>45</sup> But there is something misleading in the appeal to equality (which is a moral value) in explaining what’s wrong with checkerboard statutes, since the root of the problem is one of rationality, not of morality. This becomes clear once we examine the first half of Dworkin’s checkerboard statute: “Why should Parliament not make abortions criminal for pregnant women who were born in even years . . . ?”<sup>46</sup> We do not need to see the second half of the statute in order to find it totally unacceptable. Again, the problem is one of rationality.

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44. The justifications we seek need not be easy to detect. The rules governing secured transactions, for example, form a complex and interrelated system of regulations, and it may take time and effort to figure out why a statute distinguishes between leases with and leases without an unlimited option to terminate. A similar effort must go into detecting the public justification of a statute like the U.S. Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (2000), which exempts trading in energy from the regulatory scrutiny applied to brokers of money, securities, and commodities. Of course, it may also be the case that the U.S. Commodity Futures Modernization Act is, in fact, a checkerboard statute. Dworkin’s examples present us with categories for which the possibility of a justification is basically nil (such as distinguishing between those born in even and those born in odd years for purposes of the regulation of abortion), but Dworkin’s examples also teach us about statutes with *colorable* claims: if these colorable claims turn out to be empty promises, then we would reject these statutes as well—for the same reasons we reject Dworkin’s checkerboard statutes.

45. *See, e.g.*, 16B AM. JUR. 2D *Constitutional Law* § 836 (2014) (“Laws need not affect every man, woman, and child exactly alike in order to avoid the constitutional prohibition against inequality. Equality of operation of statutes does not mean indiscriminate operation on persons merely as such, but on persons according to their circumstances. Equal protection before the law demands more than the equal application of the classifications made by the law, but the law itself must be equal; in other words, to truly ensure equality before the law, the equal protection guarantee requires that laws treat all those who are similarly situated with respect to the purposes of the law alike.” (internal citations omitted)).

46. DWORKIN, *supra* note 37, at 178.

The flaw in this abortion statute is not simply the lack of a justification for treating women born in even years differently than those born in odd ones, but, more fundamentally, the lack of a justification for prohibiting abortions *to the category of women born in even years*. We may have a justification for forbidding *all women* to abort, but why forbid it based on whether they were born in an even or an odd year? For that, there is no justification.

In fact, Dworkin did propose a justification for his checkerboard statutes. He proposed that they were the result of a legislative compromise between two opposing factions—say, one that wants to criminalize abortions and another that does not.<sup>47</sup> The checkerboard statute was a result of the two sides splitting the difference: half the women to the right, half to the left.

But while this justification explains what *brought about* the legislative requirement, it cannot explain the requirement itself. That is to say, it fails to justify the legal requirement *as a function of the characteristics of the category to which it applies*. If you ask a poultry farmer why he treats his white chickens differently than his brown chickens and he says “because I have mixed feelings about chickens,” he may have explained what brought him to draw a distinction, but he has not explained the actual distinction he made between white and brown chickens. The rule of law, however, requires that there be justifications for the specific categories drawn by the law.

These justifications may derive from any sort of human understanding, including science (FDA regulations), economics (antitrust regulations), sociology (aspects of criminal sentencing), morality (prohibition of incest), or religious beliefs (holiday closure laws).<sup>48</sup> As Dworkin notes, we need not *endorse* an explanation in order that it satisfy this rule of law requirement.<sup>49</sup> Rather, we may recognize a rea-

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47. DWORKIN, *supra* note 37, at 179.

48. Religious explanations, however, do raise the thorny question of the relation between religious beliefs and rationality. Consider a religious-based statute forbidding scientific research in stem cells harvested from embryos. While many would no doubt affirm that the statute possesses the required rationality (including some full-blooded atheists), others may think it lacks the barest of rational justification—and is therefore an offense to the rule of law. Is there a way to decide between these two opposing positions? The precise nature of the line between a bad explanation and no explanation at all involves difficult philosophical—indeed, perhaps psychological—questions. Are rational judgments “objectively” grounded or, as many think, can they have no objective standing, and therefore cannot be true or false? No doubt these are pertinent questions, but my thesis has important practical ramifications whatever the answer may be. The mere fact that we insist on the presence of such rationality, and use it to guide legal interpretation, is of enormous consequence to laws and to legal practice—again, irrespective of that rationality’s philosophical grounding.

49. DWORKIN, *supra* note 37, at 183.

son as satisfactory even if we do not accept it as a good one.<sup>50</sup> But obviously, some purported explanations, even popular ones, must fail to satisfy our requirement. For example, many believe that there exists a relation between the position of the stars at the moment of one's birth and one's psychological makeup. This belief may be common, but it clashes with some solid scientific principles, and a statute based upon it would arguably lack a rational explanation.<sup>51</sup> We may see some positions as too unmistakably false, or as conflicting with ideas we think too well defended, and we may not accept these as sufficient explanations. Indeed, what at one point may have been a perfectly acceptable statute could transform, by changes in our understandings, into a checkerboard statute—a violation of the very idea of the rule of law.

In summary, we expect our laws to have justifications as to why they require what they do *of the specific categories they do*. There must be a rational link between the legal requirement and the characteristics of the class to which it applies. This expectation inheres in the equality before the law principle, which insists that differences in treatment be traceable to differences in the characteristics of the differently treated classes. Indeed, notwithstanding some famous claims to the contrary, the equality before the law principle does not merely require that laws, whatever they be, be *applied* similarly to all those affected.<sup>52</sup> Rather, the equality before the law principle is substantive through and through: it requires that the similarly situated be treated similarly as a matter of substantive rationality.<sup>53</sup> Justice Robert H.

50. Cf. DWORKIN, *supra* note 37, at 183.

51. Imagine a statute requiring that candidates for civil service positions be hired by reference to their month of birth—Libras for customer service positions, Leos for management.

52. See, e.g., HANS KELSEN, *What Is Justice?*, in *ESSAYS IN LEGAL AND MORAL PHILOSOPHY* 15 (Donald Davidson et al. eds., Peter Heath trans., 1973) (“And now what of the special principle of so-called equality before the law? All it means is that the machinery of the law should make no distinctions which are not already made by the law to be applied. If the law grants political rights to men only, not women, to citizens only, not aliens, to members of a given race or religion only, not to members of other religions or races, then the principle of equality before the law is fully upheld if in concrete cases the judicial authorities decide that a woman, an alien, or the member or some particular religion or race, has no political rights. This principle has scarcely anything to do with equality any longer. It merely states that the law should be applied as is meant to be applied. It is the principle of legality or legitimacy which is by nature inherent in every legal order, regardless of whether this order is just or unjust.”).

53. See, e.g., ISAIAH BERLIN, *Equality*, in *CONCEPTS AND CATEGORIES: PHILOSOPHICAL ESSAYS* 108 (Henry Hardy ed., 2013) (“[T]here is a principle . . . that similar cases call for, *i.e.*, should be accorded, similar treatment. Then, given that there is a class of human beings, it will follow that all members of this class, namely men,

Jackson, of the U.S. Supreme Court, wrote that this substantive requirement was part of the U.S. Constitution's Equal Protection Clause.<sup>54</sup> Jackson wrote:

[It is] a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants *except upon some reasonable differentiation fairly related to the object of regulation*. . . . [T]here is no more effective practical guaranty against arbitrary and unreasonable . . . government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation . . . . As a matter of principle and in view of my attitude toward the equal protection clause, I do not think differences of treatment under law should be approved on classification because of differences unrelated to the legislative purpose. The equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free.<sup>55</sup>

The equality before the law principle demands that legal requirements be justified by a rational explanation linking the required treatment to

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should in every respect be treated in a uniform and identical manner, unless there is sufficient reason not to do so. . . . The assumption here seems to be that unless there is some sufficient reason not to do so, it is 'natural' or 'rational' to treat every member of a given class (in this case, men) as you treat any one member of it.").

54. See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 221–22 (2011) (explaining that the Equal Protection Clause constitutionalized the equality before the law principle).

55. *Ry. Express Agency v. New York*, 336 U.S. 106, 112–15 (1949) (Jackson, J., concurring) (emphasis added).



the features of the targeted class.<sup>56</sup> In principle, there should be no arbitrary distinctions in the law.<sup>57</sup>

### E. *The Rationality Requirement and the Rule of Law*

But what is the basis for the claim that this rationality principle is part of the rule of law? That it is actually *constitutive* of a proper legal system such that a system that fails to respect it is a system less worthy of the label “legal”? After all, the reason why we require that legal requirements be justified by the features of the targeted class may have little to do with the rule of law and much to do with mere common sense. If there is no justification linking the features of the class to the legal requirement, why have that requirement apply to that par-

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56. The possibility that the law is riddled with arbitrary legal classifications also threatened Dworkin’s theory of “integrity.” Dworkin handled the threat by conceding that arbitrary legal distinctions existed, but seeking to limit such arbitrariness to areas of the law unaffected by issues of justice. See DWORKIN, *supra* note 37, at 179 (“[W]e do accept arbitrary distinctions about some matters: zoning, for example. We accept that shops or factories be forbidden in some zones and not others and that parking be prohibited on alternate sides of the same street on alternate days. But we reject [such arbitrariness] when matters of principle are at stake.”). In fact, however, neither zoning ordinances nor alternate parking days draw distinctions that are truly arbitrary—i.e., distinctions whose distinguishing features could not justify their disparate treatment. In the case of zoning ordinances, the different treatment accorded different zones is never unrelated to the dissimilarities between the differentiated areas. Zoning decisions reflect differences in the number of residents in a zone, the commercial or residential character of a zone, its historical features, geographical characteristics, accessibility, etc. We would certainly consider unacceptable a zoning scheme that delineated its sectors by drawing random geometrical patterns on a map. See, e.g., *Nectow v. City of Cambridge*, 277 U.S. 183, 187 (1928) (stating that a zoning decision is unconstitutional if it “has no foundation in reason and is a mere arbitrary or irrational exercise of power”). Similarly, alternate parking day regulations carve up two categories whose distinguishing features also justify their respective treatment: the whole point of this statutory scheme is that the two classes are more or less indistinguishable—i.e., the two sides of the street are more or less the same length and width and accommodate more or less the same number of vehicles. The distinction therefore captures two essentially similar categories and treats these categories in an analogous way. There are rare cases where we seek a measure of *randomness*, as in the case of statutes regulating jury selection (say, where jurors are randomly selected from voter registration rosters or driver license lists). But these, once again, are not arbitrary. A jury selection statute applies to categories with certain well-sought features—like a representative distribution of racial or economic status and lack of criminal record. A truly arbitrary selection method would never do.

57. “In principle,” because there are, of course, such legal perversions. See, e.g., WIS. STAT. §§ 111.70–111.93 (2014) (stripping Wisconsin public employees of their right to collectively bargain for working conditions but exempting the police, firefighters, and state troopers from the requirement). All rule of law requirements are sometimes violated, but such isolated instances do not, by themselves, prove these principles wrong. This is the nature of theories in the social sciences—as opposed to theories in the hard sciences, where one counterexample spells the demise of a theory.

ticular class to begin with? In short, the fact that we reject checkerboard statutes may have nothing to do with the rule of law, but with the simple fact that we see no good sense in having such statutes. We recoil at checkerboard statutes because they are senseless; but having sense is not a requirement of the rule of law.

This objection is wrong for several reasons. First, there may be perfectly sensible reasons for enacting checkerboard statutes. One is Dworkin's hypothetical legislative compromise: there is nothing *per se* senseless or unreasonable about checkerboard compromises.<sup>58</sup> We make Solomonic compromises all the time in our lives, but we do not make them in our statutes. Additionally, a so-called checkerboard statute may be a perfectly sensible way to simply reward a particular group or to punish another. Consider a legislative proposal to reward firefighters by granting them an exemption from parking regulations, or to punish petty criminals by depriving them of the right to park downtown. There is nothing *per se* unreasonable about such suggestions; they are only unreasonable *as statutes*. Statutes that reward firefighters or punish criminals must do so in a way that is related to the characteristics of firefighters or criminals. If there is no relation between parking regulations and these characteristics, such regulations are unacceptable as legal requirements. This is simply how we think about the law: such statutes are unlikely to be proposed, let alone enacted, in the absence of such a rational link. Of course, there may be a rational explanation linking firefighters to parking—perhaps a large percentage of them are handicapped because of work-related injuries. In such a case, this would not be a checkerboard statute but a perfectly proper legal rule. The critical point is that we demand of our legal requirements that they possess such a rational explanation, and legislators propose statutes and debate them with such explanations in mind.

This demand is a unique feature of a *legal* system. We do not expect that all legitimate systems of rules possess such rationality. We do not think, for example, that military rules (“those whose last names begin with the letters A-F are shipped to Afghanistan”) or the rules that religions lay down for the faithful (“do not shave your beard,”<sup>59</sup>

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58. DWORKIN, *supra* note 37, at 178.

59. See, e.g., Biblical Archaeology Society Staff, *Making Sense of Kosher Laws*, BIBLE HISTORY DAILY (July 9, 2012), <http://www.biblicalarchaeology.org/daily/ancient-cultures/daily-life-and-practice/making-sense-of-kosher-laws/> (“The origins of Jewish dietary or kosher laws (*kashrut*) have long been the subject of scholarly research and debate. Regardless of their origins, however, these age-old laws continue to have a significant impact on the way many observant Jews go about their daily lives. One of the more well-known restrictions is the injunction against mixing meat with dairy products. Not only do most Jews who observe *kashrut* avoid eating any

“do not mix dairy and meat products”<sup>60</sup>) need comply with such a requirement. We consider such rules perfectly legitimate even if they do not possess a rational link between their requirements and the features of the category to which they apply. But we do demand this of our legal rules. What we have in this requirement is a unique aspect of a *legal* system—like generality, advance publication, or prospectivity, all of which are unique characteristics of what we call the rule of law.<sup>61</sup>

#### F. *Ramifications*

That rationality is a requirement of the rule of law does not mean, of course, that judges are free to refuse to enforce or apply statutes that violate it.<sup>62</sup> As with all other rule of law requirements, from prospectivity to generality to promulgation, all legal systems sometimes derogate from this principle. However, whenever this occurs, legal practitioners have an obligation to minimize, to mitigate, and, in the end, to subvert and condemn such violations—the severity of the response being a function of the seriousness of the interests involved. Violations of rule of law principles can be more egregious or less egregious, and so should legal practitioners’ responses to them.

The rationality requirement has many other profound effects on our law. First, as was explained in the previous sections, the principle shapes legislative enactments by placing off-limits some perfectly reasonable policy proposals—like the proposal that high school graduation should be a condition for marriage.<sup>63</sup> And like so many other rule

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meat and milk products together, many also wait a certain amount of time—30 minutes to a few hours—between eating meat and dairy. Everything the foods touch must be kept completely separate. A fully kosher household, for example, might have two or more different sets of flatware, tableware and cooking ware for making and serving meat dishes separate from dairy-based dishes. Some families even use two different dishwashers in order to maintain the separation.”)

60. The young Iranian who talks to V.S. Naipaul in Naipaul’s *Beyond Belief* is not expressing an orthodox view of religious beliefs—as he himself acknowledges—when he says, “To me, the rules about beards have no logic. They don’t say why. They just say ‘Do it.’” V.S. NAIPAUL, *BEYOND BELIEF: ISLAMIC EXCURSIONS AMONG THE CONVERTED PEOPLES* 223 (1998).

61. See Fuller, *supra* note 36 (listing the requirements of a legal system to include: (1) generality, (2) publicity, (3) prospectivity, (4) clarity; (5) non-contradictory, (6) feasibility, (7) constancy over time, and (8) congruity between written law and official enforcement).

62. Say, by refusing to enforce a stem-cell research ban that they find lacking in any rational justification. See *supra* note 48.

63. See Fuller, *supra* note 36.

of law requirements,<sup>64</sup> the requirement has become embedded in constitutional doctrine in the form of “rationality review” of all government actions (and, as already noted, in certain conceptions of the Equal Protection Clause).<sup>65</sup> Moreover, the requirement of rationality also shapes legal interpretation. Indeed, the rational justification of which we speak is none other than the proverbial legislative purpose or intent, which plays center stage in statutory interpretation.<sup>66</sup>

Critics often allege that there is no “real” legislative purpose to speak of since there are numerous legislators, each with her own purpose, some with no purpose at all.<sup>67</sup> They charge that legislative purpose is a front—an endlessly manipulable and extremely speculative idea that can be framed on endless levels of abstraction so as to produce any desired result.<sup>68</sup> Take the overused “no vehicles in the park” example. A critic might say that the statute’s legislative purpose ranges from the specific purpose of preserving park paths for walkers to the highly abstract purpose of creating an agreeable environment. These different legislative purposes may call for different resolutions—indeed, they call for starkly different inquiries.

However, this critique is greatly alleviated, albeit not eliminated, once we realize that the correct legislative purpose relates the characteristics of a targeted class (“vehicles”) to the treatment demanded (the ban from the park). Here, the options are much more limited. The legislative purpose of the “no vehicles in the park” statute is neither to preserve paths exclusively for walkers nor to create a pleasant environment. Rather, its purpose is to keep the park free of certain characteristics of vehicles, such as their danger to pedestrians, their noise, or, their pollution. Whether a case falls within or without the statute’s legislative purpose depends, at least in part, on the degree to which the

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64. Like the prohibition on retrospective criminal sanctions, on bills of attainder, on excessively vague legal requirements, etc. *Id.*

65. *See, e.g.,* Ry. Express Agency v. New York, 336 U.S. 106 (1949). *See also* Anja Seibert-Fohr, *The Rise of Equality in International Law and Its Pitfalls: Learning from Comparative Constitutional Law*, 35 BROOK. J. INT’L L. 1 (2010) (discussing similar rationality review outside the United States).

66. *See* Fuller, *supra* note 36.

67. *See, e.g.,* Frank H. Easterbrook, *Statutes’ Domain*, 50 U. CHI. L. REV. 533, 547–48 (1983); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); William T. Mayton, *The Possibilities of Collective Choice: Arrow’s Theorem, Article I, and the Delegation of Legislative Power to Administrative Agencies*, 1986 DUKE L.J. 948 (1986); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2124–26 & n.22 (1990); Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761, 774 (1987).

68. *See, e.g.,* sources cited *supra* note 67.

case at hand presents such characteristics. This does not mean that the inquiry is perfectly determinate. It surely is not, and people may disagree about which characteristics are the relevant ones or to what extent they are present in the case at hand. But this indeterminacy is a far cry from the claim that legislative purpose is a judicial fiction ran amok.

Indeed the issue of legislative purpose is another perspective from which to observe the incompatibility of the rule of law with checkerboard statutes. The problem with such statutes is that, having no identifiable justification linking the legal requirement to its targeted class, they are not amenable to proper legal reasoning. The application of checkerboard statutes can proceed only as the application of blind commands. Legal reasoning stands helpless before them: it has nothing to grasp onto, for it is precisely this link between the features of a targeted class and the treatment it receives which opens the way for legal reasoning.

#### CONCLUSION

We can now circle back to the arbitrary Chinese regulations with which we began and see why laws that specify the number of teeth an employee may show when smiling, condition employment on symmetrical breasts, or allow marriage licenses only for those who graduated from high school, are far less likely in a rule of law democracy.<sup>69</sup> Democracy's regularly scheduled elections make governments far more averse to unjustified and relatively ineffective regulations, while the nature of the democratic legislative process—with its impetus toward the broadest possible consensus—means that rational justifications and accommodations figure prominently in the crafting of policy. Generally speaking, there is too little to be gained and too much to be lost from arbitrary regulations.

As for the rule of law, these arbitrary regulations fail to possess the rationality required by the equality before the law principle. There seems to be no rational relation between symmetrical breasts and civil service employment, or between a high school diploma and the ability to marry. Again, one can always come up with some explanation. For example, allowing only those with high school diplomas to marry may make for a better next generation. However, that explanation must be one that legislators are willing to accept as rational, and then endorse.<sup>70</sup>

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69. *See supra* text accompanying note 25.

70. The real motivation—the mere desire to incentivize high school graduation—obviously would not do since it has no rational link to the class to which the law applies, that is, those applying for marriage licenses. Lon Fuller noted that authorita-

Needless to say, these constructive descriptions of democracy and the rule of law have their counterparts in altogether contrary conceptions of the two. As already noted, some theorists have long argued that the democratic legislative process, where different and often contradictory interests are forced to hammer out legislative compromises, is a recipe for some irrational and arbitrary policies. And some legal theorists have used this claim to argue that judges encountering statutory language that leads to absurd or odd results are nevertheless obligated to follow such language to its illogical conclusions.<sup>71</sup> Democracy is a sausage factory, they say, and judges must eat these sausages, whether they like them or not.<sup>72</sup>

That such arguments misunderstand the essence of democracy is a familiar argument.<sup>73</sup> What I argue here is that they also misunderstand the essence of the rule of law. What makes the rule of law a staple of good government is its imposition of reason and rationality on the exercise of government power. And this imposition of rationality is also a chief factor in its synergy with democracy. In this there should be no surprise, for both modern democracy and the rule of law are model products of the Age of Enlightenment—of humanity's turn toward reason and rationality in the management of its affairs.

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rian regimes tend to chafe under the restrictions of the rule of law, which constrain their use of power. Fuller, *supra* note 36, at 33–49. The requirement of rationality is another substantial restriction on the exercise of political power—one that democratic regimes find far more acceptable than autocratic ones.

71. An actual application of this judicial philosophy can be found in the recent D.C. Court of Appeals decision invalidating the Internal Revenue Service's interpretation of the Affordable Care Act. See *Halbig v. Burwell*, 758 F.3d 390, 407 (D.C. Cir.) (“[W]e must hew to the statute’s plain meaning, even if it compels an odd result.”), *vacated and held in abeyance*, No. 14-5018 (D.C. Circuit 2014) (en banc).

72. See, e.g., John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 102 (2006) (“Legal Process-style purposivism rests on the assumption that interpretation should proceed as if a reasonable person were framing coherent legislative policy. But measured against the true workings of the legislative process, that is an unreasonably optimistic view.”); Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1614–15 (2012) (“There are pretty absurd statutes out there. That is what you get from legislative compromise. . . . [T]he deals brokered during a committee markup, on the floor of the two Houses, during a joint House and Senate Conference, or in negotiations with the President . . . are not for us to judge or second-guess. . . . [Court decisions can be] certainly absurd as a matter of substance [because courts should presume] that the opposing factions in Congress had bargained for just such a result.”); see also John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 FORDHAM L. REV. 2009, 2049–50 (2006); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2412 (2003).

73. For legal scholarship on the matter, see, for example, Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and “Empirical” Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988).