

CHAPTER FIVE

THEORY

There are many competing current theoretical formulations of the rule of law. That should come as no surprise. It is not just that the phrase is ambiguous on its own terms, open to multiple readings. It not just that its history is a tale of different threads running through many centuries and played out in a variety of contexts. Debates over the rule of law have often been debates about something else of more immediate concern to theorists, about capitalism versus communism, about liberalism (or the primacy of the individual) versus communitarianism (or the primacy of the social), about laissez faire economic conservatism versus the social welfare state, about formal versus substantive equality, about legal positivism versus natural law theory, about whether property can be protected from mass democracy, about whether the king, or the parliament, or the pope, reigns supreme. In an implicit tribute to its powerful rhetorical resonance, theorists have accorded the rule of law a prominent role in these theoretical and political disputes, characterizing it in ways that serve their broader purposes. Hence the multitude of theoretical meanings.

The most influential theoretical formulations of the rule of law will be presented in this Chapter. These theories will be elaborated in a progression that runs from thinner to thicker accounts, by which I mean moving from those versions with lesser requirements to those with more requirements. The discussion will track the standard divide in the literature between what are called “formal” and “substantive” theories of the rule of law. It is widely accepted among theorists that one must adopt either a formal or

a substantive version, with a majority announcing their allegiance to the former. Two descriptions of the formal-substantive contrast will serve as preliminary guides to the discussion:

Formal conceptions of the rule of law address the manner in which the law was promulgated (was it by a properly authorized person...); the clarity of the ensuing norm (was it sufficiently clear to guide an individual's conduct so as to enable a person to plan his or her life, etc.); and the temporal dimension of the enacted norm (was it prospective...). Formal conceptions of the rule of law do not however seek to pass judgment upon the actual content of the law itself. They are not concerned with whether the law was in that sense a good law or a bad law, provided that the formal precepts of the rule of law were themselves met. Those who espouse substantive conceptions of the rule of law seek to go beyond this. They accept that the rule of law has the formal attributes mentioned above, but they wish to take the doctrine further. Certain substantive rights are said to be based on, or derived from, the rule of law. The concept is used as the foundation for these rights, which are then used to distinguish between "good" laws, which comply with such rights, and "bad" laws which do not.¹

The nature of a formal theory of the rule of law is best understood by way of contrast with a substantive theory. A substantive theory is characterized mainly by the greater substantive content it incorporates. Thus it incorporates to some degree one or more of the following: rules securing minimum welfare..., rules securing some variety of the market economy, rules protecting at least some basic human rights, and rules institutionalizing democratic governance. Here, the contrast with formal theories of the rule of law is stark.²

Although they focus on different aspects of the contrast, both accounts draw the same basic distinction which can be summarized thusly: formal theories focus exclusively on the form of legality, while substantive theories also include requirements that the content of the law be just in certain fundamental respects.

FORMAL VERSIONS OF THE RULE OF LAW

¹ Paul Craig, "Formal and Substantive Conceptions of the Rule of Law," Public Law 467,467 (1997).

² Robert S. Summers, "A Formal Theory of the Rule of Law," 6 Ratio Juris 127,135 (1993).

Rule by Law

The thinnest formal version of the rule of law is the notion that the state rules through law. A more apt label for this version might be “rule *by* law,” rather than rule of law, for it entails no connotation of legal limitations. The precise idea of rule *by* law is that law is a means by which the state operates in the conduct of its affairs, “that whatever a government does, it should do through laws.”³ Taken to one extreme, this version holds that “all utterances of the sovereign, because they are utterances of the sovereign, are law.”⁴ Understood in this way, the idea of the rule of law has no real meaning, for it collapses into the notion of rule by the sovereign. Likewise, this version of the rule of law has no meaning in the context of theories that define the state or government in legal terms. “It has been said that the rule of law means that all government action must be authorized by law....If government is, by definition, government authorized by law the rule of law seems to amount to an empty tautology, not a political ideal.”⁵

Although certain early versions of the German Rechtsstaat (law-state) resembled rule *by* law, no modern Western legal theorist identifies the rule of law in terms of the thinnest formal version, as rule *by* law. The *sine qua non* of the rule of law tradition is the notion that the government is itself bound or limited by law, an orientation which the idea of rule *by* law fails to manifest. This version would merit no more than a brief mention, a quick caution against the susceptibility to confusion generated by the close overlap in terms, were it not for the fact that the rule of law has apparently been

³ Noel B. Reynolds, “Grounding the Rule of Law,” 2 Ratio Juris 1,3 (1989).

⁴ Franz L. Neumann, “The Change in the Function of Law in Modern Society,” in *The Rule of Law Under Siege*, edited by William E. Scheuerman (Berkeley: Univ. of Calif. Press 1996) p. 104.

understood by some as the rule *by* law. In the words of Chinese law professor Li Shuguang: “‘Chinese leaders want rule by law, not rule of law’The difference...is that under the rule of law, the law is preeminent and can serve as a check against the abuse of power. Under rule by law, the law can serve as a mere tool for a government that suppresses in a legalistic fashion.”⁶ Other scholars have made similar observations: “Some Asian politicians focus on the regular, efficient application of law but do not stress the necessity of government subordination to it. In their view, the law exists not to limit the state but to serve its power.”⁷

Emptiness of the Formal Version

A serious error would be committed if rule *by* law were dismissed as an gross authoritarian distortion of the rule of law tradition. Its main thrust falls outside the core inspiration of this tradition, to be sure, but the formal version of the rule of is quite compatible with ruthless authoritarian regimes. Joseph Raz, a leading contemporary legal theorist, emphasized this in his influential articulation of the elements of the rule of law:

A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and racial persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies....It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law.⁸

⁵ Joseph Raz, *The Rule of Law and Its Virtue*, in *The Authority of Law* (Oxford: Clarendon Press 1979) p. 212-13.

⁶ “Chinese Movement Seeks Rule of Law to Keep Government in Check,” by Steven Mufson, *Washington Post*, 5 March 1995, A 25.

⁷ Thomas Carothers, “The Rule of Law Revival,” *77 Foreign Affairs* 95,97 (1998).

⁸ Raz, *The Rule of Law and its Virtue*, p. 211.

The law may...institute slavery without violating the rule of law.⁹

These assertions are inconsistent with many popular references to the rule of law, and might shock casual users of the phrase. It bears repeating, therefore, that this formal version of the rule of law is by the dominant understanding of the rule of law among legal theorists. It should further be recalled that the United States by most accounts followed tenets of the rule of law even when slavery was legally (and Constitutionally) enforced, and racial segregation legally imposed, and that South Africa abided by the rule of law even when the majority of its citizens had no right to vote.¹⁰ To repeat, the formal version of the rule of law does not incorporate any separate criteria of the good or just.

Raz followed Hayek when he identified “the basic intuition” underlying the doctrine of the rule of law to be: “the law must be capable of guiding the behavior of its subjects.”¹¹ He derived the elements of the rule of law from this single idea. According to Raz, these elements include that the law must be prospective, general, clear, public, and relatively stable. These comprise the minimum required to enable individuals to anticipate the legal implications of their actions. To this list Raz added several mechanisms he considered necessary to effectuate rules of this kind: an independent judiciary, open and fair hearings without bias, limited review of legislative and administrative officials—and limitations discretion of the police—to insure conformity to the requirements of the rule of law. With minor variations, the first set of requirements is representative of all formal versions of the rule of law; the second set, with minor

⁹ Id. p. 221.

¹⁰ A. van de S. Centlivres, “The Constitution of the Union of South Africa and the Rule of Law,” in *Government Under Law*, edited by Arthur Sutherland (Cambridge: Harvard Univ. Press 1956).

¹¹ Raz, “The Rule of Law and its Virtue, p. 214.

variations, is also often recognized, usually with the understanding that it stands in a supportive or supplemental relation to the first set.¹²

Raz agreed with Hayek that the rule of law furthers human autonomy and dignity by allowing people to plan their activities with advance knowledge of the circumstances under which they would be subject to legal interference by the government, and with knowledge of how the law would respond to their interactions with other individuals. Facilitating the capacity of individuals to plan in this manner, earlier labeled legal liberty, enhances freedom. “But it has no bearing on the existence of spheres of activity free from governmental interference and is compatible with gross violations of human rights.”¹³ “It says nothing about how the law is to be made: by tyrants, democratic majorities, or any other way. It says nothing about fundamental rights, about equality, or justice.”¹⁴

Morality and the Rule of Law

Raz is a leading theorist of a prominent school of thought called legal positivism, which holds that there is no necessary relationship between law and morality, that laws can be immoral but nonetheless valid as long as they are recognized as valid by legal officials.¹⁵ Legal positivism is usually set in opposition to natural law theory, versions of which assert that there is an inherent moral aspect to law, such that immoral laws are invalid and do not qualify as “law.” It is therefore significant that, although many legal

¹² See Summers, “A Formal Theory of the Rule of Law;” Robert B. Summers, “Propter Honoris Respectum: The Principles of the Rule of Law,” 74 Notre Dame Law Review 1691 (1999).

¹³ Raz, “The Rule of Law and its Virtue,” p. 220-21.

¹⁴ Id. p. 214.

¹⁵ The leading modern text of legal positivism is H.L.A. Hart, *The Concept of Law* (Oxford: Oxford Univ. Press 1961). For a discussion of the debate between legal positivism and natural law theory, see Brian Z. Tamanaha, “Legal Positivism,” *International Encyclopedia of Behavioral and Social Sciences* (2002).

positivists adopt the formal version of the rule of law, it cannot be laid upon the shoulders of legal positivists alone.¹⁶ John Finnis, the preeminent modern exponent of natural law theory, also articulated a formal version of the rule of law, with elements virtually identical to those set out by Raz.¹⁷

Vehement anti-positivist, Lon Fuller, set out the most prominent formal version of the rule of law, one far more influential among legal theorists than Hayek's. Fuller rejected legal positivism's separation of law and morality. He argued that law is a purposive enterprise, inherently moral in nature, which entails the subjecting of human conduct to the governance of rules. The elements of "legality" set out by Fuller include generality, clarity, public promulgation, stability over time, consistency between the rules as stated and what the legal actors do, and prohibitions against retroactivity, against contradictions, and against requiring the impossible.¹⁸ Identical to Raz's version, Fuller does not incorporate any requirements with regard to the content of the law; nor is democracy required. In what sense, then, is law inherently moral under Fuller's account? The morality of law identified by Fuller is essentially the same as the primary benefit of the rule of law identified by Hayek and Raz—it allows people to plan their activities, thereby enhancing their freedom and facilitating social interaction.¹⁹

Despite the similarities in their understandings of the rule of law, legal positivist Raz and anti-positivist Fuller draw two different contrasting implications from their conceptions. The first difference is that, for Fuller, a system that lacks these elements is

¹⁶ A number of theorists have identified the formal approach with legal positivism. See Craig, "Formal and Substantive Conceptions of the Rule of Law," p. 477; Dyzenhaus, "Recrafting the Rule of Law," p. 6. For reasons that will be stated in the text, I believe this identification is mistaken.

¹⁷ See John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press 1980) p. 270-76.

¹⁸ Lon L. Fuller, *The Morality of Law*, 2nd revised edition (New Haven: Yale Univ. Press 1969) Chap. 2.

¹⁹ *Id.* p. 209-10.

“not simply bad law, but not law at all.”²⁰ Fuller refers to the “rule of law” and to “legality” as if they are synonymous, and uses the criteria of the rule of law/legality to serve as the conditions for the existence of a “legal” system. In contrast, Raz along with most legal positivists would say that a legal system might fail to comply with the essential elements of rule of law yet still be a legal system. An illustration of the differing implications of these positions can be seen in relation to the Nazi legal regime, which had secret laws, laws that were not general, retroactive law making, and vague clauses. Both Fuller and legal positivists would agree that Nazi law failed to satisfy the requirements of the rule of law. But Fuller would go on to conclude that, therefore, it was not a “legal” system; whereas legal positivists would maintain that it was still a legal system but one which failed to live up to the rule of law.

For most legal positivists the meaning of the “rule of law” as a political ideal is a distinct (though related) issue to the question “what is law?” Fuller conflates these two issues: the “rule of law” *is* “legality;” the elements of the rule of law provide the answer to the question “what is law?” Fuller is not alone in drawing this connection; nor is it limited to natural law theorists. Robert Summers, another prominent exponent of the formal rule of law, made much the same assertion: “It just is characteristic of a true system of law that, overall it operates substantially in accord with principles of the rule of law;” so where a “massive violation” of the rule of law exists “we would say the system is not a system of law at all.”²¹

²⁰ Id. p. 197, 39.

²¹ Robert S. Summers, “Propter Honoris Respectum: The Principles of the Rule of Law,” 74 Notre Dame Law Review 1691,1699 (1999). Even Raz conceded that most of the elements of the rule of law “cannot be violated altogether by any legal system.” Raz, “The Rule of Law and its Essence,” p. 223.

The second difference is that, while Raz and Fuller (as well as everyone else who adopts the formal version) recognize the same core good provided by the rule of law—enhancing freedom by allowing people to plan—Fuller draws from this the conclusion that law is inherently moral, while Raz and most legal positivists refuse to take this step. Legal positivists point out that a legal system possessing the elements of the rule of law may nonetheless have laws with terribly unjust content—remember US slavery and South African apartheid. It may be, in short, an evil legal system. Fuller was well aware of this possibility, and acknowledged that the purely procedural characteristics of the formal version of the rule of law were consistent with laws with a wide variety of substantive aims,²² but he expressed the faith that its requirements have an “affinity with the good.”²³ By that he means that legal systems with these formal characteristics will more likely also have laws with fair and just content. The fact that the rules must be public means that legal officials can be called upon to justify them, and can be held to them. It provides a basis for accountability. “There will be at least some values and principles in the official culture to which the citizen can appeal in his complaints about injustice, and some tensions which he can exploit to embarrass the regime.”²⁴ At a minimum the procedural requirements of the rule of law impose limits on what might otherwise be a completely unrestrained tyranny acting entirely ad hoc. Agreeing with Fuller on this point, Finnis asserted that “A tyranny devoted to pernicious ends has no self-sufficient *reason* [‘(other

²² Fuller, *The Morality of Law*, p. 153.

²³ *Id.* p. 157-59.

²⁴ Jeremy Waldron, “The Rule of Law in Contemporary Liberal Theory,” 2 *Ratio Juris* 79, 93-94

than tactical and superficial)^{25]} to submit itself to the discipline of operating consistently through the demanding processes of law...”²⁶

There is, however, a compelling reason to refuse to identify the rule of law with morality, the tactical one alluded to by Finnis in his parenthetical. The rule of law is the dominant, most powerful and often repeated, legitimating slogan for government around the globe. Given its rhetorical power, and given that political and legal theorists have argued that legal systems that satisfy the requirements of the rule of law are entitled to a strong claim to obedience from their citizens,²⁷ it would behoove a tyrannical regime with oppressive laws to institute the rule of law—accepting inconveniences it imposes—in order to claim entitlement to the allegiance of its citizens. These sophisticated (or wily) tyrants will find support for their position in arguments put forth by prominent theorists to the effect that regimes with the rule of law, even if oppressive, should be obeyed since the alternative might be worse. Legal theorist Jeremy Waldron made such an argument: “a system that comes close to satisfying the ideal [of the rule of law] may make a reasonable claim on our support if there is a real danger that disobedience and protest against its (admitted) injustices and imperfections may precipitate a collapse into a type of regime that has not respect for legality whatsoever.”²⁸ It is a potentially pernicious argument. An odious regime may use the rule of law to legitimate its tyranny and squelch dissent in a manner which smacks of rule *by* law by pointing out that there are

²⁵ Finnis, *Natural Law and Natural Rights*, p. 274.

²⁶ *Id.* p. 273 (emphasis in original).

²⁷ Waldron, “The Rule of Law in Contemporary Liberal Theory.”

²⁸ *Id.* p. 94.

even more tyrannical possibilities. “Repressive law is perhaps less terrible than lawless repression, but it can be terrible all the same.”²⁹

According to Raz, the supreme virtue of the rule of law is not a moral virtue but the virtue of an efficient instrument suited to achieve the purpose to which it is put (whatever that might be):

A good knife is, among other things, a sharp knife. Similarly, conformity to the rule of law is an inherent value of laws, indeed it is their most important inherent value. It is of the essence of law to guide behavior through rules and courts in charge of their application. Therefore, the rule of law is the specific excellence of the law....A knife is not a knife unless it has some ability to cut. The law to be law must be capable of guiding behavior, however inefficiently. Like other instruments, the law has a specific virtue which is morally neutral in being neutral as to the end to which the instrument is put. It is the virtue of efficiency; the virtue of an instrument as an instrument. For the law this virtue is the rule of law. Thus the rule of law is an inherent virtue of the law, but not a moral virtue as such.³⁰

Another way of putting his point is that the rule of law is the most refined form that law can take, the epitome of law in its quality of lawness. The morality of law is a function of the uses to which it is put. The rule of law in the service of an immoral legal regime would be immoral; in the service of a moral regime it would be moral. Whether a legal regime merits support is not, therefore, a question of whether it respects the rule of law (though that may be a part of the consideration) but of whether it is a moral legal system.

²⁹ Martin Krygier, “Marxism and the Rule of Law: Reflections After the Collapse of Communism,” 15 *Law and Social Inquiry* 633, 641 (1990).

³⁰ *Id.* p. 225-26.

Overarching Consensus of Formal Accounts

The differences between positivists and anti-positivists, while they must be recognized, should not obscure the remarkable extent of agreement exhibited by theorists who otherwise usually stake out diametrically opposed positions. They all emphasize that the primary value of the rule of law—the essence of what it does—is to provide predictability, thereby allowing people to plan, and that this is highly valued because it enhances *individual autonomy*.³¹ Above all, the rule of law is about legal liberty. Another point of unanimity is that the rule of law is *neutral* with regard to a wide range of alternative substantive content. Fuller asserted that his notion of legality was “indifferent toward the substantive aims of the law and is ready to serve a variety of such aims with equal efficiency.”³² Summers asserted that this neutrality is strong a reason to prefer the formal over the substantive version: “a relatively formal theory is itself more or less politically neutral, and because it is so confined, is more likely to command support on its own terms from right, left, and center in politics than is a substantive theory which not only incorporates the rule of law formally conceived but also incorporates much more controversial substantive content.”³³

Yet another area of agreement can be found in the almost complete overlap in core elements identified as definitive of the rule of law: generality, certainty, clarity, publicity, prospectivity. All of these theorists derived their elements following the same basic strategy: by deduction from the primary value served by the rule of law *qua* law. These theorists emphasized that these elements required that the law as enacted be faithfully and routinely adhered to by all government officials, especially judges. These

³¹ See Waldron, “The Rule of Law in Contemporary Liberal Theory,” p. 84-85.

³² Fuller, *The Morality of Law*, p. 153.

theorists acknowledged that judges must not regularly depart from the rules to achieve substantive justice (or equity), that this should occur only in exceptional circumstances if at all, for otherwise the certainty of the rule of law would be destroyed.³⁴ These theorists recognized the necessity for institutional mechanisms to effectuate these basic elements, specifically an independent judiciary (and legal profession) through some form of separation of powers. These theorists recognized that no system could perfectly realize these criteria, that approximation was good enough, and that Western legal systems had achieved the necessary levels. And all of these theorists concurred that the formal rule of law is necessary but not sufficient to constitute a completely just legal system, that the substantive content of the law must also be just.

Rule of Law is About Rules

A final key area of agreement is that all formal accounts center their analysis of the rule of law on what they considered to be the rule-based nature of *legality*. The overall general reasoning goes as follows. The “rule of law” is in essence about “law.” “Law” is in essence comprised of rules (rules are the distinctive form that law takes). Rules are formal by nature; so law is formal by nature; so the rule of law is formal by nature. Rules can consist of any kind of content. The rule of law is open to any kind of content.

The qualities of generality, certainty, clarity, and prospectivity are at base tied to the nature of *rules*. Generality is an aspect of what it means to be a “rule,” as opposed to

³³ Summers, “A Formal Theory of the Rule of Law,” p. 136.

³⁴ *Id.* p. 137

a “order.”³⁵ That is the core difference between following a rule and taking an ad hoc action making a context specific decision. Uncertain or unclear rules have no efficacy. A retroactive rule is an oxymoron, for it cannot be followed, and therefore by definition is not a rule.

Hence these formal qualities are characteristics that all rules possess. At bottom, for formal versions, the rule of law comes down to what it means to be a rule. Any philosophical or sociological analysis of rules and rule following will highlight precisely the same considerations and elements as the formal version of the rule of law.³⁶ In the end there is nothing really distinctive about the formal rule of law as a separate ideal. Fuller’s view that the rule of law *is* legality and Raz’s view that the rule of law is *the epitome* of legality amount to the same thing—it’s about rule according to rules. The only limitation imposed on the government by this formal sense of the rule of law is that the law must take on the form of rules.

Limitations of the Emphasis on Rules

This last point, which theorists would not vigorously contest, is telling in ways not sufficiently appreciated. It produces an account of the rule of law impoverished in two respects that go beyond its substantive emptiness. First, as a matter of emphasis it ratchets up to primary significance a particular stream of the rule of law tradition that is intimately connected to capitalism. Max Weber’s argument that the formal rational law of the West facilitates capitalism because a rule oriented legal system provides the

³⁵ Frederick Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life* (Oxford: Clarendon Press 1991) Chap. 2 (“Rules as Generalizations”).

security and predictability necessary for market transactions ties directly in to Hayek's formal approach to the rule of law.³⁷ Both center upon the formality and predictability of rule following. This identity licensed the dual assumptions that capitalism requires the rule of law (ala Weber) and that the rule of law could not operate in the context of a socialist economic system or the social welfare state (ala Hayek). Capitalism and the rule of law are thus tightly wrapped into a unit.

Notwithstanding Weber, however, it is not obvious that capitalism requires the formal rule of law to function. The required level of predictability can be produced in other ways, for example through relationships based either on trust or in a mutual interest in maintaining a continuing relationship,³⁸ and capitalism requires flexibility as well as predictability.³⁹ The quickly growing body of transnational commercial law, called the new *lex mercatoria*, operates outside of any state legal system, with a strong emphasis on dispute resolution through arbitration rather than on the rigid application of rules.⁴⁰ At the very least, the necessity of capitalism for the rule of law requires more investigation before it is taken for granted.

Moreover, notwithstanding Hayek, there are sound reasons to believe that the formal rule of law can coexist with a variety of political and moral systems without difficulty. The most compelling evidence of this are the many successful examples in the world today of such various combinations. Despite his warnings, Western societies have

³⁶ See Schauer, *Playing by the Rules*; Frederick Schauer, "Formalism," 97 *Yale Law Journal* 509 (1988); Robert S. Summers, "The Formal Character of Law," 51 *Cambridge Law Journal* 242 (1992); Max Weber, *On Law in Economy and Society*, edited by Max Rheinstein (New York: Simon and Schuster 1967).

³⁷ See David Trubek, "Max Weber on Law and the Rise of Capitalism," [1972] *Wisconsin Law Review* 720 (1972).

³⁸ See Carol Jones, "Capitalism, Globalization and the Rule of Law: An Alternative Trajectory of Legal Change in China," 3 *Social and Legal Studies* 195 (1994).

³⁹ See William E. Scheuerman, "Globalization and the Fate of Law," in *Recrafting the Rule of Law*, edited by David Dyzenhaus (Oxford: Hart Publishing 1999).

demonstrated that the social welfare state can indeed be combined with the rule of law. Administrative discretion can be contained within legal restraints through adherence to legislative mandates and surrounding rules and procedures. And asking judges to apply open-ended standards like reasonableness or to make policy decisions involving interest balancing do not immediately or inevitably destroy the legal character of a predominantly rule based legal system. As long as the dominant orientation of government officials remains rule-oriented and rule bound, discretion allowed to government officials to further policy goals, or discretion accorded to judges to achieve justice in individual cases, is not necessarily the first slip down a headlong slide to oppression. Legal theorist Martin Krygier, intimately familiar with pre- and post-Communist Eastern Europe, observed that “there is a world of difference between, on the one hand, the unconstrained political voluntarism and instrumental use of law found in despotisms, and on the other, welfare states that mix bureaucratic interventions with political democracy and strong and long legal traditions.”⁴¹

Many formal rule of law theorists disavow Hayek’s (and Dicey’s) argument that the rule of law is inconsistent with the social welfare state.⁴² The formal rule of law ideal in itself does not specify the requisite proportion or areas of government action that *must* be rule bound, though all agree that it should apply to a high degree in the area of criminal law. Raz observed that societies can legitimately choose to forego adherence to the rule of law in certain contexts in order to realize other values.⁴³ The history set out in

⁴⁰ Tamanaha, *A General Jurisprudence of Law and Society*, p. 125-27.

⁴¹ Martin Krygier, “Marxism and the Rule of Law: Reflections After the Collapse of Communism,” 15 *Law and Social Inquiry* 633, 642 (1990).

⁴² See Summers, “A Formal Theory of the Rule of Law,” p. 136-37. An affirmative argument that the rule of law is compatible with socialism can be found in Christine Sypnowich, “Utopia and the Rule of Law,” in *Recrafting The Rule of Law*.

⁴³ Raz, “The Rule of Law and its Virtue,” p. 228.

earlier Chapters confirmed the connection between liberalism and the development of capitalism, and the centrality of the rule of law to liberalism. But liberalism is not only about capitalism, and, more importantly, the tradition of the rule of law has always been about much more than just capitalism.

This assertion leads to a more crucial point obscured by the formal rule of law in its emphasis on rules. The core inspiration of the rule of law tradition has been the restraint of tyranny. Such restraint went beyond the idea that the government must enact and abide by laws that take on the proper form of rules (be general, certain, etc.), to encompass the idea that there were certain things the government or sovereign could not do. The second impoverishment of the rule orientation of the formal approach is that this emphasis is at most secondary, if not entirely absent. Raz openly acknowledges that the formal rule of law may serve tyranny. Even in Fuller's account, resistance to tyranny is by-product of the procedural restraints imposed by the rule of law. A theory of the rule of law that takes its essence to be the government acting according to prospective, public rules lacks the resources for generating an argument that the government is prohibited from doing certain things to its citizens. The government can do whatever it desires, so long as it is able to pursue and formulate those desires in terms consistent with (general, clear, certain, and public) rules declared in advance. If the government wishes to do something not presently legally authorized, it must simply change the law first, making sure to meet the requirements of the legal form.

Based upon this conclusion, it is not unfair to assert that the formal rule of law tradition has more in common with the idea of rule *by* law, which is likewise a purely formal idea, than with the medieval idea that the king operates within a web of natural,

divine, or customary law constraints, which were substantive. This is not to deny that there is a distance between rule by law and the formal rule of law, or to deny that the formal rule of law serves important values. It is, rather, to emphasize the point that the rule of law tradition is about more than law formally conceived.

Democracy and Formal Legality

Like formal legality, democracy is substantively empty in that it says nothing about what the content of law must be. It is a decision procedure utilized to determine the content of law. A theoretical argument about legitimacy ties formal legality to democracy.

The legitimacy of democracy derives from its service to the political freedom of the individual. Freedom is to live under laws of one's own making, theorists from Rousseau to Kant have asserted. As leading contemporary philosopher Jurgen Habermas put it, "the modern legal order can draw its legitimacy only from the idea of self-determination: citizens should always be able to understand themselves also as authors of the law to which they are subject as addressees."⁴⁴ Law thus obtains its authority from the consent of the governed. Democracy is the mechanism through which this consent is manifested. So the substantive content of laws in a free society must be filled in by democratic means. When this occurs, judges, other government officials, and citizens must follow and apply the law as enacted. Under this reasoning, formal legality, in the sense of being bound to follow the rules, is derivative, for it is required by and takes its authority from democracy.

⁴⁴ Jurgen Habermas, *Beyond Facts and Norms*, translated by William Rehg (Cambridge: MIT Press 1996) p. 449.

Habermas made the most extensive recent argument to this effect, in an effort to capture the complex of ideals in liberal democracies.⁴⁵ According to Habermas, the loss of belief in natural law and the fact of moral pluralism leaves democratic procedures the only appropriate way to legitimate law and its coercive apparatus: “Democratic genesis, not a priori principles to which the content of norms would have to correspond, provides the statute with its justice: ‘The justice of a law is guaranteed by the particular procedure by which it comes about.’”⁴⁶ Under this understanding, he asserted, the “legitimacy of positive law is conceived as procedural rationality,”⁴⁷ meaning that, in the absence of higher standards against which to adjudge the moral rightness of the law, the law is good if it is made pursuant to good procedures. Democratic mechanisms that are rational and allow everyone affected by the law an equal opportunity to participate, and that require everyone’s consent, are good procedures.

Rousseau identified the majority decision made by representatives as the best way to identify the “general will,” which reflects the will of everyone. Kant argued that that the consent of *all* citizens (restrictively defined) does not mean what they would agree to if actually consulted, but instead what they would agree to if they acted consistent with reason.⁴⁸ Habermas, at least in theory, requires unanimity: “the legitimacy of law ultimately depends on a communicative arrangement: as participants in rational discourses, consociates under law must be able to examine whether a contested norm meets with, or could meet with, the agreement of all those possibly affected.”⁴⁹ Owing to this unanimity requirement, this system is a truly free one in which “the addressees of law

⁴⁵ Id. Chapters Three, Four, Five, and Six.

⁴⁶ Id. p. 189.

⁴⁷ Id. p. 453.

⁴⁸ Kant, *Political Writings*, p. 78-80.

are simultaneously the authors of their rights.”⁵⁰ Despite his rather unequivocal assertions, however, in the end Habermas does not really mean actual unanimous consent, which he knows is impossible. These theorists were presenting a regulative ideal, setting up as a goal that legal systems should strive toward enacting laws all persons affected would agree to, even if they are doomed to fall short. Interestingly, if the goal were indeed to enact laws that would achieve unanimous agreement, it is not necessarily the case that majoritarian democracy is the best system in pursuit of that end, at least in situations of moral pluralism where democratic contests leave some groups as winners and others losers. Laws drafted by a philosophical or political elite with the unanimity objective in mind might well come closer to approximating it. The logical extension of these theories, which suggests caution in embracing them, is that (abstract) freedom for citizens might best be attained by denying the freedom (in practice).

Perhaps the most persuasive position on these issues remains the frankly pragmatic stance taken by Locke: requiring direct participation and requiring unanimity are recipes for paralysis, so representative democracy and majority rule will have to do. So long as a person or group on the losing side on one issue has a fair chance of prevailing on another issue, the law will be consented to (even by losers) and the system will be free.

Before considering substantive accounts of the rule of law, it is worthwhile to note that resort to democracy as a procedural mode of legitimation for law carries a limitation identical to that of formal legality. Just as formal legal systems can carry out evil laws, systems that use democratic procedures to determine the content of the law can

⁴⁹ Habermas, *Between Facts and Norms*, p. 104.

⁵⁰ *Id.*

produce evil laws. When democracy is cited as grounds for the legitimacy of law, and the values of formal legality are offered as additional reasons for legitimacy, the moral claim of law to obedience might seem weighty. But neither of these formal mechanisms insure that the laws enacted and carried out will be moral in content or effect.⁵¹

SUBSTANTIVE VERSIONS OF THE RULE OF LAW

Individual Rights and the Rule of Law

All substantive versions of the rule of law incorporate the elements of the formal rule of law, then go further, adding on content requirements in various combinations. That is what makes this category thicker than the formal. Among legal theorists the most renowned substantive account of the rule of law is Ronald Dworkin's, mentioned earlier, which he set out by way of contrast to the formal ("rule-book") version:

I shall call the second conception of the rule of law the 'rights' conception. It is in several ways more ambitious than the rule-book conception. It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced *upon the demand of individual citizens* through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish, as the rule book conception does, between the rule of law and substantive justice; on the contrary it requires, as a part of the ideal of law, that the rules in the rule book capture and enforce moral rights.⁵²

⁵¹ See Tamanaha, *A General Jurisprudence of Law and Society*, p. 96-106.

⁵² Ronald Dworkin, "Political Judges and the Rule of Law," 64 *Proceedings of the British Academy* 259,262 (1978).

Dworkin insists that these rights, which he indicates are discernable by resort to political principles, are not themselves granted by the positive law, but are instead prior to and an integral aspect of the positive law.

He avoids resort to metaphysics by identifying the source of those rights in the community. The rule-book “represents the community’s effort to capture moral rights.”⁵³ But the rule book is not the exclusive source of these rights, and the rule book can be silent or can produce conflicting interpretations. In such instances it is the role of the judge to make the decision which “best fits the background moral rights of the parties” by framing and applying an overarching political principle that is consistent with the body of existing rules and principles.⁵⁴ These principles may not be in direct contradiction with existing democratically created rules, but they can go beyond the rules, and they can resolve apparent conflicts between the rules. When engaging in this task judges do not ask what the legislators did do or would have done had they anticipated the problem at hand, but what they *should* have done had they been acting consistent with the political principles underlying the system and infusing the community.

Dworkin acknowledged the obvious objection to his rights conception: it is “often the case” that “it is controversial within the community what moral rights they have.”⁵⁵ If that is so, how then is the judge supposed to formulate the supposedly prevailing political principles? Dworkin does not address this question so much as rest upon the faith that the application of a controlling principle will usually be evident, and upon the faith that within liberal societies the basic principles cohere. Accordingly, even in

⁵³ Id. p. 269.

⁵⁴ Id. p. 268.

⁵⁵ Id. p. 263-64.

situations of conflict between competing principles, with careful examination the correct resolution will become apparent.

Scant support for this sanguine attitude can be found in philosophical or public discourse. As moral philosopher Alastair MacIntyre recently observed, “no fact seems to be plainer in the modern world than the extent and depth of moral disagreement, often enough disagreement on basic issues.”⁵⁶ Recitation of a few familiar examples of ongoing controversies should suffice to confirm the point.

Antagonists on opposing sides of the question of whether affirmative action is consistent with the prohibitions against discrimination under the civil rights statutes and Equal Protection Clause of the US Constitution can both recite compelling political principles on their behalf. Supporters of affirmative action claim that existing social inequalities and (conscious and unconscious) racism systematically operate to repress minorities in a manner that consistently places them at a competitive disadvantage in the competition for educational and employment opportunities. Equality requires treating like cases alike, and dissimilar cases dissimilarly. They are in dissimilar competitive positions owing to societally imposed disadvantages. The ten pound weights society has appended to their legs render the race manifestly unfair. Therefore equality requires that they be treated differently, that they be accorded certain advantages (i.e. lowered entry criteria for college, or preferences in bidding for contracts, or prevailing in cases of a tie) to offset the disadvantages they have suffered, so they can compete from a truly equal position. They must be given a ten yard head start to make up for the ten pound weights. Opponents of affirmative action insist that such advantages unfairly discriminate against

⁵⁶ Alastair MacIntyre, “Theories of Natural Law in the Culture of Advanced Modernity,” in *Common Truths: New Perspectives on Natural Law*, edited by E.B. McLean (Wilmington Del.: ISI Books 2000).

innocent whites who are competing for the same opportunity (running the same race). Equality requires that everyone be treated the same, with the same criteria applied to all. Regardless of the alleged weights (and, besides, everyone suffers from some kind of disadvantage), treating people equally means everyone must begin at the same starting line. This is the age-old dispute, going back to Aristotle, of whether equality requires formal equality or substantive equality. The language of the Equal Protection Clause and the civil rights statutes do not support one side over the other, and community morality and political principles provide support for both positions.

A similarly irresolvable dispute involves whether the privacy rights of women, their freedom to control what happens to their bodies, entitle them to abort a fetus, or whether the fetus has a competing right to life that prohibits such abortion. Then there is the question of whether the right of association permits clubs to restrict entry to membership on whatever criteria they desire (including sex and race), or whether the right of association of those who want to join, or the prohibition against discrimination, make such restrictions improper. The list of such controversies extends from the rights of homosexuals, to the freedom to express hateful racist speech, to the right of subcultures to practice polygamy or arrange marriages or take hallucinogens on religious grounds, to restrictions on strip clubs and access to pornography on the internet. Furthermore, the scope of controversy encompasses more than the content of the right to envelop also appropriate remedies. For example, while a majority of citizens might have supported the principle of *Brown* invalidating legally enforced segregation (although a sizable group disagreed, especially in the southern US), a substantial majority of white citizens were vehemently opposed to busing children out of district as a remedy for segregated

schools.⁵⁷ These are not peripheral issues but disputes that go to the heart of the political principles and morals circulating in the US and in other liberal societies.

To suggest that society's views on these subjects cohere at the highest level of political and moral principle, such that an answer to each disagreement exists if only the judge considered the issue with enough acuity, fails to appreciate the ultimately contestable nature of the disputes, and the heartfelt depth of the opposition involved. This does not mean that reconciliation should not be sought, but that reconciliation will be achieved only through conversation and persuasion over time. Perhaps the most problematic implication of this approach is that it removes important issues from the political arena. They are decisions that must be made by individuals and societies, not matters of calculus to be discovered by the proper hierarchic alignment by judges of preexisting political and moral principles.

The existence of such deep disagreements recommend scepticism with respect to another assumption crucial to Dworkin's view, that the enacted rules generally reflect the society's moral sense, and that (taken together) these rules and principles form a coherent whole. When a community is divided in its moral sense, however, there is no reason to assume that the resulting body of legal rules or the community morality will be coherent or consistent internally. It should not, furthermore, be assumed that those empowered to make the law are always or primarily motivated to create law that faithfully mirrors the community morality. After all, the inordinate influence of special interests in securing legislation in their favor is notorious.⁵⁸

⁵⁷ See D. Adamany and J. Grossman, "Support for the Supreme Court as a National Policymaker 5 *Law and Policy Quarterly* 405 (1983).

⁵⁸ For an extensive analysis and argument that raises questions about whether the laws reflect community views, see Tamanaha, *A General Jurisprudence of Law and Society*, Chaps. Three, Four and Five

The import of these objections strikes not only at Dworkin but at all substantive versions of the rule of law that incorporate individual rights. Regardless of whether one resorts to a metaphysical natural law theory or to shared community morals, or to the body of existing rules, as guides to locating the natural rights to be protected by the rule of law, there is no uncontroversial way to determine what these rights entail. Manifold are the complexities, only a couple of which will be mentioned. As already demonstrated with the notion of equality, all general ideals—like equality, liberty, privacy, the right to property, the freedom of contract—are contestable in meaning and reach. Moving from the general ideal to particular contexts of application invariably opens up the possibility of various interpretations, no single one of which can be designated as superior by reference to the right itself (or in combination with other rights). Furthermore, no right is absolute, so consideration of social interests must always be involved, which goes beyond, and cannot be answered through consultation of, the right alone.

Anti-Democratic Implications of Rights

A final formidable problem is raised by these difficulties: the anti-democratic implications of individual rights. There are two distinct aspects to this—the limitation on democracy, and the power accorded to judges. As indicated a number of times in the course of this book, early liberalism evinced an ambivalent attitude toward democracy. Liberty understood in terms of self-determination, combined with the ideal of equality, entails that citizens are entitled to having a say in how they are ruled. But liberty understood as the right to property and the right of minorities (a label then appended to religious groups and the wealthy, not to racial groups) to be free from oppression stands

in fear of popular democracy. It was widely assumed that, given the chance, “The poor majority would of course pass laws taking from the rich minority their wealth until wealth was equally distributed.”⁵⁹ For liberalism, and for the rule of law in its service, fear of mass democracy has always dominated. Consequently, within liberalism, the “Rule of Law is more concerned with and committed to individual liberty than democratic governance.”⁶⁰ Thus individual rights trump democracy. There are certain actions a parliament cannot take, certain laws it cannot pass, even when democratically authorized. This sets restrictions on the notion that people (the demos) are entitled to rule themselves as they please.

A standard answer given in response to this objection is that democracy still rules, at least when the individual rights that are protected against infringement are explicitly contained within Constitutions or Bills of Rights, because such clauses are themselves the products of democratic forces. These limits are self-imposed by the demos on the demos, and can be removed by the demos (by constitutional amendment) if it so desires, so there is no inconsistency with democratic rule. This answer is not satisfactory, however, to many rights theorists, from Locke to Dworkin, who insist that rights preexist enactment, that individuals possess these rights (as a grant from God, or attached to our status as human beings, or as members of a moral community) independent of any explicit recognition in constitutional provisions or statutes.

Another sophisticated response to the anti-democratic objection is that individual rights are in fact consistent with democracy in so far as democracy needs such rights to

⁵⁹ Frederic William Maitland, *A Historical Sketch of Liberty and Equality* (Indianapolis: Liberty Fund 2000 [1875]) p. 153.

⁶⁰ Allan C. Hutchinson and Patrick Monahan, “Democracy and the Rule of Law,” in *The Rule of Law: Ideal or Ideology*, p. 100.

preserve the integrity of its process; that is, only truly free people can exercise the self-determination allowed by democracy. Freedom is foremost self-determination (democracy), but to be genuinely self-determining one must first be free (individual rights). Democracy is limited by individual rights for the greater good of democracy, both in the service of freedom. Priority (or equal primacy) is then given to democracy, and the content of individual rights consists in large part of what is necessary to facilitate democracy. The rights of property, of free association, and free speech, in this view, are all necessary for the constitution of the self-determining person that democracy presupposes and requires. This theory has the attraction of intertwining democracy and individual rights, but it reverses the liberal tradition, which historically espoused a secondary position for democracy relative to individual rights and democracy: “The existence and extent of democratic governance is only justified insofar as it better serves the enhanced liberty of individuals; it is a recent recruit on the proclaimed march to the truly liberal state.”⁶¹

A distinct anti-democratic problem arises owing to the fact that *someone* must say what individual rights mean in particular contexts. Rights are not self-applying. Someone must identify the limits they impose on the law making power. In many contemporary systems final say over the content of rights is accorded to judges. When judges are not elected, this grants to a group of individuals not accountable to democracy the power to impose restraints on democracy. No concern would be merited by this allocation of authority if the content and implications of rights were readily apparent, but, as indicated, often they are not. Once again does the indeterminacy problem rear its unwelcome head. If the judges consult their own subjective views to fill in the content of

⁶¹ Id. p. 100.

the rights, the system would no longer be the rule of law, but the rule of the man or woman who happens to be the judge. Substitute one judge for another with different views, or get a different mix of judges, and the result might well be different. It amounts to a clutch of Platonic Guardians presiding over the common people (and their representatives) rendering final judgments on issues that most divide the polity, removing controversies from the political arena, placing them under the purview a legal elite.

Defenders pursue one of three main avenues to maintain the integrity of law from this charge of subjectivity. So called “originalists” among legal theorists insist that the judge must interpret the rights in strict fidelity to the intentions of the delegates and voters who drafted and ratified them. The judge’s task is to answer a factual question: what did the enactor of the right intend. This interpretive orientation obviates the subjectivity of the judge and remains true to democratic authority. Three problems with this approach stand out: the evidence of such intention (especially for rights enacted a century or two ago) often is weak or non-existent; there may well have been no intention at all (the problem at hand was not contemplated at the moment of enactment); or there may have been a variety of intentions among those who voted. Instead of dealing directly with the issues at hand, the judges debate historical questions, for which they are ill qualified.

Pragmatically oriented theorists offer a more realistic alternative, asserting that this openness of rights (and of the law generally) to the subjective views of the judges occurs only at the margins, outside the core of plain meaning, not all the time. When it surfaces the judge must try in good faith to render what he or she believes to be the right decision. A lamentable departure from democratic authority it might be, but one that is

inevitable regardless what system is devised. Anyway the situation does not arise frequently enough to render this practice one of rule by Platonic Guardians. The virtue of this response is candor. But its attempt to minimize the significance of the problem is not persuasive. Even if judges consult their personal views of what should be done on a relatively infrequent basis, it is still significant if it occurs on issues which society holds dear and over which it is most divided

The third avenue tracks the position staked out by Dworkin. He denied that judges consult their *own* subjective views of the governing principles but instead (should) seek to find the community's latent or emergent principles; and this task is construed as democratic in nature, as a furtherance of democracy rather than inconsistent with it.⁶² Judicial opinions are a part of public political discourse. The Court, like the legislature, is a political institution participating in and reflecting the political process.⁶³ Judges should step in to enforce rights especially under those circumstances where democracy is failing to accurately represent the principles underlying the polity or to achieve justice. Judges, in this understanding, actually support democracy, even as they invalidate democratically enacted legislation on the grounds that it is inconsistent with individual rights.

Sceptics of this argument point out that it is still the judge's view of the community's principles, which is difficult to separate from the judge's own set of principles. The latter invariably shapes the former. The suspicion that the personal views of the judges have a determinative role in shaping the content of the rights is difficult to

⁶² See Dworkin, "Political Judges and the Rule of Law."

⁶³ See Allan C. Hutchinson, "The Rule of Law Revisited: Democracy and Courts," in *Recrafting the Rule of Law*. This article, construing courts actions as consistent with democracy, represents a remarkable

repress considering that judges often disagree among themselves on what appears to be ideological grounds, and studies of the Supreme Court demonstrate a correlation between the personal views of judges and their decisions.⁶⁴

Finally, it is perhaps contradictory to construe judges as democratic actors when the essential thrust of the institutional design supporting the rule of law—specifically the separation of powers and an independent judiciary—is to insulate judges from political forces in order that they may render decisions based exclusively upon the law. Rights are understood to be “anti-majoritarian,” which is one of the reasons their protection is thought best laid in the hands of the (non-democratic) judiciary. Indeed, judges are universally condemned if seen to be acting politically. Dworkin’s argument is that this condemnation is merited only when judges base decisions on political “policy” as opposed to political “principle,” and the latter is what he advocates as consistent with democracy. But the line between policy and principle, if it can be drawn at all, is permeable and endlessly contestable (not to mention the principles themselves).

The Rechtsstaat

At this point it is informative to consider the avowedly substantive German version of the rule of law, called the *Rechtsstaat*, for it manifests the tensions between democracy and the rule of law. The notion of the *Rechtsstaat* has gone through several different phases. Early on it was strongly influenced by Kant’s liberalism, with an emphasis on formal rights that insured equal liberty for all. From the mid-19th Century, up through the mid-20th Century, it came to be understood more in terms of rule *by* law.

turnaround for Hutchinson, who in a previous article argued that the rule of law was a restraint on democracy.

But the atrocities committed through law by the Nazi regime, and the failure of law to serve as a barrier against Nazi terror, led to marked changes in the understanding of the *Rechtsstaat* following the Second World War. In the post-War period of German self-examination and recrimination, the prevailing legal positivist understanding of law was blamed by many as the culprit in the participation of judges and the legal profession in state tyranny. The problem was that if law and rights are whatever the state says they are, as legal positivism holds, there is no way to set legal limits on state action.

The Basic Law, West Germany's post-war Constitution, radically altered this by reinjecting with a vengeance substantive content into the rule of law. Rainer Grote summarized the changes:

The concern with the substantive elements of the rule of law is one of the most important features of the Basic Law. While including some of its widely recognized formal and procedural aspects, like the principle of legality..., the right to a fair hearing before the courts..., and the prohibition of retro-active criminal laws..., it goes at the same time beyond a merely formal understanding of the rule of law by establishing the respect for and the protection of the dignity of man as the guiding principle of all state action....The protection of individual dignity is recognized as the supreme value of the constitutional order created by the Basic Law....Art. 1, para 2 acknowledges inviolable and inalienable human rights as the basis of every community, of peace and justice in the world, thereby recognizing the universal and extralegal character of these rights which exist prior to and irrespective of their official recognition by the state....Finally, it tries to make sure that the core guarantees which shape the liberal character of the state and its federal structure cannot be abolished by way of future constitutional amendments. Among other things, art. 79 declares amendments to the Basic Law which affect the basic principles laid down in articles 1 and 20, including the inviolability of human dignity as the central element of each of the more specific fundamental rights guarantees, inadmissible in any circumstances (save the adoption of a completely new constitution).⁶⁵

⁶⁴ See Tamanaha, *Realistic Socio-Legal Theory*, Chap. 8.

In addition to these explicit protections for individual rights, a special Constitutional Court with broad jurisdictional scope was created to enforce the rights of individuals with respect to government actions. Court decisions, especially those relating to the right of dignity, have gone beyond the negative sense of restricting government actions to also in some cases require affirmative government action when necessary to alleviate harm to rights caused by conduct of private citizens and groups.⁶⁶ “In sum, the rule of law appears under the Basic Law as shorthand for the concept of fundamental rights, which is complemented by the fragmentation of political power within the framework of a parliamentary democracy and a strong role for the judiciary.”⁶⁷

These features situate the preservation of rights solidly within the notion of the rule of law, beyond the reach of the legislature, and even beyond the reach of constitutional amendment (short of completely starting anew, short of revolution). Repudiating legal positivism, the declaration that rights exist independent of enactment places them above lawmakers and the demos. Henceforth there would be no question of whether there are limits on the power to legislate or limits on government action; the only question would be the content of those limits. In effect, this construction revived a form of natural law limits *sans* its religious underpinnings, and handed over enforcement to a judicial body.

Only two consequences resulting from this system will be noted here. The first is that the right to dignity has proven especially susceptible to a broad reading by the judges

⁶⁵ Ranier Grote, “Rule of Law, Rechtsstaat and Etat de droit,” in *Constitutionalism, Universalism and Democracy—A Comparative Analysis*, edited by Christian Starck (Baden-Baden: Nomos Verlagsgesellschaft 1999) p.286.

⁶⁶ Id. p. 289.

⁶⁷ Id. p. 288. See also Ulrich Karpen, “Rule of Law,” in *The Constitution of the Federal Republic of Germany*, edited by Ulrich Karpen (Baden-Baden: Nomos Verlagsgesellschaft 1988).

on the Constitutional Court, covering all sorts of subjects, imposing negative as well as positive duties on the part of the government. Once again, the problem of indeterminacy raises serious questions about how judges specify the content and implications of such rights in situations of application.⁶⁸ The second is that many political disputes have been transformed into constitutional questions, such that there has been “a marked judicialization of politics in Germany.”⁶⁹ The effect of this expansion of rights has been “a reduction in the legislative discretion”⁷⁰ of the Parliament. Through this understanding of the rule of law, the realm of politics, the reach of democracy, is being circumscribed.

Formal Legality, Individual Rights, and Democracy

To reiterate the central point of the preceding two Parts, the anti-democratic implications of individual rights are considerable, both in the limits they set on democratic legislation and in the fact that unelected judges determine the extent of those limits. Notwithstanding this tension, there are thick substantive conceptions of the rule of law which include the formal version, individual rights, *and* democracy.⁷¹

Rather than claim that the link between these three aspects is *conceptual*, another way of associating them is to observe that *in practice* they have often been conjoined—that they cluster together in contemporary societies considered to exemplify the rule of law tradition. When the phrase the rule of law is uttered, therefore, it typically is understood to include democracy and individual rights along with formal aspects of

⁶⁸ See Habermas, *Between Facts and Norms*, p. 240-53.

⁶⁹ Grote, “Rule of Law, Rechtsstaat and Etat de droit,” p. 288

⁷⁰ *Id.* p. 291.

legality. This triumvirate is not analytically nor semantically necessitated, under this view, but that does not detract from the fact that it is a unified package, at least in liberal democracies. T.R.S. Allan made an argument (more implicitly than explicitly) like this on behalf of his thick substantive conception of the rule of law:

[T]he term ‘rule of law’ seems to mean primarily a corpus of basic principles and values, which together lend some stability and coherence to the legal order....The rule of law is an amalgam of standards, expectations, and aspirations: it encompasses traditional ideas about individual liberty and natural justice, and, more generally, ideas about the requirements of justice and fairness in the relations between government and governed. Nor can substantive and procedural fairness be easily distinguished: each is premised on respect for the dignity of the individual person....

The idea of the rule of law is also inextricably linked with certain basic institutional arrangements. The fundamental notion of equality, which lies close to the heart of our convictions about justice and fairness, demands an equal voice for all adult citizens in the legislative process: universal suffrage may today be taken to be a central strand of the rule of law.⁷²

Allan was careful to limit his conception to the British understanding of the rule of law, but it is representative of broader views. A powerful confirmation of this came in the declaration of the 1990 Conference on Security and Cooperation in Europe, with representatives from almost three dozen European countries, along with the United States and Canada: “the rule of law does not mean merely a formal legality which assumes regularity and consistency in the achievement and enforcement of democratic order, but justice based upon the recognition and full acceptance of the supreme value of the human

⁷¹ See Norman S. Marsh, “The Rule of Law as a Supra-National Concept,” in *Oxford Essays in Jurisprudence*, edited by A.G. Guest (Oxford: Oxford Univ. Press 1961) p. 244.

⁷² T.R.S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Oxford Univ. Press 1993) p. 21-22.

personality and guaranteed by institutions providing a framework for its fullest expression;” and that “democracy is an inherent element of the rule of law.”⁷³

While the formal version is the dominant understanding of the rule of law among legal theorists, this thick substantive rule of law, which includes formal legality, individual rights, and democracy, might well capture the common understanding of the rule of law within Western societies. Common opinion is weighty in the contest over what an ideal represents, even when theorists are wont to assert that the popular understanding is wrong or confused. What makes the rule of law so important today is not its theoretical significance but its power as a widely repeated slogan.

A significant implication can be taken from the fact that formal legality, individual rights, and democracy are regularly instantiated as a package. The anti-democratic implications of individual rights, while quite real, can also be managed within particular systems. When formal legality, rights, and democracy are all valued within that society a balance can be found through the flux of operative political forces. There is no guarantee of maintaining a successful balance, but that it can work cannot be doubted in the face of so many current examples, each different in its own way. When courts, in the name of protecting individual rights, overreach or squelch democratic lawmaking too much, their conduct becomes a political issue and creates a backlash that can prompt the court to change its conduct. A notorious example of this is the 1930’s US Supreme Court, which struck legislative social welfare initiatives until President Roosevelt proposed to enlarge the Court as a way to appoint more compliant Justices; in response to

⁷³ Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSFE, June 5- July 29, 1990, numbers 3 & 4. See also Ernest S. Easterly, “The Rule of Law and the New World Order,” 22 *Southwestern Univ. Law Review* 161, 165-66 (1995); John Norton Moore, “The Rule of Law and Foreign Policy,” [1993] *Harvard Journal of World Affairs* 92.

the so-called “court packing plan,” the Court began upholding the legislation. Although history has adjudged this event in favorable terms, it points out the attendant risks, for under other circumstances pressure can also be brought to bear on Courts with anti-democratic consequences.

There is no single formula for the achievement of a workable balance. At a minimum there must be a potentially active public, exercising a degree of vigilance over government officials, prepared to rise up in protection of individual rights *and* democracy, and of the idea that everyone, including the government, is bound by the law. It is also essential that the government officials share in these ideals.

Thickest Substantive Versions

The thickest substantive versions of the rule of law incorporate formal legality, individual rights, and democracy, but add a further qualitative dimension that might be roughly categorized under the label “social welfare rights.” The outstanding example of this remains the findings of the International Commission of Jurists of on meaning of the rule of law following a 1959 Conference on the subject:

The ‘dynamic concept’ which the Rule of Law became in the formulation of the Declaration of Dehli does indeed safeguard and advance the civil and political rights of the individual in a free society; but it is also concerned with the establishment by the state of social, economic, educational and cultural conditions under which man’s legitimate aspirations and dignity may be realized. Freedom of expression is meaningless to an illiterate; the right to vote may be perverted into an instrument of tyranny exercised by demagogues over an unenlightened electorate; freedom from government interference must not spell freedom to starve for the poor and destitute.⁷⁴

obsession on preventing government tyranny, freeing the individual to do as they please. In this conception, the rule of law imposes on the government a duty to make life better for people, to enhance the circumstances of their existence, including insuring a measure of distributive justice. The German *Rechtsstaat* took a half step in this direction with its recognition of the right of dignity. Leading US constitutional theorist Lawrence Tribe also articulated a version of this when he advocated expressed “the desire to incorporate basic notions of decency and compassion into a strong and principled Rule of Law.”⁷⁵

Wonderful as these aspirations might be, incorporating them into the notion of the rule is seriously problematic for the reason identified by Raz: “to explain its nature is to propound a complete social philosophy.”⁷⁶ Contests over social values are thereby reformulated into fights over what the rule of law means. The rule of law then serves as a proxy battleground for a dispute about something else, distracting from a fuller consideration of the important social goals that are really at issue.

SUMMARY OF ALTERNATIVE THEORETICAL FORMULATIONS

The following table specifies the basic set of alternative characterizations of the rule of law set out in this Chapter. Consistent with the preceding discussion, the table is presented in an order that runs from thinner to thicker accounts of the rule of law, with a basic separation between formal and substantive accounts. To repeat, formal accounts incorporate as aspects of the rule of law only formal or procedural characteristics,

⁷⁴ International Commission of Jurists, *The Rule of Law in A Free Society: A Report of the International Congress of Jurists* (Geneva 1959).

⁷⁵ Laurence H. Tribe, “Revisiting the Rule of Law,” 64 *N.Y.U. Law Review* 726, 731 (1989).

⁷⁶ Raz, “The Rule of Law and its Virtue,” p. 211.

whereas substantive versions include requirements relating to the content of the law as well—the law must be good in some respect or another.

ALTERNATIVE RULE OF LAW FORMULATIONS

Thinner -----> to -----> Thicker

FORMAL

VERSIONS:	Rule-by-law -law as instrument of government action (but not restriction)	Elements of legality -general, prospective, equal, clear, certain (legal liberty)	Democracy +legality -consent determines content of law (political liberty)
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SUBSTANTIVE

VERSIONS:	Individual Rights -property, contract, privacy, autonomy (private liberty)	Right of Dignity & /or Justice	Social Welfare -substantive equality, welfare, preservation of community
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Most accounts of the rule of law along this continuum are progressively more encompassing in the sense that each successive version incorporates the cluster of characteristics of the versions that precede it. For example, the versions that include individual rights usually also include democracy and legality; the social welfare versions often incorporate those three as well as concerns about equitable distribution, and more.

Anglo-American legal theorists predominantly identify the rule of law in terms of the elements of legality (second category). This narrow approach focuses on what are traits specific to legality, to rules as such, remaining neutral with regard to the content of the law. It can therefore be applied with many different substantive regimes, and owing to this neutrality it will be less controversial. This substantively empty quality has been

identified by theorists, and by the World Bank and other development agencies, as grounds for its universal application.⁷⁷ The flaw of this approach is that it is compatible with laws with evil content, and may even help fortify the grip of an oppressive regime.

A notable group of Anglo-American legal theorists adopt the fourth category, including legality, democracy, and individual rights within the rule of law. This substantive version ties together the entire Western political-legal structure, and packages it as a unit under the “rule of law.” This version includes minimum requirements that the content of the law be just, at least with regard to individual rights. The flaws of this approach are that there are serious questions about how to devise standards by which the content is to be evaluated (especially in contexts of moral pluralism), the tendency to expand judicial power at the expense of democratic forces, and opposition that comes from non-Western countries with different underlying socio-cultural understandings (especially those that are more communitarian than individualist).

As between these two most popular versions, the strengths of one mirrors the weaknesses of the other.

⁷⁷ Lawrence Tshuma, “The Political Economy of the World Bank’s Legal Framework for Economic Development,” 8 *Social and Legal Studies* 75, 83 (1999); World Bank, *Governance and Development* (Wash. D.C.: World Bank 1992).