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‘Who’ or ‘what’ is the rule of law?

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Abstract

The standard account of the relation between democracy and the rule of law focuses on law’s liberty-enhancing role in constraining official action. This is a faint echo of the complex, constitutive relation between the two. The Greeks used one word – *isonomia* – to describe both. If democracy is the system in which people have an equal say in determining the rules that govern social life, then the rule of law is simultaneously before, after, concurrent and synonymous with democracy: It contributes to the formation of citizens with the capacity for self-governance, serves as the instrument through which democratic decisions are implemented, functions as one of the central social practices that constitute citizens as equals and addresses the question of how to ensure that government by the people operates for the people. The rule of law has many independently valuable qualities, including impartiality and predictability. But, to valorise the rule of law for its own sake is to fetishize authority. The fundamental values of the rule of law are as the instrument of democratic self-governance and the expression of the equal dignity of all persons. Democracy thus entails the rule of law, but both implicate the yet more comprehensive ideal of equality. Core rule-of-law values require political norms and conditions of equality, generality and comprehensiveness. In a modern, differentiated society, however, the constitutive relation between democracy and the rule of law is fractured and law becomes the agent of authority. Courts in the modern constitutional state have contributed to the decline of rule-of-law values, supporting role specialization through judge-made immunity doctrines that protect officials at all levels. The crisis of police violence against minorities is a symptom of this breakdown. Greater accountability can ameliorate the problem. But an effective solution requires the fair and equal distribution of political power.

Keywords

Black Lives Matter, democracy, equality, majority rule, rule of law, supermajority requirements

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I Law and democracy

Democracy and the rule of law – like song and dance or pen and paper – seem a natural pair. The connection between the two is an entrenched part of our political tradition; yet, the exact nature of the relation is unclear. On one hand, one can imagine a small self-governing group that follows no precedents or rules but votes on each and every issue or dispute as it comes up.[1] (Though it may seem far-fetched, this is pretty much how many law faculties function.) On the other, one can imagine an authoritarian society – Singapore comes to mind – that applies its laws with a rigorous impartiality and harsh even-handedness. So, what is the relation between democracy and the rule of law?

The most common answer is that the rule of law protects liberty by imposing constraints on official action. This is Justice Jackson's characterization in *Youngstown Sheet & Tube*: 'The essence of our free Government is "leave to live by no man's leave, underneath the law" – to be governed by those impersonal forces which we call law'.[2] 'A government of laws and not of men' is, on this view, one in which official action is governed by pre-existing rules of sufficient clarity and generality to preclude the arbitrary whim of individuals or the brute impositions of power.[3] So understood, the rule-of-law ideal is closely entwined with law's traditional tendency towards formalism. This, for example, is the view promoted in Justice Scalia's well-known article *The Rule of Law as a Law of Rules*,[4] which insists that standards, totality of the circumstances and multi-factor balancing tests are not '"law", properly speaking'.[5] On this view, the logical compulsion of a rule is what gives law its impersonal force.[6]

The rule of law is also liberty enhancing in that it provides the order and stability necessary for individuals to exercise their rights. It enforces contracts, protects property and safeguards one's physical integrity from accident or assault. On this understanding, the rule of law is a pre- or co-condition of democracy.[7] Even so, this understanding of the rule of law is not as fully benign as it seems. It presents the law as a guarantor of our expectations, but that law appears as a top-down authority which oversees social life.[8] The law acts on citizens who, however grateful for the law's protections, are nevertheless its subjects. For James Madison, this top-down, law-as-authority view is prior to and (it would appear) more fundamental than the rule of law as a constraint on officials: 'you must first enable the government to control the governed; and in the next place, oblige it to control itself'.[9]

Both these understandings of the rule of law are quintessentially liberal in that they focus on individual freedom from interference or restraint. But they complicate the relation between democracy and the rule of law in four escalating ways. First, on its own terms, the liberal view of the rule of law is auxiliary to democracy: *Ex ante*, the rule of law protects liberty as a precondition of democracy. *Ex post*, it protects us from breaches of fiduciary duty by those we empower over us. As such, it bears only a second-order or supplemental relation to democracy. Second, as Michel Rosenfeld observes, the liberal version of the rule-of-law ideal creates a paradox:

> In terms of the institutional framework necessary for constitutional democracy, . . . the rule of law seems definitely on the side of the state, and often against the citizen. In contrast, in connection with protection of fundamental constitutional rights, the rule of law seems on the

side of the citizen against the state to the extent that constitutional law can be invoked by citizens against laws and policies of the state.[10]

Third, the idea of law as the guarantor of social order can be seen as a direct challenge to democracy: It appears (as in the Madison quote) as an authority that governs and not as the product of choices by self-governing citizens.[11]

Fourth, the liberal understanding entails a twofold reification that subverts the relation between democracy and the rule of law. On one hand, it reifies the law as a set of rules and principles distinct from the actual humans who create and direct it. This masks a vicious circularity that, as Pocock explains, threatens the whole point of the rule-of-law ideal: 'laws ensure that reason rules and not particular passions, but they are invented and maintained by men'.[12] On the other hand, this reification detaches law from its source and legitimacy in democratic self-governance. In Frank Michelman's words, law becomes 'an autonomous force' that provides 'an external untouchable rule of the game'.[13]

Perhaps we can do better if we focus on other, widely accepted dimensions of the rule-of-law ideal. In previous work, I identified the four characteristics of the rule of law as accountability, comprehensiveness, equality and ordinariness.[14] Accountability, as already discussed, is the idea that official action must conform to law.[15] Comprehensiveness is the notion that no one is above the law and that even the highest officials are subject to legal strictures.[16] Equality is the principle that everyone is governed by the same law without regard to status or person.[17] This is the ideal expressed in the maxims 'equality before the law' and 'equal justice under law'.

Ordinariness is perhaps the most overlooked aspect of the rule-of-law ideal. In his classic discussion of the rule of law, A.V. Dicey identified the quality of ordinary law administered by ordinary tribunals.[18] It is the sense in which great issues of constitutional law can be raised and determined in a routine action for trespass or assault.[19] It is the sense in which we recognize the rule of law as vindicated when General Pinochet is detained by regular municipal police officers acting on the authority of an arrest warrant issued by the Bow Street magistrates' court, one of London's local criminal courts.[20] Ordinariness is a crucial tenet of the rule of law in common law systems without independent constitutional causes of action, as we were in the early Republic.[21] Citizens would have little recourse unless ordinary courts stood open to enforce the common law without regard to the official status of even the highest governmental actors. But even under our constitutional system, the understanding persists that an officer who acts in violation of the law is 'stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct'.[22] Thus, police officers who during the course of their duties use excessive force in violation of the Constitution or other laws are liable to prosecution for murder or assault like any other person. Ordinary law administered by ordinary tribunals even in extraordinary cases.

It will have occurred to you that all these characteristics of the rule-of-law ideal are connected. Comprehensiveness, accountability and ordinariness all follow from the idea that – if law is truly to rule – it must apply to everyone equally. Thus, equality before the law is the general principle from which 'no one is above the law' follows. This includes officials, who are answerable to the law for their actions. The openness of ordinary courts

to apply the ordinary rules to all manner of litigants is a necessary corollary if the comprehensiveness and equality of the law are to be maintained.

The demand for equality brings into focus the connection between democracy and the rule of law. In what follows, I argue that the rule of law, democracy and equality are nested concepts – each resting on the latter, more encompassing idea. Democracy, in other words, entails the rule of law; but, both democracy and the rule of law implicate the yet more comprehensive ideal of equality. As we shall see, this way of understanding the conceptual relation between democracy and the rule of law has profound implications.

We need a working definition of democracy to start. It is conventional to identify democracy with majority rule or consent of the governed. But it is a correspondingly familiar riposte that one cannot *define* democracy in these terms without collapsing the idea in on itself. Imagine a majority that votes to suppress speech or disenfranchise an unpopular minority. Or consider a community that consents to autocratic rule. We recognize such actions as undemocratic.[23] But, how could we know that if majority rule or consent of the governed were the measure of democracy? There must be some other, substantive standard or idea of democracy by which we assess such majoritarian actions as undemocratic.

The fundamental idea of democracy is that people make the rules that govern the terms and conditions of their life together.[24] As Pericles says in the Funeral Oration, 'we Athenians decide public questions for ourselves'.[25] Or, as recently echoed by Justice Kagan in her opinion for the Court in the 'faithless electors' case, 'here, We the People rule'.[26]

We recognize that the disenfranchisement of a minority (even if it takes place by majority vote) is undemocratic because it means that some citizens are excluded from the process of self-rule. Indeed, we can underscore the point by refining the example. Suppose that, at the time of exclusion, the dominant group imposes an additional requirement: All subsequent legislation must be approved by a supermajority of the remaining voters such that no legislation can be enacted that wouldn't have passed by majority vote before the exclusion. Thus, assume a hypothetical community in which the disenfranchised group makes up 20% of the population. A 64% supermajority of the remaining voters would ensure that any legislation was supported by 51% of the total population – that is, that it would have passed by a majority vote even under the earlier, more inclusive regime. This system would still be undemocratic because it is a form of oligarchy in which only privileged members of the community decide the terms of social life.[27] So, too, with the suppression of unpopular speech: Those who hold the unpopular view might still vote. But, if they are not free to persuade their fellow citizens to join in support of their position, they are not meaningful participants in the process of collective self-rule.

Why, then, is it conventional to identify democracy with majority rule? The answer is that majority rule is essential to democracy and, therefore, serves as a metonym or shorthand for it. In an earlier idiom, Madison and Hamilton identified majority rule with 'the republican principle'.[28] Indeed, Hamilton insisted that 'fundamental maxim of republican government . . . *requires* that the sense of the majority should prevail'.[29] Majority rule is the only decision-making procedure that implements the fundamental democratic idea of collective self-governance. A supermajority requirement may *seem*

more democratic because it means that any decision has the support of more of the voters. On this logic, unanimous consent would seem better still because no one would be compelled to follow a rule that he or she had not agreed to.[30] But, aside from the impracticalities of such requirements, systems of this sort are less democratic because they enable a minority veto.[31] A small, like-minded group (or, under an unanimity requirement, a single individual) can systematically frustrate the will of the majority.[32] In which case, the rules of social life would be determined not by the decision of the mass of citizens, but by the minority who effectively control the agenda.[33] (This was true of the U.S. Senate in the 116th Congress, where the 53-vote Republican majority represented 44% of the population and approximately 47% of the electorate.) A political system that gives a small group of citizens a greater voice – that is, that empowers some citizens over others – is not a democracy, but a form of oligarchy.

It follows that democracy is the form of government in which all citizens have an equal voice. In a simple democracy, people vote by raising their hands – a voting procedure in which each person is necessarily equal. Majority rule, together with the one-person-one-vote principle,[34] is the only decision-making procedure that fully meets the democratic standard.[35]

We have taken the long way around to highlight the crucial (though sadly overlooked[36]) point that democracy *requires* political equality. Thus, we have seen that there is an asymmetric relation between democracy and majority rule: Democracy entails majority rule ($D \models \mathrm{MR}$), but majority rule does not necessarily correlate with democracy ($\mathrm{MR} \neq D$). Political equality is, so to speak, the additional term that solves this equation ($D = \mathrm{MR} + \mathrm{PE}$). We can now refine our earlier definition to say that democracy is a system in which people have an equal say in determining the rules that govern social life.[37] Collective self-governance, in other words, isn't *self*-government unless everyone has an equal voice. As de Tocqueville explains, when 'all the citizens take a part in the government', then 'nobody can wield tyrannical power; men will be perfectly free because they are entirely equal, and they will be perfectly equal because they are entirely free'.[38]

We are now in position to appreciate the intimate relations between democracy and the rule of law. First, the rule of law is the mechanism by which democracy is realized. The people (or their elected representatives) choose the terms of collective life and implement those decisions through law. Suppose, for example, a community adopts health legislation requiring restaurants to post nutritional information or citizens to wear masks during a pandemic. Those laws are enforced by various officials (judges, prosecutors, administrators, etc.). If they are not applied equally and comprehensively, the health of the community will be compromised and the authority of democratic decision-making undermined. A society in which people could 'opt out' would no longer be a system of collective self-governance but of radical individual autonomy (or anarchy).[39] Conversely, if the law is applied equally and comprehensively, then as de Tocqueville says, there can be no tyranny: When the majority make only those laws that apply also to themselves, the minority need not fear being singled out for oppression. Finally, officials must be accountable to the law, both in their official duties (e.g. enforcing the posting regulation) and in their behaviour (e.g. wearing masks themselves) because they are both agents and addressees of democratic decision-making.[40]

Madison got it backwards: You must first enable the people to regulate themselves and, in the next place, oblige the officials to be governed by *that* law.

Second, and more profoundly, democracy and the rule of law both affirm the equal dignity of all persons. As Hannah Arendt observes, 'men were by nature (φυσει) not equal, and needed an artificial institution, the *polis*, which by virtue of its νομος [*nomos*] would make them equal'.[41] The practices of democracy – voting, freedom of speech and debate – offer each citizen an equal say in making the law. So, too, the rule of law guarantees that each member of the community is treated equally, subject to the same laws in the same way without regard to status. Democracy and the rule of law are the social practices that constitute citizens *as* equals.

The rule of law has many independently valuable qualities – liberty, order, impartiality, predictability, accountability. But, to valorise the rule of law for its own sake is to fetishize authority.[42] The fundamental values of the rule of law are as the instrument of democratic self-governance and the expression of the equal dignity of all persons. The other values flow from or are secondary to those basic ideals.

Syntactically, the rule of law is a 'what'. Conceptually, it is a 'who'.

II A more perfect union

It may seem to some that I have brought you along on a fool's errand. In grounding the rule of law in collective self-rule, I have answered the initial question only to recreate the problem of partiality and interest that the rule of law was meant to solve. After all, on the liberal view, the rigorous impartiality of law is what preserves our autonomy and protects us from exploitation and abuse by the majority. If we do not ensure that reason and law rule, won't we be vulnerable to the whims and passions of passing majorities? On this liberal view, democracy and the rule-of-law ideal stand in necessary tension.[43] And this just brings us back full circle to the questions with which we started.

Today, we read the phrase 'a government of laws, not of men' as an assertion of rule by the impersonal force of law. That was not its original meaning. James Harrington coined the phrase in the mid-17th century; for him, it expressed the traditional republican idea of the rule of virtue over self-interest. 'And as a commonwealth is a government of laws and not of men, so is this the principality of the virtue and not of the man; if that fail or set in one, it riseth in another, which is created his immediate successor'.[44] Harrington's focus was on the pragmatic problem of system design. How does one structure government such that the people who make the laws do so on the basis of reason and not passion or self-interest? This is what we earlier identified as the circularity problem:

> But seeing as they that make the laws in commonwealths are but men, the main question seems to be how a commonwealth comes to be an empire of laws and not of men? or how the debate or result of a commonwealth is so sure to be according to reason, seeing that they who debate and they who resolve be but men.[45]

Harrington's solution had both an institutional and economic component. Institutionally, he proposed a tripartite system: 'the commonwealth consisteth of the senate proposing, the people resolving, and the magistracy executing'.[46] The senate would be

selected by ballot and rotation (so that if virtue 'fail or set in one, it riseth in another'), the popular assembly by election, and the magistrate would be 'answerable unto the people that his execution be according unto the law'.[47]

His economic proposal, which he saw as the 'foundation of government',[48] was for an equitable division of property that he called an 'equal agrarian'.[49] A government of laws was, for Harrington, the logical outcome of legislation by people of equalized estates, equalized interests and equalized power.[50] The congruence of interests among estate holders would insure that the decisions of a commonwealth would be made with an eye to the common good and, thus, 'according to reason'.[51] The result would be a government of virtuous laws and not a mere reflection of the self-interest of the powerful. As he explained, 'no man is governed by another man, but by that only which is the common interest, by which means this amounteth unto a government of laws, and not of men'.[52]

Whatever the flaws of his political theory – Madison was certainly no fan[53] – Harrington's account illuminates three enduring points. *First*, the rule of law is not an abstraction (an impersonal 'what') but a practical problem of social organization. It is a question of how the people who make and administer the law (the 'who') can be entrusted to do so with reason in the public interest. The liberal legalist solution is to circumvent this problem by constructing a formal system 'that reaches toward comprehensive schemes of welfare and right' via rules that operate in a logical, consistent way.[54] But, putting aside the implausibility of the task,[55] the resulting system would be incompatible with the very idea of democratic self-governance.

Second, Harrington's understanding of what constitutes 'a government of laws, not of men' reveals the centrality to democracy of egalitarian social relations. While it may not be possible to equalize wealth – whether for the reasons identified by Madison[56] or otherwise – a society (such as ours) with wide divergences in wealth, power and interests will find it difficult to sustain democracy (as ours, in fact, does). Beyond formal political equality, collective self-governance requires at a minimum that (1) wealth is not a factor in political influence (the danger of oligarchy), (2) interests are not so divergent and antagonistic that they cannot be addressed through negotiation and compromise (the problem of polarization) and (3) there are institutions, such as the public school and the draft, that foster other-regarding behaviour and mutual respect among citizens (the challenge of cultivating civic virtue).[57]

Third, a democracy cannot be indifferent to the *quality* of its laws because law shapes both behaviour and character. 'In a government of laws', Brandeis famously warned, the 'Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example'.[58] When the law reflects the special interests of the powerful,[59] it breeds cynicism, contempt for government, selfishness and social fragmentation.[60] Conversely, when the law promotes the public interest in a fair and even-handed way, it encourages both confidence in institutions and solidarity and mutual respect among citizens. In the democratic tradition invoked by Brandeis, the rule of law is the foundation of civic education.[61]

As Arendt slyly observes, people are not created equal: some are smarter, some are stronger, some are born into wealth. It takes a legal system to protect the weak from the strong, to safeguard the credulous from the unscrupulous and to give everyone a voice in the affairs of social life. At the macro-level, the laws of a democratic polity convey a

message of human dignity and equality. At the micro-level, the laws provide the template for the conduct and comportment of its citizens. Replying to Socrates's claim that virtue and the excellence (*aretē*) required for governance cannot be taught, Protagoras explained that:

> Just as, when a child is still learning to write, the teacher draws lines on his book with a pencil and then makes him write the letters following the lines, so the city lays down the laws, devised by good lawmakers of the past, for our guidance, and makes us rule and be ruled according to them. . . . [62]

A law requiring masks during a pandemic, for example, embodies concern for one's fellow citizens. Thus, Harrington maintained: '"Give us good men and they will make us good laws" is the maxim of a demagogue. . . . But "give us good orders, and they will make us good men" is the maxim of a legislator and the most infallible in the politics'.[63]

Earlier, I argued that the rule of law is the instrument of democratic self-governance and the expression of the equality of all persons. We can now refine that claim to say that democracy and the rule of law exist in a complex, reflexive relation. The rule of law is simultaneously before, after, concurrent and synonymous with democracy. It is *before* democracy in the sense that it contributes to the formation of citizens with the civic virtue capable of self-governance. It is *after* democracy in serving as the instrument through which democratic decision-making is implemented. It is *concurrent* with democracy because it is one of the central social practices that constitute citizens as equals. And, it is *synonymous* with democracy because it addresses the question of how to ensure that government *by* the people operates *for* the people (i.e. in their common interests).

This correspondence would have come as no surprise to the ancient Greeks who used the same word – *isonomia* – to name both democracy and what we now call the rule of law. Martin Ostwald tells us that, *nomos* (νομος) abruptly replaced *thēsmos* (θεσμος) as the Greek word for law and this occurred at the time of the democratic reforms of Cleisthenes around 508–507 BC. While *thēsmos* signifies 'something imposed by an external agency, conceived as standing apart and on a higher plane than the ordinary',[64] *nomos* implies an obligation 'motivated less by the authority of the agent who imposed it than by the fact that it is regarded and accepted as valid by those who live under it'.[65]

A compound of *isos*, meaning 'equal', and *nomos*, *isonomia* was the most prominent and popular of a trio of cognate terms for democracy and its institutions that included *isēgoria*, the equal right of poor and working people to address the assembly, and *isokratia*, equality of power.[66] *Isonomia* both preceded the coinage of the term 'democracy' (a compound of *demos* 'the people' and *kratos* 'power') and provided the normative force for the democratic ideal. '*Dēmokratia* does no more than describe a fact', Gregory Vlastos explains, '*Isonomia* expresses an idea, indeed a whole set of ideas by which the partisans of democracy justified the rule of the people'.[67] By the time of Cleisthenes's reforms, *isonomia* had come to mean 'not . . . a state of equal law for everybody' but 'the ideal of a community in which the citizens had their equal share'.[68]

Contemporary conceptions of the rule of law as an impersonal force restraining arbitrary governmental action reflect the assumptions of Enlightenment rationalist

discourse in which reason restrains the will to power. For the ancient Greeks, in contrast, it was the sharing of power that constrained abuse of or by the law. *Isonomia*, Vlastos elaborates, 'designates a political order in which the rule of law and responsible government are maintained by the equal distribution of political power'.[69]

For the Greeks, 'democracy and the rule of law' was a tautology. Democracy meant 'to rule and be ruled in turn'.[70] There was, in a real sense, no separation between the citizens who made the law and those to whom the law applied: Athenian law prohibited 'the introduction of any law that does not affect all citizens alike'. As Demosthenes went on to explain, this statute represented 'the true spirit of democracy. As every man has an equal share in the constitution [*politeia*] generally, so this statute asserts his equal share in the laws'.[71] (Recall de Tocqueville's observation that, in a democracy where everyone participates, people are 'perfectly free because they are entirely equal, and they will be perfectly equal because they are entirely free'.) Every Greek citizen had both an equal share in the provenance of the law and an equal stake in its efficacy. 'For the Greeks', Martin Ostwald observes, 'freedom and equality, as well as the State itself, are entities that citizens share through the community to which they belong'.[72]

In a modern, differentiated society, the elegance of a single law for everyone is not possible. The right of entry onto property for the firefighter and the health inspector cannot be the same as it is for all other citizens. Land use regulations could hardly apply to all landowners without differentiating among wetlands, agricultural areas and urban spaces. The greater complexity of modern society necessarily transforms the command of equality into a more limited rule that laws must include all those similarly situated with respect to the purpose of the law.[73] Because the determination of who is 'similarly situated' is hardly mechanical or self-evident, modern courts recognize the difficulties of the line-drawing exercise and usually defer to legislative determinations.[74]

The symmetry of ruling and being ruled is irretrievably fractured in modern society. Laws are made by a professional political class whose re-election, fund-raising and other incentives diverge significantly from those of their constituents. Legislation tends to be problem-oriented rather than general, and that is under the best of circumstances. Often, it takes the form of interest-group competition in which entrenched economic interests have significant advantages with respect to mobilization and resources that skew the process in their favor.[75]

Core rule-of-law values could nevertheless be maintained in a healthy democracy, but it would require the kind of political norms and conditions (the 'who') clearly lacking in our current moment. These would include (1) a political presumption against departures from generality and neutrality in lawmaking, (2) mechanisms to address the significant problems of oligarchy endemic to our systems of political finance and legislative lobbying, (3) a more equal distribution of electoral power and (4) measures to overcome the problem of polarization and foster a revived sense of common purpose.[76] Developments of this magnitude would require major cultural, political and legal change. With the possible exception of changes in electoral distribution, they are not the kinds of reforms that could be achieved through constitutional adjudication.

The track record of the courts, in any event, has contributed to – rather than ameliorated – the decline of rule-of-law values. The Supreme Court has supported role specialization in the modern constitutional state, applying judge-made immunity doctrines to

protect officials at all levels. Doctrines of executive and prosecutorial discretion,[77] official and governmental immunity from suit[78] and legislative and executive privilege[79] applied by constitutional courts wielding the power of judicial review undermine the comprehensiveness, impartiality and accountability required by the rule-of-law ideal. The 'who' of the rule of law is no longer the democratic community of lawmaking citizens. Law increasingly becomes an autonomous, bureaucratic authority administered from above.

It is not surprising, then, that the modern constitutional system does a poor job of protecting citizens – especially minority citizens – from state violence. In this context, Michel Rosenfeld's point that 'the rule of law seems definitely on the side of the state, and often against the citizen' is poignant. Much has been said in the wake of protests following the killing of George Floyd about the role of qualified immunity in shielding police from accountability. But the problem lies as much with the constitutional rules governing police use of force, which have become increasingly solicitous of the police.[80] Both phenomena reflect a structural flaw of the judiciary for whom, as Robert Cover observes, the identification with state violence is constitutive. '[L]egal interpretation is as a practice incomplete without violence . . . because it depends upon the social practice of violence for its efficacy'.[81] This alignment with state authority impedes judges' ability to act as an effective counterweight. Because judges partake in 'the institutional privilege of force',[82] they are susceptible to the seductions of its power.[83] The predictable result 'is deference to the authoritarian application of violence, whether it originates in court orders or in systems of administration'.[84]

We can encapsulate the argument of this article by considering how each of the different views of the rule of law might respond to the problem of police violence. Only the Madisonian conception of law as authority is plausibly consistent with the current state of affairs. (And, as just noted, this presents as a very dark picture of the rule of law.) Both liberal and democratic conceptions of the rule of law, in contrast, would see endemic police violence against African Americans as a violation of the equal dignity and respect due all persons. Both would see it as a problem of accountability.

The liberal and democratic conceptions of the rule of law would diverge, however, in how they conceptualize the accountability problem. The liberal view would see police violence as a failure of some officers to conform their actions to law, instead giving vent to prejudice, abuse or the brute imposition of power (the 'few bad apples' cliché). Consequently, the remedy would focus on getting the right mix of incentives – such as specific legal limitations on police conduct, the elimination of qualified immunity, implicit bias training[85] or mandatory liability insurance requirements for officers[86] – to change individual police behaviour. The democratic view, in contrast, would see police violence as reflecting a breakdown in the process of self-governance itself. Cognizant of the separation of rulers and ruled, it would identify the accountability problem as arising from the marginalization of African Americans within the political community. (No one thinks that police would treat wealthy White citizens in the same callous and brutal ways.) Accordingly, it would recognize that the solution lies fundamentally in the empowerment of African American citizens and their inclusion as full and equal members of the democratic community. The crisis of police violence, in other words, is a crisis of the unequal distribution of political power.[87]

Apart from the suite of democratic values of which it is a part, the rule-of-law ideal is easily reduced to an estranged and alienated 'what'. As an ensemble, in contrast, the trio of equality, democracy and the rule of law offers an attractive, even enticing vision of the 'who' we might be.

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Notes

1. Such a society does have one law with which everyone complies: the voting rule which specifies that the majority (or some designated supermajority) rules. Although any group also has rules defining membership, these are generally susceptible to ongoing redefinition by the majority.
2. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J. concurring).
3. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ('The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right'.). These rules may originate in the common law (as did the right in *Marbury*), statutes or the Constitution. The key point is that they represent an impersonal authority impartially administered.
4. Scalia (1989).
5. Scalia (1989: 1178–80). For a critique of this understanding of how rules work, see Winter (2001a: 186-222).
6. Thus, in Justice Scalia's co-authored book on appellate advocacy, the only form of legal reasoning that he identifies is the syllogism. Scalia and Garner (2008).
7. Compare Habermas (1996) (co-originality thesis).
8. Winter (2020).
9. *The Federalist Papers* (1961: No. 51, 319).
10. Rosenfeld (2001), available at http://papers.ssrn.com/paper.taf?abstract_id=262350. The critical phrase here is 'to the extent that . . . ' For, as Robert Cover points out, courts often invoke jurisdictional doctrines to avoid having to address violence by state actors. Cover (1984: 53–56).
11. *Marbury*, 5 U.S. at 177 ('It is emphatically the province and duty of the judicial department to say what the law is'.); see also National Endowment for the *Arts v. Finley,* 524 U.S. 569, 604 (1998) ('But courts cannot allow a legislature's conclusory belief in constitutionality, however sincere, to trump incontrovertible unconstitutionality, for "it is emphatically the province and duty of the judicial department to say what the law is"'.); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) ('When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is'.).
12. Pocock (1975: 324): 'If laws can attain the status of reason . . . then laws must rule and not men. . . . But the argument is in danger of becoming circular: laws ensure that reason rules and not particular passions, but they are invented and maintained by men and can prevail only when men are guided by reason to the public good and not by passion to private ends. The laws must maintain themselves, then, regulating the behavior of the men who maintain them. . . . '

Compare Hobbes (1994: 112): 'that covenants being but words, and breath, have no force to oblige, contain, constrain, or protect any man, but what it has from the public sword'.

13. Michelman (1988: 287).
14. Winter (2001b: 155–66, 162–63).
15. See *Marbury*, 5 U.S. at 166 ('But when the legislature proceeds to impose on that officer other duties . . . he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others'.); *Youngstown Sheet & Tube*, 343 U.S. at 646 (Jackson, J., concurring) (The 'take Care' clause 'gives a governmental authority that reaches so far as there is law, the [due process clause] gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules'.).
16. *United States v. Nixon*, 418 U.S. 618 (1974); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
17. One could also characterize this dimension of the rule of law as 'impartiality'. But for reasons that will appear shortly, this liberal characterization misses important dimensions of the concept.
18. Dicey (1982: 181): 'every man, whatever be his rank or position, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals'.
19. See *Entick v. Carrington*, 19 Howell's State Trials 1029 (1765); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).
20. Chittenden (1998).
21. This changed with the adoption of the Fourteenth Amendment and the passage of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (2012).
22. *Ex parte* Young, 209 U.S. 123, 160 (1908).
23. Compare *United States v. Carolene Products Co*., 304 U.S. 144, 152 n. 4 (1938). Democracy is a more-or-less, rather than all-or-nothing phenomenon. Political systems can be judged along an axis that runs from democratic to oligarchic (and thence to autocratic). And, democracy may not be the only desideratum. See Winter (2012: 204–05): 'we make different kinds of judgments about . . . various democratic arrangements' and the judgments that some are 'better, others more democratic . . . need not converge'.
24. A more precise definition would be that democracy 'consists in the sharing of authority with others under conditions of mutual recognition and respect'. Winter (2012: 203, 223–37). The simplified description in the text is consistent with this strong, normative view.
25. Thucydides (2013) Book 2.37.1, 40.2-3.
26. *Chiafalo v. Washington*, 591 U. S. ___, 140 S. Ct. 2316, 2328 (2020). This idea is usually referred to as popular sovereignty. But it would seem both simpler and more accurate to conceptualize the issue directly in terms of self-governance. This avoids reifications such as 'the People' or 'the general will' and, as discussed below, grounds democracy directly in the normative ideals of political equality and collective autonomy.
27. *The Federalist*, No. 39, 237 (Madison) (emphasis in original): 'It is *essential* to such a [republican] government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it'.
28. *The Federalist*, No. 10, 75 (Madison); *The Federalist*, No. 71, 430 (Hamilton).
29. *The Federalist*, No. 22, 142 (Hamilton) (emphasis added).

30. If it seems better, it is because our liberal culture conflates individual autonomy with democracy. The problems with grounding democracy in individual autonomy are discussed in Winter (2012: 205–10, 238–41). The best evidence of the primacy of individual autonomy over democracy in our culture can be found in the Supreme Court's campaign finance cases. See *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011); *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010); *Buckley v. Valeo,* 424 U.S. 1 (1975).
31. *The Federalist*, No. 22, 143 (Hamilton) ('To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision) is, in its tendency, to subject the sense of the greater number to that of the lesser number'.). There may, of course, be practical political reasons for a minority veto of this sort as when an intractably divided society needs to reassure a fearful minority. But, Hamilton continued, the 'real operation' of unanimity or supermajority requirements 'is to embarrass the administration, to destroy the energy of the government, and to substitute the pleasure, caprice, or artifices of an insignificant, turbulent, or corrupt junto to the regular deliberations and decisions of a respectable majority'.
32. This was the position of the slave states in the early Republic. See particularly U.S. Constitution, Art. I, § 2 (the three-fifths clause).
33. Although the minority cannot on its own enact its agenda into law, the effect of the minority veto is to force the majority to conform its proposals to those acceptable to the minority. Bachrach and Baratz (1962: 947–53); Elshtain (1990: 136–38).
34. *Reynolds v. Sims*, 377 U.S. 533, 558 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964); *Gray v. Sanders*, 372 U. S. 368, 381 (1963).
35. Winter (2019).
36. *Rucho v. Common Cause* 588 U.S. ___, 139 S.Ct. 2484 (2019); *Gill v. Whitford*, 585 U.S. ___, 138 S. Ct. 1916 (2018).
37. Under real-world conditions of plurality, consent of the governed marks the realistic limits of the democratic ideal. On one hand, consent of the governed is the flip-side of majority rule; it is the principle which legitimates democratic outcomes that command less than unanimous assent. On the other, it defines the minimal condition under which a government with an indifferent or apathetic citizenry can tolerably be called a democracy.
38. de Tocqueville (1988: 503).
39. On the fundamental protections for the minority in a system of collective self-governance, see Winter (2012: 204–10, 223–39). Compare *INS v. Chadha*, 462 U.S. 919, 966 (1983) (Powell, J., concurring) ('Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to "the tyranny of a shifting majority"'.).
40. Compare *The Federalist*, No. 78, 466 (Hamilton): '[E]very act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void'.
41. Arendt (1965: 30–31).
42. *See* Winter (2020: 352–59).
43. Compare Michelman (1999: 5–6). Michelman focuses on the tension between democracy and constitutionalism. But, whether the source of the law is the Constitution or the common law, the tension derives from the fact that judicial interpretations or judge-made rules often have no direct or obvious warrant in democratic decision-making. In the early Republic, Jeffersonian

radicals were particularly opposed to the application of the common law by unelected judges. Wilentz (2005: 121–23).

44. Harrington (1992: 35).
45. Harrington (1992: 35, 20–21). Harrington here is reflecting directly on Hobbes's critique (note 12, *supra*). See Harrington (1992: 35, 24–25).
46. Harrington (1992: 25). Harrington continued that such a government would be 'complete' because it 'partake[s] of the aristocracy as in the senate, of the democracy as in the people, and of the monarchy as in the magistracy'. John Adams, along with other Americans, would esteem a version of this notion of 'mixed government'. See Wood (1998: 198–200, 203–06): 'It was this Commonwealth understanding of the mixed polity, perceived through "Aristotle, Livy, and Harrington", that enabled John Adams in 1775 to argue that the uncorrupted "British constitution is nothing more nor less than a republic in which the king is first magistrate"'. Bailyn (1992: 273–74, 282–83 n.50): 'Throughout, however, he [Adams] was grappling with the problem of recreating the "equipoised" balance of the English constitution in the circumstances of the American states'.
47. Harrington (1992: 25). See also Harrington (1992: 34): 'the senate debating and proposing, the people resolving, and the magistracy executing by an equal rotation through the suffrage of the people given by the ballot'.
48. Harrington (1992: 271–72): 'All government is interest, and the predominant interest gives the matter or foundation of government. . . . If the many or the people have the whole, . . . the interest of the many or the people is the predominant interest, and causes democracy'.
49. 'An equal agrarian is a perpetual law, establishing and preserving the balance of dominion by such a distribution, that no one man or number of men, within the compass of the few or aristocracy, can come to overpower the whole people by their possessions in lands'. Harrington (1992: 33); see also Harrington (1992: 34): 'An equal commonwealth . . . is a government established upon an equal agrarian'.
50. '[E]quality of estates causes equality of power, and equality of power is the liberty, not only of the commonwealth, but of every man'. Harrington (1992, 20). See Pocock (1975: 387–88): '[Harrington held] that only a democracy of landholders – that is, only a society where a *demos*, or many, of landed freemen held land in relative equality – possessed the human resources (Machiavelli might have said the *materia*) necessary to distribute political authority in the diversified and balanced ways they created a self-stabilizing *politeia*'.
51. Harrington (1992: 19–22): 'And if reason be nothing else but interest, and the interest of mankind be the right interest, then the reason of mankind must be right reason. Now compute well, for if the interest of popular government come the nearest unto the interest of mankind, then the reason of popular government must come the nearest unto right reason'.
52. Harrington (1771: 362), available online at: https://oll.libertyfund.org/titles/916#Harrington_0050-version3_1550.
53. In *The Federalist*, No. 10, 72–73, Madison notes that one way of 'curing the mischiefs of faction' is to remove its causes 'by giving to every citizen the same opinions, the same passions, and the same interests'. The reference seems clearly to Harrington. Madison argues that this expedient is 'impracticable' because 'diversity in the faculties of men' naturally leads to disparities in wealth and from this 'ensues the division of society into different interests and parties'. Madison, of course, wrote at the beginning of the Industrial Revolution at a time when the commercial economy was expanding whereas Harrington lived a century earlier in a

largely agrarian society. Madison's solution to the problem of faction was a large republic, which would make it difficult for factions to unite and coordinate effectively. But this solution, too, has proved impractical.

54. Unger (1996: 36, 46).
55. There is an anti-formalist tradition that starts with Holmes's *The Common Law* (1881) and runs through Roscoe Pound, Karl Llewelyn and the Legal Realists, to Duncan Kennedy and Critical Legal Studies (including such others as Robert Cover). *A Clearing in the Forest* (Winter 2001a) draws on this tradition to lay out the cognitive and epistemological reasons that make the formal vision of law impossible.
56. See note 53 *supra*.
57. See Skocpol (2003); Putnam (2000); Sandel (1996).
58. *Olmstead v. United States,* 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).
59. LaForgia and Vogel (2020) ('Mr. Trump's cabinet includes a former coal lobbyist as administrator of the Environmental Protection Agency, a former lobbyist for the defense contractor Raytheon Technologies as defense secretary, a lobbyist for the auto industry at the helm of the Energy Department and a former oil and gas lobbyist as interior secretary'.).
60. Compare *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting) ('If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy'.).
61. As Wood summarizes Protagoras's argument for democracy: 'Life in a civilized and humane community, which has courts of justice and the rule of law, as well as education, is the school of civic virtue; and the community's customs and laws are the most effective teachers'. Wood (2008: 61).
62. Plato (2009: 326d). 'Protagoras's speech is the only substantive and systematic argument for the democracy to survive from ancient Greece'. Wood (2008: 59).
63. Harrington (1992: 64). As Harrington later notes: 'Good orders make evil men good, and bad orders make good men evil'. Harrington (1992: 274). See also Pocock (1975: 196): '*Buoni ordini* [good orders] produce both *buona milizia* [a good militia] and *buona educazione* [a good civic education] .... Freedom, civic virtue, and military discipline seem to exist in a close relation to one another'.
64. Ostwald (1969: 55).
65. Ostwald (1969: 158–60); see also Wood (2008: 36): *Nomos* 'suggests something held in common, whether pasture or custom'.
66. Vlastos (1995: 105); see also Wood (2008: 36–39).
67. Vlastos (1995: 96).
68. Ehrenberg (1950: 514–48, 530–31); see Wood (2008: 36): 'Cleisthenes himself seemed to describe the new political order as *isonomia*'.
69. Vlastos (1995: 107).
70. *Aristotle's Politics* (2013: 1317a40–1317b2-10); see also *Protagoras*, quoted above note 60.
71. Demosthenes, 'Against Timocrates', (59) in Demosthenes (1986: 411).
72. Ostwald (1996: 49–61, 55).
73. Tussman and tenBroek (1949: 346): 'A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law'.

74. The classic statements of what is called the 'rational basis test' are *Carolene Products*, 304 U.S. at 151-54; *Williams v. Lee Optical*, 348 U.S. 483 (1955) and *Ferguson v. Skrupa*, 372 U.S. 726 (1963).
75. Lowi (2009). For a thorough discussion of the distribution of advantages in mobilization and resources and how they affect different modes of regulation, see Komisar (1990: 23–77) and Komisar (1997).
76. Tussman and tenBroek saw early on that the 'demand for equal laws becomes meaningless' in the context of a legislative process of interest-pluralist bargaining and that 'the requirement that laws be equal rests upon a theory of legislation quite distinct from that of pressure groups – a theory which puts forward some conception of a 'general good' . . . .' Tussman and tenBroek (1949: 350).
77. *Heckler v. Chaney*, 470 U.S. 821 (1985); *Imbler v. Pachtman*, 424 U.S. 409 (1976); see also *Linda R. S. v. Richard D*., 410 U.S. 614, 619 (1973).
78. *Harlow v. Fitzgerald*, 457 US 800 (1982) (extended qualified immunity from suit under § 1983); *Seminole Tribe of Fla. v. Florida*, 517 US 44 (1996) (striking down under the Eleventh Amendment congressional authorization to sue state actors to require them to bargain in good faith with Indian Tribes).
79. *Tenney v. Brandhove*, 341 U.S. 367 (1951) (absolute immunity of state legislative officials from damages actions under § 1983); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (absolute immunity of President from suit for damages for unconstitutional actions).
80. *Compare Tennessee v. Garner*, 471 U.S. 1, 11 (1986) ('Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so'.); with *Graham v. O'Connor*, 490 U.S. 386, 397-98 (1989) (question is one of 'objective unreasonableness' and evidence of malicious or sadistic intent is irrelevant) and *Scott v. Harris*, 550 U.S. 372 (2007) ('*Garner* was simply an application of the Fourth Amendment's 'reasonableness' test . . . '). See also *Plumhoff v. Rickard*, 572 U. S. 765 (2014).
81. Cover (1986: 1613); see also Cover (1984: 47) ('all judges are in some way people of violence').
82. Cover (1984: 54).
83. See, for example, *Plumhoff*, 572 U.S. at 777 (12 additional shots fired after the progress of suspect's car was blocked were permissible because, 'if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended'.).
84. Cover (1984: 56).
85. All these are part of the Justice in Policing Act, H.R. 7120, which was passed by the House on 25 June 2020 and sent to the Senate to moulder.
86. See Ramirez et al. (2019).
87. Compare *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966) (the Voting Rights Act barring English-language literacy test 'may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government [in] the provision or administration of governmental services, such as public schools, public housing and law enforcement'.).

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