Chapter 2

The strong version of the rule of law

It is widely accepted among rule of law scholars, as well as lawyers and philosophers at large, that the law must be general – that it must treat all in the community equally, or as equals (as will be seen, those two phrases mean different things). This ideal appears in more familiar forms in the demands of activists and the provisions of constitutions worldwide, such as the Equal Protection and the Privileges and Immunities Clauses of the US Constitution. It's surprisingly hard, however, to sort out what that abstract ideal should actually require of our political communities.

I have said that achieving regularity and publicity rules out hubris and terror, but this is only partially true: a state can be regular and public with respect to only some of the subjects of law, while still inflicting hubris and terror on others (e.g., slaves). To be wholly free from hubris and terror, a state's laws must be minimally general in that official coercion of *all* subjects of law satisfies regularity and publicity.

However, even if the state achieves publicity and regularity with respect to all subjects of law, its legal system still might not treat the subjects of law as equals, if there is one (public and regular) law for some individuals (i.e., elites) and another for the masses. Generality, the third and strongest principle of the rule of law, forbids this. For the state to comply with the principle of generality, officials must substantially satisfy the principles of publicity and regularity *and* only use the state's coercive power in accordance with laws that do not draw irrelevant distinctions between individuals (that is, general laws). They must also use the discretion given to them consistently with the same principle: in a standard formulation, they must treat like cases and individuals alike, treating them differently only if there is a relevant distinction between them.

Most of the argument in this chapter will be devoted to filling out the idea of a "relevant distinction." This, I argue, means that when a law or exercise of official discretion treats people differently from one another, there must be public reasons to justify the different treatment. I also add some more flesh to the notion that generality is about equality. However, since the claim that generality is an egalitarian principle is neither novel nor controversial, the main work of this chapter is to answer the far more vexed question of what generality demands.[1]

I GENERALITY AND THE IDEA OF A RELEVANT DISTINCTION

After describing the existing accounts of generality, this section defends the argument that we must have a substantive, not formal, conception of what it means for law to be general. The extent to which a law is general cannot be determined from abstract properties of its text alone.

A *Many conceptions of generality*

The literature reveals no consistent account of what generality requires. Hayek alone has four different conceptions of generality within a few pages of one another: (1) general law applies to everyone, particularly those who make and enforce it; (2) general law can pick out particular classes of application so long as the distinction so made is equally justifiable to those within and without the classes to which it applies; (3) law is general when legislators cannot know the particular cases to which it will apply; and (4) generality is an "aspect" of a feature of law called "abstractness," which appears to refer to law that does not give overly detailed directions to its subjects or too closely specify its circumstances of application.[2] The relationship between those four versions of generality is obscure. For Rawls, generality is the requirement that like cases be treated alike, but he acknowledges that specifying a rule to determine which cases are like is a major difficulty with this formulation.[3] Hart also suggested that the principle of generality means "treating like cases alike," but added that "the criteria of when cases are alike will be, so far, only the general elements specified in the rules," which simply reduces generality to regularity.[4]

Some commentators would more or less strip generality from our conception of the rule of law. Most notable among these is Raz, who limits the principle of generality to only the constitutional basics of government – the secondary rules governing how primary rules are to be made – and flatly denies that the rule of law forbids systematic discrimination.[5] Unsurprisingly, Raz also denies that the rule of law has anything to do with equality. Others have taken less extreme, but still minimalist, positions – most notable is Rousseau, who argues that general law is law that does not have a specific object, by which he appears to primarily mean law that does not pick out particular individuals by name.[6]

B *Against the formal conception of generality*

We can start to understand the problems posed by generality by thinking about one of its more prominent loci of application, the principle of judicial impartiality. Certain applications of this idea are easy: no rule of law scholar would disagree with Locke's principle that no one may be a judge in his own case, or the stronger demands of contemporary legal ethics that require judges to not share interests with the parties to a case and to resist pressure by the powerful. But many things

other than their personal interests can bias judges. For example, a judge may rule from racial animus. A racist judge manifestly violates generality. He treats like individuals differently because he distinguishes between them on the basis of irrelevant personal properties. But a judge is allowed to take some kinds of distinctions into account. She must not give one defendant a harsher sentence than another for the same crime because one is black and the other is white, but she may give a defendant a harsher sentence because, for example, he held a position of trust with respect to the victim. It's surprisingly difficult to give an abstract principle that captures both the impermissibility of the first distinction and the permissibility of the second.

Similarly, we can consider how difficult is the job of lawyers in a common-law jurisdiction. They are paid to consider a mass of cases – all of which are like in some respects and not like in others – and demonstrate that the instant case is relevantly like some, and not relevantly like others ("distinguishing" those others, in legal jargon).

The same point applies to legislation. Consider that the law "No vehicles in the park" makes a distinction between inside the park and outside the park. We think that's general, as we do the law "No motorbikes in the park." But we don't think the laws "Black people may not ride motorbikes in the park" or "Tim Smith may not ride a motorbike in the park" are general. One candidate for a formal principle to distinguish between those cases is that the latter cases single out specific classes of *people* – but that's permissible sometimes, too. It doesn't, for example, offend the rule of law to decree that "Two parking spaces in each lot shall be reserved for disabled people" or "Convicted felons may not own firearms."

In all these applications, we see that "treat like cases alike" does not provide enough information to guide officials.[7] We must have some account of what makes the cases like or unlike – a relevance criterion governing the reasons under which officials may treat cases and individuals differently. The search is for some principle to capture the twin intuitions that disability is a relevant criterion for allocating parking spaces and race is not a relevant criterion for allocating the right to ride motorbikes in the park.[8]

This point can be broadened and made more abstract. The idea of general law can be conceived as either formal or substantive. Define a formal conception of generality as one according to which an observer can determine whether a law is general purely by examining properties of a law itself, including its text, and/or the process by which it was enacted, including the actions and motivations of legislators. By contrast, a substantive conception requires an observer to examine nonlegal social facts and/or appeal to normative values (such as "liberty" or "equality") in order to determine whether a law is general.

I defend a substantive conception of generality, and argue that the formal conception of generality is necessarily incoherent. In order to do so, I distinguish, and reject, three different subtypes of the formal conception.

On the *minimal* conception of generality, the law is not allowed to pick out particular people. This conception forbids things like the bill of attainder, or the law with a proper name in it.[9] In addition to proper names, this minimal version of the principle must (on pain of absurdity) also forbid laws that incorporate other rigid designators that refer to people, such as indexicals used in the right context. For example, it would prohibit a king from pointing at someone and saying, "You are hereby outlawed."

On the *epistemic* conception of generality, laws are forbidden to the extent that those who enact them know (can pick out) to whom they are to apply. This conception is distinctively associated with Hayek.[10]

Finally, on the *similarity* conception of generality, law must be cast in general (or abstract) terms, or treat every citizen the same. These conceptions propose to police the extent to which the law classifies citizens into different groups in order to ensure that it "treats like cases (and citizens) alike."[11]

The minimal conception fails because it is unstable along the dimensions of both *uniqueness* and *rigidity*, which are the only two plausible criteria by which we might distinguish the laws it forbids from the laws it permits. First: if the law may not contain rigid designators referring to one person, it would be irrational to permit it to contain rigid designators referring to multiple people. That is, if the rule of law forbids the legislature from enacting "Thomas Wentworth may not work as a lawyer," it must also forbid "Thomas and Margaret Wentworth may not work as lawyers," and if it forbids that, it must also forbid "Thomas, Margaret, Sarah, John, Phillip … [etc.] Wentworth may not work as lawyers," or "None of you people whom I am addressing right now may work as a lawyer."

Second, if the law forbids rigid designators, it must also forbid at least *some* nonrigid designators that, in the actual world, are extensionally equivalent to rigid designators. This is clearest in the individual case: if the legislature may not enact "Thomas Wentworth may not work as a lawyer," it also may not enact "The person who lives at 1640 Attainder Lane on July 30, 2012, may not work as a lawyer." Otherwise, the prohibition against rigid designators would be practically meaningless, since the legislature could always find a sufficiently precise nonrigid designator that would pick out exactly those whom the legislature wished to attaint.

The instability of the minimal conception along the dimension of number and its instability along the dimension of rigidity can combine: from the preceding, it follows quite naturally that the rule of law forbids the legislature from enacting "Nobody in the family of the person who lives at 1640 Attainder Lane on July 30, 2012, may work as a lawyer." And after taking that step, we've lost both of the candidate principles by which we might distinguish those descriptions the minimal formal conception of generality forbids and those it permits. If the state can't pick out the class of people who live at a given address for special (mis)treatment, can it pick out nobles as a class, or the class of people in a given city, or the disabled, or even

natives (as opposed to foreigners) as a class? The minimal conception of generality offers us no answer.[12]

To see that the epistemic conception fails, simply ask: "Knows under what description?" If the legislature passes a law that "All redheads must serve in the army," each legislator knows exactly to whom the law will apply, under the description "redheads," even if none know each individual by name. The same is true if the legislature enacts "Everyone who lives at 1640 Attainder Lane is to be shot," just in case legislators aren't quite sure of the names of the residents. Either the epistemic formal conception just reduces to the minimal formal conception (and collapses for the same reason) – that is, to the demand that the legislature must not know those to whom a law can apply *by name* (or other rigid designator) – or it fails to constrain laws, because legislatures always know to whom a law applies under the description written into the law.

The failure of the minimal and epistemic conceptions should have been predictable, for any conception of the principle of generality worthy of the name must surely forbid "the Jews are barred from England" and must surely permit "only those over 21 may buy alcohol." Neither version of the principle has the capacity to distinguish between those two examples. Unsurprisingly, then, the best contemporary liberal legal theorists have endorsed the similarity conception, in the form of the command that the law "treat like cases alike." The problem with the similarity conception is that, on it, all legislative acts are formally nongeneral, for some conceptions of what it means for cases to be "like," because all laws include conditions for their application, which will only be met by some people and cases. On the other side, all legislative acts except for those that actually contain rigid designators are also formally general, relative to some other conception of "likeness," in that they specify in abstract terms (for some level of abstractness) the criteria for their application. The same point put differently: all cases, and people, are like in some respects and different in some respects.[13] The demand to "treat like cases alike" requires a nonformal criterion by which we may pick out the features of the cases that are relevant for determining whether they are "like," for generality purposes, or not.[14]

People with disabilities are dissimilar from people without disabilities; black people are also dissimilar from white people. Yet, taken in a formal sense, the command "treat like cases alike" cannot help us understand why it is permissible to enact the law "The seats at the front of the bus are reserved for people with disabilities," but impermissible to enact the law "Black people must sit at the back of the bus." Intuitively, we know that disability is relevant to bus seating in a way that race is not, but that relevance judgment comes not from some formal idea of what it means to treat like cases alike but from our deeper moral and political commitments to making the world accessible for the disabled and to avoiding racial segregation.

Ultimately, the judgment of generality is ineluctably substantive and normative: when we say a law is general, we mean that it doesn't pick out its classes of

application in a way that offends the value that lies behind imposing the requirement of generality in the first place.[15] I will say that this value is a "relevance criterion": it is what allows us to treat like cases alike by defining those properties of cases and treatment that are relevant for judging likeness.[16]

C Public reason as relevance criterion

Since we ordinarily say that the principle of generality captures the idea of equality under law, and since the rule of law as a whole is an egalitarian ideal, the relevance criterion that allows us to apply the requirement of generality should capture the idea that the subjects of law are to be treated as equals.[17] Thus, I propose that we say that the relevance of a legal distinction is picked out by its justifiability by public reasons. The idea of public reason is ready-made for this kind of problem, because it ensures that we treat our fellow subjects of law as equals by offering them reasons for the things we require of them that we can reasonably expect them to accept.[18] If all subjects of law know that distinctions between them are justified by public reasons, those who get the short end of the stick in some distinction are at least spared the insult of being disregarded or treated as inferiors, and comforted by the existence of some general reason, which counts as a reason for everyone, for their treatment.[19] Put differently, coercing someone based on reasons that at least have the potential to count as reasons *for her*, rather than simply determining her fate based on the idiosyncratic reasons of the decision maker, expresses respect for her status as an agent to whom justification is owed for what is done to her.

This reinterpretation of the idea of general law as law that is justifiable by public reasons captures a high-level similarity between the two ideas. Public reasons are reasons that can be addressed to all citizens.[20] The law, in turn, is general when it genuinely is addressed to all. And this mode of address comes in the form of reasons that express respect for the subjects of the law as the kinds of beings to whom reasons must be offered. In doing so, we express their inclusion in the political and legal community on equal terms.[21]

II HOW TO APPLY THE PUBLIC REASON CONCEPTION OF GENERALITY

To say that the principle of generality imports the idea of public reason may seem unhelpful. It might be worried that, for many commentators, "public reason" will just mean "reason I agree with." In this section, I argue that we can more precisely spell out the notion, at least as an evaluative criterion for law in particular.

A Public reason: expressive

The requirement of public reason as it applies in the rule of law context is helpfully understood as expressive, in the sense given by Anderson and Pildes.[22] To see this,

consider that the standard formulation, given by Rawls, is that a public reason is "at least reasonable for others to accept . . ., as free and equal citizens, and not as dominated or manipulated, or under the pressure of an inferior political or social position."[23] However, it is unclear what it might mean for it to be "reasonable" to so accept.

This reasonableness requirement might be understood in the first-person sense, from the point of view of the person offering the reason (the sovereign or a representative). However, this is underdemanding: it would entail that a law is general whenever those who enact it think that those whom they regulate ought to agree, without regard to what the regulated think.[24] Alternatively, it might be understood in the second-person sense, from the point of view of those to whom the reason is offered. But this is overdemanding. It would amount to giving those regulated by a law a veto over that law, since if they reject the reasons for it they will naturally think that it's not reasonable to demand they accept those reasons.[25] Nor is there likely to be some kind of objective "view from nowhere" third-person source of the judgment about whether it is reasonable to demand that someone accept the reasons for a law.[26]

Instead, we should understand these reasonableness judgments as conventional, drawn from the understandings shared by the members of a legal community. It is unreasonable to demand that someone accept a reason if, in the community shared by the reason-giver and the reason-taker, demanding that reason be accepted is not something one does to a free and equal citizen, and accepting that reason is not something one does when one sees oneself as a free and equal citizen. That is, to fail to offer public reasons is one way in which one might fail to treat the one to whom reasons ought to be offered with the respect owed to a free and equal citizen, as that status is understood in the community in question.

This is an expressive standard of behavior in Anderson's sense: it begins with an evaluative attitude toward an object ("equal" attached to the reason-taker), and generates the demand that one behave in the way appropriate to that attitude (by giving only reasons consistent with it). The match of appropriate reasons to attitudes is given by the social meaning of those reasons and that attitude. And as Anderson explains, to take an appropriate evaluative attitude to something is, in part, to act in the way that, in one's social world, one acts when one holds that attitude.[27]

As I will argue in a moment, this exercise amounts to finding the social meaning of a law: Does it express the equality of the citizens it regulates, or does it not? To determine the social (or expressive – I use the terms interchangeably) meaning of a law is to determine the attitudes about those regulated that members of the relevant community must attribute to the relevant agent in order to rationalize that law. The remainder of this section gives an account of how to identify those attitudes.[28]

B Finding the expressive content of a law

Law is (a) susceptible to purposive interpretation, (b) authority-claiming, and (c) legitimacy-claiming. Those properties render it distinctively susceptible to expressive interpretation.

1 Reasons and meanings

In the rule of law context, we need to use the expressive content of a law not only to figure out whether the reasons under which a law is justified are consistent with conceiving of all members of the community as free and equal, but also to determine what those reasons are in the first place.

We are not engaged in a mind-reading exercise in which the object is to sort out what the legislature was thinking. We are engaged in a justificatory exercise in which the object is to sort out whether a law can be justified in the right sort of way to each member of the community. The inquiry is about whether a law could, in principle, be publicly justified, not about whether some legislators said the right magic words or subjectively held an attitude of respect toward those regulated. If a public reason for a law is available, even if not actually in anyone's brain, then that law is general.[29]

I claim that the inquiry into the expressive meaning of a law is rationalistic, in that it amounts to an inquiry into reasons associated with a law, and constructive, in that it *attributes* those reasons to the occupiers of several standpoints with respect to the law, based on the reasons that apply to people in those standpoints. To attribute to all relevant agents the reasons they might endorse a given law is both to exhaust the logical space for expressive meanings of that law and to exhaust the possible public reasons for that law. For that reason, the public reason inquiry and the expressive meaning inquiry are the same.

Such a method, which positively invites skepticism, is possible with respect to law, because laws, unlike other expressive acts, implicitly make claims about the particular ways in which (1) legislators, (2) those called upon to obey the law, and (3) the community at large are supposed to relate to the law. By attending to these special properties of laws from those particular standpoints, we can fill out their expressive content in a way that we cannot so easily accomplish for other acts.[30]

Specifically, legislators are supposed to enact laws for rational, purposive, and collectively oriented reasons: a law, to not be arbitrary, has to be rationally directed at some ostensibly public end. We can understand the expressive content of a law from the first-person perspective of the legislature enacting it in terms of the end at which it implicitly claims to be directed.

As to those whom a law commands, the law demands it be taken as authoritative, that is, as giving exclusionary reasons for actions. And that claim to authority in turn depends on the claim that the law helps them act according to reasons that already apply to them.[31] We can understand the meaning of the law from the second-person

perspective of the one called upon to obey a law in terms of the reasons that it implicitly claims to help those who are asked to obey to apply.

Finally, as to the general members of a community for which a law is enacted, the law claims to be enacted in their names.[32] As such, it claims to be consistent with their self-understanding as a political community and the relationships with one another that self-understanding instantiates. We can understand the meaning of the law from the third-person perspective of the general member of the community in terms of the self-understanding with which it implicitly claims to be consistent.[33]

Moreover, the language of law is the language of reasons; those who participate in legislation and law obedience do so with the presupposition that there is a rational connection between the reasons for a law and the law itself.[34] Accordingly, interpreting a law is analogous to interpreting a linguistic act in the rationalistic approach associated with Donald Davidson and his concept of "radical interpretation."[35] Davidson elucidates a "principle of charity" that assumes that the speaker holds true beliefs and speaks honestly, including a "principle of coherence," which requires us to take the utterances of the speaker as logically consistent, and a "principle of correspondence," which requires us to attribute to the speaker beliefs that we take to be true. Taking those principles together entails, in Davidson's words – which are even more compelling when applied to legal enactments rather than to ordinary linguistic acts – that "[s]uccessful interpretation necessarily invests the person interpreted with basic rationality."[36]

In sum, the expressive content of a law can be found by bringing four theses together:

Expressive meanings are conventional. The expressive content(s) of a law is the content that it has in the community in which it is enacted, from the standpoint of that community, and cannot be determined apart from the social facts of that community, including its history and the way its members currently relate to one another. The inquiry is about social facts, not psychological facts about legislators or anyone else.

Laws have meaning from three points of view. Laws have expressive content from the first-person, second-person, and third-person standpoints, corresponding to the points of view of the legislator, person regulated, and ordinary member of the community. However, the content of each of these standpoints is to be interpreted in light of the first thesis; that is, we understand the expressive content of a law as the meaning that the community at large can attribute to the law from the first-, second-, and third-person standpoints – not the subjective content of the brains of the legislators, people who are called upon to obey, and ordinary citizens.

Law makes distinctive claims. The expressive content of a law is distinct from the expressive content of any other act, because laws make special demands on those who interact with them.

Expressive meanings of laws are rationalistic. This act of interpretation must be carried out, per Davidson's principle of charity, by attributing true, rational beliefs to the occupiers of each standpoint, where those beliefs are the reasons for the occupier of each standpoint to interact with the law in the way appropriate to each standpoint (enact it for that reason, obey it for that reason, etc.).

Using those principles, I can specify the expressive content of a law from each of the three standpoints. From the first-person standpoint, the members of a community may attribute expressive content to a given law by answering this question: "What attitudes must a legislator in our community hold in order to rationally enact this law for some public purpose?"[37]

From the second-person standpoint, the members of a community may attribute expressive content to a given law by answering this question: "What attitudes must those whom the law commands hold in order to rationally take this law as helping them to act according to reasons that already apply to them?"

From the third-person standpoint, the members of a community may attribute expressive content to a given law by answering this question: "What attitudes must we hold in order to rationally take this law as enacted in our names and expressing our self-understanding as a political community?"

This account borrows techniques from ethical constructivism to give the content of expressive values. Constructivist views idealize (to a greater or lesser degree) human interests and reasons, from standpoints specified by the view and/or by people's actual positions in the world, and derive moral claims from them.[38] This theory of law's expressive meaning takes idealized interpretations of the reasons that apply to people, from the three sorts of standpoints relative to the law that they may occupy, plus the claim that laws must be rational to people in each of those standpoints, and uses those building blocks to make claims about what law must mean, expressively, to the occupiers of each standpoint.

There are two distinct idealizing steps. The first is to attribute reasons to legislators, those called upon to obey a law, and those in the political community in whose name the law is enacted. The second is to attribute beliefs about those reasons (the reasons discovered in the first idealization) to members of the community at large. The point is that those meanings need not correspond to actual thoughts held by any of those people. A law can have (say) insulting meaning even if, empirically, nobody in the community actually thinks the law is insulting, just so long as the interpretation of the law according to which it is insulting is the correct way to interpret it in its social context.[39] We don't take an opinion poll to find out the expressive meaning of a law; we reason (from an external standpoint) about what community members should think.

Nonetheless, expressive meanings are social facts – observers don't get to just make them up. Rather, the reasons that observers may attribute to a law depend on the obligations and interests of, and constraints on, those in a given community at a given time. Moreover, while the expressive meaning of a law does not depend on

how people in the community actually interpret it, ordinarily the best evidence for the expressive meaning of a law will be the interpretation that actual people in the community give to a law. If the constructed interpretation of a law differs from the actual interpretation in the community, that's a reason to worry that the constructed interpretation is wrong, and to investigate it further with additional evidence or argument. There are some situations where the expressive meaning of a law depends (in a nonevidentiary sense) on the actual interpretations given it in the community. This is particularly likely where the law commands some symbolic or communicative behavior with a preexisting meaning.[40]

A law may have multiple expressive meanings. This is not a problem for the account. If there is any public reason available for a law, then that public reason should correspond to an expressive meaning for that law that incorporates reasons consistent with the equality of each citizen. If any such meaning is available from each standpoint, the law is general.

Finally, the expressive meaning of a law may change over time, because the social facts underlying that meaning may change. This entails that the correct rule of law evaluation of a law may also change over time: a law may be general at one moment and nongeneral at another. That's not a problem: there are many acts and institutions whose moral evaluation may change over time, as understood by ordinary moral and political theory. For example, a utilitarian will accept or reject a law depending on the extent to which that law maximizes well-being or preference satisfaction; this evaluation may change over time as people's preferences or needs change.[41]

2 Proof of concept

Consider a concrete example: the law "Black people must sit at the back of the bus." This is a very easy case: de jure racial segregation is nongeneral if anything is, but the analysis will help clarify how generality works. The law will satisfy the principle of generality if and only if some public reason can plausibly be offered for it from each of the three standpoints. Each standpoint is necessary, because all laws serve a triple function – as purposive public policy (corresponding to the first-person standpoint), obligation-generating legal command (the second-person standpoint), and expression of the community's self-understanding (the third-person standpoint) – and if a law cannot serve each of those functions without making use of the idea that some members of the community are of superior or inferior status, the law as a whole expresses the inequality that the principle of generality forbids.[42]

Considering the first-person standpoint, those in a racialized society such as the United States would attribute expressive content to it as follows: "There's no obvious public purpose for this law, except to express something about how black people and white people are to relate to one another. In our social world, black people are ordinarily treated as inferiors, so a rational legislator, in the world in which we live,

must accept that black people are indeed inferiors and intend to reinforce that existing hierarchical treatment in order to enact this law."[43]

Considering the second-person standpoint, those regulated would attribute expressive content as follows: "Why should a black person sit at the back of the bus? There's no obvious reason that applies to black people except for reasons about their relative status and some duty to behave in accordance with it. Given our social environment, in which black people are understood as inferiors, the only reason that could be being served by such a law is a supposed duty on behalf of black people to act in accordance with this inferior status. Therefore, to rationally take this law as authoritative, a black person must accept his or her own social inferiority."

Considering the third-person standpoint, community members would attribute expressive content as follows: "Why would we, as a political community, have a stake in bringing it about that black people sit at the back of the bus? What matters, for our relationships with one another, that gives us reason to rationally endorse the social arrangements that this law brings about? Since the only effects of the law are to separate the subordinate caste from the dominant caste and to physically manifest underlying social relations, we must believe that it is right for black people to be subordinate in order to endorse this law."

Unsurprisingly, the law "Black people must sit at the back of the bus" expressed the inferior social status of black people from all three standpoints. Since the inferiority of black people is not a public reason, and, within the social context of mid-twentieth-century America no other reasons could plausibly be assigned to such a law, the law was not justifiable by public reasons.

It will be helpful to again compare the bus segregation law to a law such as "The seats at the front of the bus are reserved for disabled people." Such a law is susceptible to rationalistic interpretations that do not presuppose the inferiority of the disabled: from the first-person and third-person standpoints, the law can represent an egalitarian concern for the physical accessibility of public services for all citizens, while from the second-person standpoint, those ordered to move to the back can understand it as helping them to follow their general duties of care toward their fellow humans. Even though other, more pernicious, interpretations may be available (the law may be seen as representing a paternalistic or patronizing attitude toward the disabled), the existence, in the actual social world, of a highly plausible interpretation of the law that renders it consistent with the equal standing of the disabled from all three standpoints allows us to see the reserved seating for the disabled law, unlike the bus segregation law, as general.

To clarify, although the expressive meaning of the bus segregation law was set by the way that those in the community should have understood it, our moral evaluation of that meaning is set by universalistic standards. That is, the law "Black people must sit at the back of the bus" can only be said to express the inferiority of black people in the social context in which it was enacted. In a different social context, it might have a different meaning. (We might imagine a culture in which the rear of a

seating area is a symbolic position of esteem.) But the moral evaluation of a given socially determined expressive meaning does not itself depend on social facts. Once we determine that some law expresses the inferiority of some members of the community, that law is to be condemned on rule of law grounds whether or not anyone (or, indeed, everyone) in that community endorses this message. Even if both black and white people agreed that black people were inferior and that it was appropriate to express this inferiority through segregation, that would not make the laws acceptable from the standpoint of the rule of law.[44]

However, because the meaning itself depends on social facts, public reason as used here exercises a weaker constraint than Rawls's version. For example, in a nonhierarchical religious society, one in which nonmembers of the dominant religion are still seen as equals, laws might prefer the dominant religion without expressing disrespect to nonadherents; in such a society, those laws will be consistent with the version of public reason used here. They would not be consistent with Rawls's version, which excludes religious reasons – but Rawls's version is the public reason of a liberal democracy, and the rule of law is compatible (see Chapter 1) with states other than liberal democracies. Accordingly, Islamic states (for example) can be compatible with the rule of law.

III GENERALITY AS EGALITARIAN PRINCIPLE

The principle of generality captures the idea that subjects of law are to be treated as equals under the law. This is, as I've noted, largely uncontroversial. Hence, it doesn't require very much defense, just a few notes to make the conventional wisdom a little more precise. The literature does not contain much detail on the conception of equality being invoked. I suggest that generality is necessary and sufficient for the state to satisfy three uncontroversial egalitarian demands.

First, generality satisfies the demand that the state be *free from legal caste*.[45] Few forms of inequality are more pernicious than those running along ascriptive group lines – the creation of superior and inferior groups of people based on race, gender, sexual orientation, parentage, and the like. Many of history's greatest evils – numerous genocides, the centuries of discrimination against Jews, the mass enslavement of Africans – have been made possible by ascriptive caste. And while ascriptive castes can be created or maintained purely by private initiative, the state historically has propped these systems up with its laws by, inter alia, denying political representation to members of lower-caste groups, prohibiting them from owning property or participating in certain professions, and imposing badges of inequality on them. Sometimes the state even invents the ascriptive groups on which castes are based, or warps the meaning of preexisting ascriptive groups, as the Belgians did in Rwanda.[46] Every reasonable person endorses the view that the state is forbidden to create or support such castes.

Second, generality is necessary and sufficient to satisfy the demand that the costs of legal public goods be *reciprocally borne*. Subjects of any legal system share an interest in the benefits of law – benefits like security against violence, property rights, the power to make enforceable contracts, and so forth. But for there to be law, there must be some constraints on the choices of community members. Since each of us receives the benefits of those constraints, each should suffer from them on equal terms. It's just unfair for me to demand that others produce the public good of law by subjecting their behavior to social control unless I'm willing to pay the same price, or unless I can offer them some reason that I can reasonably expect them to accept to justify my special treatment.[47] Otherwise, I exploit them to serve my own interests.[48]

Third, generality is necessary to satisfy the egalitarian demand that the interests of all subjects of law be *counted*. A state that does not satisfy the principle of generality has laws that are not justifiable to some subjects, that is, that treat those subjects' interests as dispensable, as not worthy of consideration in making public policy. This is essentially a restatement of the fundamental idea of the expressive conception of generality, and is thus an appropriate way to end this chapter. Making a general law is a way of respecting the right that each has to have his or her interests matter for the community that proposes to command his or her behavior.