CONSTITUTIONAL BUT LEGALLY INVALID: ON THE PRACTICE OF INTERPRETIVE JUDICIAL REVIEW

Ofer Raban[1]

Table of Contents

INTRODUCTION

This paper argues that courts regularly employ a form of non-constitutional judicial review by depriving statutes of their intended legal effect if these statutes offend some principle of the Rule of Law. This form of judicial review goes relatively unnoticed for two principal reasons. First, it is obscured in the ordinary process of legal interpretation, where it is often presented as respecting—rather than thwarting—legislative wishes. Second, many of the clearer occasions for such non-constitutional judicial review are decided through *constitutional* review, as more and more rule of law principles have become embedded in constitutional requirements.

The precise list of rule of law principles is a matter of some controversy.[2] But the principles I will discuss below are fairly non-controversial. They include the requirement that

[1] Professor of Law and Elmer Sahlstrom Senior Fellow at Trial Law, University of Oregon. I would like to thank Dr. Peter van Lochem for the kind invitation to take part in this special issue. I am also thankful to the two anonymous reviewers and to Ronan Cormacain for the insightful comments.

the law be non-contradictory, that it be relatively clear and understandable, and that like cases be treated alike. As we shall see, legal interpreters routinely deprive statutes of their legal effect when they violate these principles.

CONTRADICTORY STATUTES

One trivial example of statutes being deprived of their legal effect concerns mutually contradictory statutes ("trivial" because one of two contradictory statutes must perforce remain unenforced). Here is an example. In 2006 the Michigan courts faced a case implicating two Michigan statutes regulating car insurance policies.[3] The first statute dealt with individuals whose car insurance claims were denied, and were minors at the time of the accident. The statute granted those individuals a right to challenge the denial of coverage in court for up to one year after they became adults.[4] The purpose of the statute was to allow such individuals to vindicate their own legal rights without complete dependence on potentially negligent or incompetent parents or guardians. But a second Michigan statute (which was legislatively amended after the enactment of the first) limited the award of damages from lawsuits challenging denial of car insurance coverage to damages incurred within one year of filing the lawsuit.[5] That second statute functioned as a statute of limitations that incentivized prompt filings of such potentially expensive claims.

The case before the Michigan courts concerned a plaintiff who was injured while a minor and then sued to recover for his unpaid insurance claims six years after the original injury—but less than one year after he became an adult. According to the first statute he was allowed to seek recovery for his unpaid insurance claims; according to the second statute he was barred from seeking recovery. Resolving the case required that one of the two statutes be deprived of its intended legal effect.

---

[2] For different conceptions of the Rule of Law *see, e.g.*, James Roland Pennock, Administration and the Rule of Law 15 (Farrar & Rinehart 1941); Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 Law & Phil. 137, 157 (2002); Brian Z. Tamanaha, On the Rule of Law: History, Politics, Theory Ch. 7, 8 (Cambridge Univ. Press 2004); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1175–81 (1989).

[3] See generally, *Cameron v. Auto Club Ins Assn,* 476 Mich. 55 (2006), reversing 263 Mich. App. 95, 687 N.W.2d 354 (2004).

[4] MCL 600.5851(1).

[5] MCL 500.3145(1).

Here there was no choice but to deprive one of the statutes of its effect. Thus, the form of non-constitutional judicial review involved in contradictory statutes is rather weak: it is necessary, and legislative wishes are not denied outright—since it is hard to see how a legislature could simultaneously wish mutually contradictory requirements. Nevertheless, contradictory statutes remind us that legislative enactments do not exist in a vacuum: they are released into a rich legal environment that includes other statutes as well as governing legal norms, with which all statutes must be reconciled. Moreover, as we will see next, courts also deny legal effect in cases where it is unnecessary to do so, and is in defiance of explicit legislative wishes.

EXCESSIVELY VAGUE STATUTES

American courts have long refused to enforce criminal statutes that are insufficiently clear. One New York court explained this limitation on legislative power as follows:

> [A]lthough ignorance of the existence of a law be no excuse for its violation, yet if this ignorance be the consequence of an ambiguous or obscure phraseology, some indulgence is due to it. It should be a principle of every criminal code, and certainly belongs to ours, that no person be adjudged guilty of an offence unless it be created and promulgated in terms which leave no reasonable doubt of their meaning. … [A] court has no option where any considerable ambiguity arises on a penal statute, but is bound to decide in favour of the party accused.[6]

Note that the court did not simply state that vague statutes *may* not apply to situations where it is unclear whether they apply or not. That point is utterly trivial. Rather, the court stated that vague statutes *must* not apply to situations where it is unclear whether they apply or not. The mere fact that a criminal statute is vague means that it should not be enforced. In other words, a legislature may seek to prohibit certain conduct, and yet the courts may refuse to enforce the prohibition if the legislature failed to express itself in sufficiently precise terms.

Here is an old but clear exemplification of that principle. In 1833, several seamen were prosecuted for locking up their captain and installing the first officer in his stead—after concluding that the captain had become deranged. They were put on trial for "making a

[6] *The Enterprise*, 8 F. Cas. 732, 734-5 (C.C.D.N.Y. 1810).

revolt," which was forbidden by a criminal statute; but the court acquitted. The presiding judge wrote in his opinion:

> [T]he offence of making a revolt, is not sufficiently defined by this law, or by any other standard, to which reference could be safely made; to warrant the court in passing a sentence upon the prisoners, in case of conviction. I confess I have always considered…to make a revolt, was to throw off all obedience to the master; to take possession by force of the vessel by the crew; to navigate her themselves, or to transfer the command to some other person on board. … But although this is still my opinion…[i]f we resort to definitions given by philologists, they are so multifarious, and so different, that I cannot avoid feeling a natural repugnance, to selecting from this mass of definitions, one, which may fix a crime upon these men, and that too of a capital nature; when, by making a different selection, it would be no crime at all... Laws which create crimes, ought to be so explicit in themselves, or by reference to some other standard, that all men, subject to their penalties, may know what acts it is their duty to avoid. For these reasons, the court will not recommend to the jury, to find the prisoners guilty of making, or endeavouring to make a revolt, however strong the evidence may be.[7]

American Courts continue to refuse enforcement of excessively vague criminal statutes by employing this interpretive principle known as the "lenity rule."[8] The U.S. Supreme Court recently explained the rule as follows:

> [N]o citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. [The rule]…induce[s] [the legislature] to speak more clearly...[9]

Another recent decision of that court illustrates the application of these principles. In 2016, the U.S. Supreme Court reversed a criminal conviction obtained under a bribery statute that

---

[7] *U S v. Sharp*, 27 F. Cas. 1041 (C.C.D. Pa. 1815)

[8] Courts repeatedly admonish that "the rule of lenity is subordinate to our obligation to determine legislative intent, and the rule of lenity will not be construed so rigidly as to defeat legislative intent" (*People v. Gutman*, 959 N.E.2d 621, 624 (2011)); and that "The rule of lenity is only applied when the Legislature's intent is lacking" (*In re Restraint of Bowman*, 109 Wash. App. 869, 875–76, 38 P.3d 1017, 1021 (2001)). But what is meant by those qualifications is that criminal prohibitions will be enforced if a more precise and less vague legislative intent could be detected—not that the legislature could enforce uncertain and vague criminal prohibitions *if that was its intent*. In other words, if the statutory language and the legislative intent do not meet some minimal level of clarity and specificity, the statute would not be enforced. See also *Gee v. State*, 225 Ga. 669, 675-677 (1969) (applying the rule of lenity to resolve a dispute between two conflicting statutes).

[9] *United States v. Santos*, 553 U.S. 507 (2008).

prohibited public officials from committing (or agreeing to commit) an "official act" in exchange for "anything of value."[10] The statute defined an "official act" as

> [A]ny decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.[11]

This broad definition intended to cast a wide net. The Supreme Court first rejected the claim that the statute was unconstitutionally vague, but then gave the statute a narrow construction:

> [U]nder the Government's interpretation, the term "official act" is not defined with sufficient definiteness that ordinary people can understand what conduct is prohibited, or in a manner that does not encourage arbitrary and discriminatory enforcement. Under the standardless sweep of the Government's reading, public officials could be subject to prosecution, without fair notice...[12]

The Court therefore held that the Governor of Virginia did not perform an "official act" when, in exchange for gifts and loans from a businessman who wanted the University of Virginia to conduct free research on a dietary supplement produced by his company, the Governor contacted Virginia officials and university employees and asked them to meet with the businessman; convened meetings and dinners with university officials and researchers where he wondered aloud whether the businessman's product was worth exploring; and inquired with the Virginia Secretary of Administration whether it "would be good" for state employees to have the supplement included in their health care coverage.[13] Whatever one thinks of the merits of the case, this is another demonstration of a court denying a statute its legal effect for offending a principle of the rule of law—here, the requirement that statutes must possess a certain minimum of clarity and specificity.

Of course, legislatures may have good reasons to enact ill-defined and very broad statutes. For one thing, the legislature may wish to deter a broad and nebulous range of activities. Examples include not only statutes that prohibit corrupt "official acts," but also statutes that make it a crime to engage in "unfair methods of competition" (whatever that is),[14] or prohibit driving "without due care and attention, or without reasonable consideration for

---

[10] *McDonnell v. United States*, 579 U.S. ___ (2016).
[11] 18 U. S. C. §201(a)(3).
[12] Id (quotation marks omitted). See also *Skilling v. United States*, 561 U.S. 358 (2010).
[13] Id.
[14] *See, e.g.*, *CA v. National Research Co.*, 201 Cal.App.2d 765 (1962).

other persons using the road."[15] Such broad statutory language seeks to deter and punish a diverse range of harmful activities that are defined by reference to their deleterious effect. Perhaps more nefariously, legislatures may enact excessively vague statutes in order to allow the executive to engage in selective enforcement (or the judiciary to engage in broad discretionary determinations). Consider, for example, Russia's Law on Combating Extremist Activity (2002), which defines "extremist activity" to include, *inter alia*, "incitement to social…hatred; … or mass dissemination of materials known to be extremist…"[16] Such statutes are not uncommon. But then again, in systems that respect the rule of law, they are often deprived of their intended legal effects.

TREATING LIKE CASES ALIKE

i. The Rational Justifiability of Legal Requirements

One central but often misunderstood rule of law principle is the requirement of equality before the law—also known as the principle that like cases must be treated alike.[17] At first glance, the principle does not seem to constitute a constraint on legislative power, since it appears to be measured by reference to what the legislature has said. That is to say, legislative enactments arguably *determine* what cases are "alike." Hans Kelsen articulated this (erroneous) understanding as follows:

> [W]hat of the special principle of so-called equality before the law? All it means is that the machinery of the law should make no distinctions which are not already made by the law to be applied. If the law grants political rights to men only, not women, to citizens only, not aliens, to members of a given race or religion only, not to members of other religions or races, then the principle of equality before the law is fully upheld if in concrete cases the judicial authorities decide that a woman, an alien, or the member or some particular religion or race, has no political rights. This principle has scarcely anything to do with equality any longer. It merely states that the law should be applied as is meant to be applied. It is the principle of legality or legitimacy which is by

[15] Road Traffic Act (U.K., 1991).
[16] See http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/201/201011/20101129_3_10sova_en.pdf
[17] Following Aristotle, the requirement is often described as a principle of justice, though its status as part of the rule of Law is non controversial. See Aristotle, Nicomachean Ethics, Book 5.

> nature inherent in every legal order, regardless of whether this order is just or unjust.[18]

According to this conception, the principle that like cases must be treated alike constitutes a limitation on those enforcing the law—but not on the legislature, whose determinations are the measure for the application of the principle.

In fact, however, the very possibility of deciding whether a case falls within or without a legal category—and thus the very possibility of complying with the principle that like cases be treated alike—presupposes a fundamental limitation on legislative enactments: namely, that there be some rational explanation as to why a legal category is treated as it does. Here is why.

First, as H.L.A. Hart pointed out, the principle that like cases be treated alike is intimately related to the rule of law's principle of generality:

> If we attach to a legal system the minimum meaning that it must consist of general rules--general both in the sense that they refer to courses of action, not single actions, and to multiplicities of men, not single individuals--this meaning connotes the principle of treating like cases alike, though the criteria of when cases are alike will be…the general elements specified in the rules.[19]

The legislature identifies some general category, and proceeds to accord that category some treatment. The requirement that like cases be treated alike can therefore be rephrased as the requirement that if a case falls within that general category, the case should be treated as the rule specifies.

But whether a case does or does not fall within a legal category is a question that necessitates engagement with the *reasons* for treating that category in the way specified. Take a murder statute requiring twenty years of imprisonment for those who "intentionally kill another human being." A question may arise whether one who intentionally killed a fetus has intentionally killed "another human being" and therefore should be treated alike.[20] The answer to that question revolves, in part but necessarily so, around the *reasons* for which "intentionally killing another human being" warrants twenty years of imprisonment: whether

---

[18] See, e.g. HANS KELSEN, ESSAYS IN LEGAL AND MORAL PHILOSOPHY 15 (Peter Heath trans., Donald Davidson, Jakko Hintikka, Gabriël Nuchelmans & Wesley C. Salmon eds., D.Reidel Publishing 1973).

[19] H.L.A Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 623-4 (1958).

[20] See, e.g., *Keeler v. Superior Court*, 2 Cal. 3d 619 (1970).

a fetus should be considered a "human being" depends on whether the reasons for punishing such intentional killing apply with equal force to the killing of fetuses as to the killing of living persons. Thus, whether the term "human being" does or does not include a fetus may vary from statute to statute, depending on the reasons for the treatment the statute specifies. Whether a fetus is or is not a human being would be different for a statute regulating the burial, rather than the killing, of a "human being"; or for a statute regulating chemicals that are harmful to a "human being." The question whether a baby and a fetus should be treated alike depends on whether the reasons for the statutory requirement apply with similar force to a fetus as to a baby.

So treating like cases alike necessitates an evaluation of the explanations, or justifications, for the treatment accorded the specified legal category. These explanations need not be *endorsed* by the legal interpreter.[21] Interpreters can recognize reasons, and rely upon them, even if they do not accept them as good ones.[22] Nevertheless, some reason linking a legal category to the treatment accorded it under the law must be recognized. And this means, in turn, that every legal requirement should be explainable *by reference to the characteristics of the category to which it applies*. The very ability of legal interpreters to comply with the principle that like cases be treated alike depends on their ability to determine whether a case possesses or lacks the characteristics that explain the statutory treatment.

In other words, as Isaiah Berlin put it, the principle that like cases be treated alike is, at bottom, a principle of rationality:

> [T]here is a principle . . . that similar cases call for, i.e. should be accorded, similar treatment. Then, given that there is a class…, it will follow that all members of this class…should in every respect be treated in a uniform and identical manner, unless there is sufficient reason not to do so. . . . The

[21] *See also* Ronald Dworkin, *Law's Empire* at 183 ("Suppose you think abortion is murder and that it makes no difference whether the pregnancy is the result of rape. Would you not think a statute prohibiting abortion except in the case of rape distinctly better than a statute prohibiting abortion except to women born in one specified decade each century? … You see the first of these statutes as a solution that gives effect to two recognizable principles…even though you reject one of the principles.")

[22] The concept of "reasonable disagreement," which also relies on that distinction, has been discussed often in the literature following its role in John Rawls' *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971). *See generally* Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, MA: Belknap Press of Harvard University Press, 1996).

> assumption here seems to be that unless there is some sufficient reason not to do so, it is 'natural' or 'rational' to treat every member of a given class…as you treat any one member of it.[23]

(It is, of course, "natural or rational to treat every member of a given class as you treat any one member of it" if there is a reason for treating any member that way to begin with.) In a similar manner, the Privy Council of the United Kingdom observed that "Their Lordships do not doubt that [a principle of treating like cases alike] is one of the building blocks of democracy and necessarily permeates any democratic constitution. Indeed, their Lordships would go further and say that treating like cases alike and unlike cases differently is a general axiom of rational behaviour."[24] The law does not tolerate arbitrary classifications.

ii. Rational Justifiability as a Limitation on Legislative Power

This rationality requirement is an important and substantial limitation on the powers of the legislature, given that a legislature may have good reasons to want to draw arbitrary categories. For one thing, a legislature may wish to do so as a matter of legislative compromise. Ronald Dworkin wrote about such solomonic legislative compromises in his famous discussion of "checkerboard statutes":

> Do the people of North Dakota disagree whether justice requires compensation for product defects that manufacturers could not reasonably have prevented? Then why should their legislature not impose this "strict" liability on manufacturers of automobiles but not on manufacturers of washing machines? Do the people of Alabama disagree about the morality of racial discrimination? Why should their legislature not forbid racial discrimination on buses but permit it in restaurants? Do the British divide on the morality of abortions? Why should Parliament not make abortions criminal for pregnant women who were born on even years but not for those born in odd ones?[25]

Legal categories whose features cannot explain or justify the legal treatment they receive could result from legislative wheeling and dealing.

---

[23] ISAIAH BERLIN, *Equality*, *in* CONCEPTS AND CATEGORIES: PHILOSOPHICAL ESSAYS (Henry Hardy ed., Princeton Univ. Press 1999).

[24] *Matadeen v Pointu* [1999] 1 AC 98, 109 (per Lord Hoffmann).

[25] Ronald Dworkin, *Law's Empire* at 179.

U.S. Supreme Court Justice Robert Jackson offered another reason as to why legislators may wish to draw arbitrary legal categories: they may do so, he wrote, in order "to pick and choose only a few to whom they will apply legislation."[26] A legislature may want to exempt some favored people or entities from a legal requirement, or to single out some disfavored population for some disagreeable treatment. Indeed, drawing legal categories whose features cannot explain the legal treatment accorded to them can be an efficient way of rewarding a particular group or punishing another. Think of a law rewarding firefighters or veterans by granting them an exemption from parking regulations; or punishing petty criminals by depriving them of the ability to park downtown. There is nothing *per se* unreasonable about such suggestions. But they are unreasonable *as laws*: we expect that laws that reward firefighters or veterans, or punish criminals, do so in a way that is related to the defining characteristics of firefighters or veterans or criminals; and if there is no relation between parking regulations and these defining features, such regulations—laudable or desirable as they might be—are unacceptable as legal requirements. Rules that lack a rational link between their operative categories and the treatment they mete out are not likely to be proposed, let alone enacted.

Of course, perhaps there *are* rational explanations linking the defining characteristics of veterans or firefighters or petty criminals to parking regulations. For example, perhaps a large percentage of veterans and firefighters are handicapped as a result of their dangerous occupations, and exempting them from parking regulations would allow them the mobility they need. In such a case, these legislative proposals may be in compliance with the rule of law principle that like cases be treated alike. The point I am making is that the rule of law requires that statutes possess such rational connections. Moreover, that people may disagree about what is rational is, for purposes of my argument, completely beside the point. My argument is that courts enforce rule of law requirements in ways that often conflict with legislative wishes and intents; and they do so, among other things, by applying statutes only where their rational explanations apply. Whether interpreters are right or wrong about such determinations—or whether there is even a sense in which they can be right or wrong—are important questions in legal philosophy, but not for this thesis.

Here is a recent example of judicial application of this principle.[27] In 2010, the U.S. Supreme Court decided *Hamilton v. Lanning*, which involved the federal bankruptcy act.[28]

---

[26] *Ry. Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).
[27] For a less recent example *see, e.g.*, *Holy Trinity Church v. U.S.*, 143 U.S. 457 (1892).

The case concerned the statutory formula for calculating the monthly payment a debtor in bankruptcy must make. In *Hamilton*, due to a unique one-time injection of money to the debtor's bank account, that formula yielded monthly payments that the debtor could not possibly make. In other words, the rational justification for the statutory formula—i.e., its ability to calculate debtors' monthly payments—was absent from this debtor's case. The Supreme Court ruled that the statutory formula for calculating debtors' future payments was unenforceable in cases in which its result "is either substantially lower or higher than the debtor's disposable income."[29] In other words, where the statutory requirements makes no rational sense, the statutory requirement would not be enforced.

By contrast, legislators and legal interpreters operating in systems that lack deference for rule of law principles may pay no heed to the requirement of a rational explanation. Consider the following New York Times op-ed by an aggrieved Chinese citizen (and celebrated author), titled "In China, Power is Arrogant":

> In late 2010, Chinese customs officials imposed an import tax of 1,000 yuan (about $150 then) on every iPad brought into the country. Ignoring the fact that iPads differ in features and prices, officials set a single tariff: 20 percent of the tablet's listed 5,000-yuan value. People who paid 3,000 yuan for an iPad in Hong Kong—where smartphones and other electronics are much cheaper than on the mainland — were charged the same tariff. Even Chinese tourists returning home with their own iPads, bought in China, were taxed!
> . . . If the central government's decrees are opaque, local authorities' can be downright ridiculous. In 2001, hospital officials in the southern city of Shenzhen specified that nurses should show precisely eight teeth when smiling. In 2003, Hunan Province, in central China, stipulated that the breasts of female candidates for civil-service positions should be symmetrical. … [I]n an effort to reduce the school-dropout rate, Pinghe County in Fujian Province, on the southeast coast, decreed that a junior high school diploma was required to marry.[30]

What's the connection, say, between high-school diplomas and marriage? There seems to be none.

In fact, there are many systems of rules, closer to home than China, that similarly disregard the rationality principle. Some of the rules governing life in the military may

---

[28] *Hamilton v. Lanning*, 560 U.S. 505, 508-09 (2010). *See also* 11 U.S.C. §§ 1306(b), 1321, 1322(a)(1), 1328(a).
[29] *Id*.
[30] *See* Yu Hua, *In China, Power is Arrogant*, N.Y. TIMES, May 8, 2013, http://www.nytimes.com/2013/05/09/opinion/yu-in-china-power-is-arrogant.html.

possess arbitrary categories ("those whose last names begin with the letters A-F are shipped to Afghanistan"). Or think of religious rules—prohibitions on shaving one's beard, or on mixing dairy and meat products, or the prohibitions on the consumption of beef or pork.[31] Many such rules may have had rational origins, but these may be both unknown and of little interest to those who follow these rules or enforce them.[32] A rational explanation between a requirement and its operative categories is not something that most religious practitioners expect or demand of their religious laws.

CONSTITUTIONALIZING THE RULE OF LAW

As noted in the Introduction, non-constitutional interpretive judicial review—the practice of denying statutes their legal effect in the process of interpreting them—goes relatively unnoticed for two primary reasons. First, courts that limit legislative powers usually do so by purporting to give effect to what the legislature enacted—usually by claiming that the interpretation accords with the legislative intent.[33] In fact, however, they often do

---

[31] See, e.g., Making Sense of Kosher Laws, Biblical Archaeology Society Staff, 07/09/2012 ("The origins of Jewish dietary or kosher laws (*kashrut*) have long been the subject of scholarly research and debate. Regardless of their origins, however, these age-old laws continue to have a significant impact on the way many observant Jews go about their daily lives. One of the more well-known restrictions is the injunction against mixing meat with dairy products. Not only do most Jews who observe *kashrut* avoid eating any meat and milk products together, many also wait a certain amount of time—30 minutes to a few hours—between eating meat and dairy. Everything the foods touch must be kept completely separate. A fully kosher household, for example, might have two or more different sets of flatware, tableware and cooking ware for making and serving meat dishes separate from dairy-based dishes. Some families even use two different dishwashers in order to maintain the separation.") available at http://www.biblicalarchaeology.org/daily/ancient-cultures/daily-life-and-practice/making-sense-of-kosher-laws/.

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

[33] *See, e.g.*, *In re Restraint of Bowman,* 109 Wash. App. 869 (2001) (refusing to enforce a vague statute by appealing to the concept of legislative intent); *Hamilton v. Lanning*, 560 U.S. 505, 513 (2010) (explaining the refusal to enforce an irrational formula by stating that enforcement "would produce senseless results that we do not think Congress intended."); *Kilmon v. State*, 394 Md. 168, 905 A.2d 306 (2006) ("[T]he law necessarily and correctly presumes that Legislatures act reasonably, knowingly, and in pursuit of sensible public policy.

something quite different: courts habitually qualify, adjust, revise, or deny legal effect to legislative enactments in defiance of their legislative intent.[34] Such is the job of statutory interpretation: it must adopt statutes to a rich ecosystem that includes, *inter alia*, other rules and regulations, as well as the norms of the rule of law (that include such requirements as coherence, due notice, clarity, prospectivity, or rationality).

A second reason for the relative inconspicuousness of such interpretive judicial review is the fact that many rule of law requirements have become constitutionalized—either by the action of constitutional drafters or by the action of courts. In other words, many of the requirements of the rule of law double as constitutional limitations. For example, early in the 20th Century, U.S. courts decided that the prohibition on excessively vague statutes—thus far enforced as a matter of statutory interpretation—was, in fact, part of the U.S. Constitution's Due Process Clause (which reads, "No person shall be…deprived of life, liberty, or property, without due process of law").[35] A similar doctrine—which pertains to restrictions of speech—was announced under the First Amendment to the U.S. Constitution (which reads in relevant part, "Congress shall make no law. . . abridging the freedom of speech or of the press. . .")[36] Accordingly, what began as the enforcement of rule of law principles through the process of

---

Where there is a legitimate issue of interpretation, therefore, courts are required, to the extent possible, to avoid construing a statute in a manner that would produce farfetched, absurd, or illogical results which would not likely have been intended by the enacting body.")

[34] See, e.g., William N. Eskridge and John Ferehjoh, Politics, Interpretation, and the rule of Law in The Rule of Law (Nomos vol. XXXVI, edited by Ian Shapiro 1994), at 269 ("While legislature are designed to give statutory expression to public opinion in an open and responsive fashion, courts have a special responsibility and competence to find generality (rules), coherence, and law-likeness in statutes, even when (especially when) statutes themselves fail to possess these properties).

[35] See *Connally v. General Construction Co*., 269 U.S. 385, 391 (1926). The requirement was first located in defendants' Sixth Amendment's right to be informed of the nature of the accusations against them (see United States v. Capital Traction Co., 34 App. D.C. 592 (1910); Czarra v. Board of Medical Supervisors, 25 App. D.C. 443 (1905), and was then relocated to the Due Process Clause, where it remains today (with occasional visits to the First Amendment and to constitutional Separation of Powers). (See International Harvester Co. v. Kentucky, 234 U.S. 216 (1914) (finding the void-for-vagueness doctrine to derive from Due Process Clause); United States v. Evans, 333 U.S. 483 (1948) (finding the void-for-vagueness doctrine to derive from constitutional separation-of-powers). See also *City of Chicago v Morales*, 527 U.S. 41 (1999) (finding a statute void for vagueness under the Due Process Clause).

[36] *Community for Creative Non-Violence v. Turner,* 893 F.2d 1387 (1990).

statutory interpretation soon transformed, by a series of judicial decisions, into constitutional requirements.[37]

The same thing occurred with the rationality principle, which has become constitutionally enforced, in part, through the Fourteenth Amendment's Equal Protection Clause (which reads, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws. . ."). [38] Interpreting that Clause, the U.S. supreme Court declared that, at a minimum, legal classifications must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation..."[39] A statute is unconstitutional if it places persons into "different classes on the basis of criteria wholly unrelated to the objective of that statute."[40] The U.S. Constitution therefore requires that legal categories be based upon "some reasonable differentiation fairly related to the object of regulation."[41] ("There is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally," explained U.S. Supreme Court Justice Robert Jackson.[42])

Thus, in the United States, present rule of law constitutional requirements include the prohibition on excessively vague statutes,[43] the prohibition on retrospective legislation,[44] the

---

[37] See generally, Note, *Void for Vagueness: An Escape From Statutory Interpretation*, 23 Ind. L.J. 272, 274-78 (1948).

[38] Fourteenth Amendment to the U.S. Constitution.

[39] F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). *See also* Anja Seibert-Fohr, *The Rise of Equality in International Law and Its Pitfalls: Learning from Comparative Constitutional Law*, 35 Brook. J. Int'l L. 1 (2010) (discussing similar rationality review outside the U.S.).

[40] *Eisenstadt v. Baird,* 405 U.S. 438, 447 (1972); *Reed v. Reed,* 404 U.S. 71, 75-76 (1971).

[41] *Ry. Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

[42] Id. *See also* the recent lawsuit seeking an injunction against President Trump's executive order on border control: "Federal courts have no more sacred role than protecting marginalized groups against irrational, discriminatory conduct," said the filing by Washington state. Available at https://www.documentcloud.org/documents/3442904-TRO-Request-Ferguson-v-Trump.html.

[43] See *Connally v. General Construction Co*., 269 U.S. 385, 391 (1926). The requirement was first located in defendants' Sixth Amendment's right to be informed of the nature of the accusations against them (see United States v. Capital Traction Co., 34 App. D.C. 592 (1910); Czarra v. Board of Medical Supervisors, 25 App. D.C. 443 (1905), and was then relocated to the Due Process Clause, where it remains today (with occasional visits to the First Amendment and to constitutional Separation of Powers). (See International Harvester Co. v. Kentucky, 234 U.S. 216 (1914) (finding the void-for-vagueness doctrine to derive from Due Process Clause); United States v. Evans, 333 U.S. 483 (1948) (finding the void-for-vagueness

requirement of generality,[45] the principle that rules of law must be knowable,[46] and the requirement that legal obligations be explainable by the features of the categories to which they apply.[47]

The constitutionalization of rule of law principles is, in fact, an international phenomenon. A recent decision of the British House of Lords, for example, held that the rationality principle is mandated by the European Convention on Human Rights ("The question is whether persons in an analogous or relevantly similar situation enjoy preferential treatment, without reasonable or objective justification for the distinction, and whether and to what extent differences in otherwise similar situations justify a different treatment in law.").[48] In fact, according to a recent book on the subject, 48% of preambles to the world's constitutions include a reference to the principles of the rule of law.[49] And although many preambles—including the preamble to the American Constitution—are considered unenforceable by courts, things are not uniformly so. A recent article looking into the matter found that "A growing number of countries have legalized the language of the preamble. The preamble's rights and principles have become more and more legally enforceable, rights that lawyers can bring to court…"[50] In short, rule of law principles have become a staple of enforceable constitutional requirements.

And yet, the fact that many rule of law requirements are now enforced through constitutional law or human rights conventions should not be allowed to obscure a central truth about the role of these principles in our legal system: namely, that they are regularly enforced in the ordinary processes of applying statutes. Perhaps we can say that the common

---

doctrine to derive from constitutional separation-of-powers). See also *City of Chicago v Morales*, 527 U.S. 41 (1999) (finding a statute void for vagueness under the Due Process Clause).

[44] U.S. Constitution, Art 1, § 9 and Art. 1 § 10.

[45] U.S. Constitution, Art 1, § 9.

[46] See, e.g., *Lambert v. California*, 355 U.S. 225 (1957) (finding the defendant not guilty of registration requirement because "registration act of this character violates due process where it is applied to a person who has no actual knowledge of his duty to register").

[47] *Eisenstadt v. Baird,* 405 U.S. 438, 447 (1972); *Reed v. Reed,* 404 U.S. 71, 75-76 (1971).

[48] *A and others v. Secretary of State for the Home Department* [2004] UKHL 56 (also known as the Belmarsh 9 case).

[49] *See* W Woermans, Constitutional Preambles (Elgar 2017) at 34. I am thankful to Ronan Cormacain for this reference.

[50] Liav Orgad, The preamble in constitutional interpretation, *International Journal of Constitutional Law*, Volume 8, Issue 4, 1 October 2010, Pages 714–738.

perception of the business of legal interpretation often under-appreciates how robust and far-reaching that process actually is.