

LAW WEEK 2020  
“THE RULE OF LAW”

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## INTRODUCTION

1. Each of you has been assigned a classroom at a specific high school. The schedule you were provided has contact information for the teacher. Please contact your assigned teacher prior to the presentation (this is also a good time to find out about class size, and any other specifics of interest to you). Be creative and interactive with your presentations. The discussion questions and classroom demonstrations and exercises at the end of the materials are just suggestions. Once you are in contact with the teacher, feel free to create whatever format you think will be most engaging.
2. Most of you will present in pairs. Please coordinate with your co-presenter.
3. You will have approximately 1 hour to present and engage in discussions. Time available may change at each location. Please verify the time available to speak when you contact the teacher.
4. You should plan to spend a little time, at either the beginning or the end of the presentation, discussing the legal profession and your personal careers.
5. These materials are presented in an outlined format, but you need not follow that order. A lot of information is provided here; take what you wish, adapt it to fit your presentation, and supplement if you so desire.

On behalf of the Law Week Committee, including Dale Miller, Laney Rooks, Andrew Spaulding, Destinee Tartuffe, Mike Wanser, Jack Sanford, and Rebecca Gallagher, we would like to thank all of you for participating in Law Week 2020.

*- Carmen Sinigiani and Adam Eberts, SCBA Law Week Co-Chairs*

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## 1. WHAT IS “THE RULE OF LAW?”

*“It is more proper that law should govern than any one of the citizens”*

- Aristotle

The Rule of Law is defined as: “The authority and influence of law in society, especially when viewed as a constraint on individual and institutional behavior; (hence) the principle whereby all members of a society (including those in government) are considered equally subject to publicly disclosed legal codes and processes.”

The term “Rule of Law” is closely related to “constitutionalism” and refers to a political situation, not to any specific legal rule. The Rule of Law implies that every person is subject to the law, including people who are lawmakers, law enforcement officials, and judges. No one is above the law. In this sense, it stands in contrast to a monarchy or oligarchy where the rulers may be held above the law. It also means that laws are created through a predetermined, open, and transparent process, not by the whim of the most powerful members of society.

There are four core principles of the Rule of Law:

1. The government and its officials and agents as well as individuals and private entities are accountable under the law.
2. The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property and certain core human rights.
3. The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.
4. Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

## 1.1. WHY IS THE RULE OF LAW SO IMPORTANT?

One of the most important defining characteristics of a democracy is the Rule of Law. It is important for many reasons:

- It provides a check on abuse of power
- It provides stability in society
- It informs the expectations of the people
- It gives the guidelines within which all must operate
- It defines punishments for wrongs
- It guarantees freedoms and rights
- And provides recourse when those rights are infringed

## 1.2. HISTORY OF THE RULE OF LAW

The principle of the Rule of Law was recognized by ancient philosophers, as illustrated by Aristotle's quote. However, use of the phrase, "Rule of Law", can be traced to 16th-century Britain, and in the following century the Scottish theologian Samuel Rutherford employed it in arguing against the divine right of kings. "The Rule of Law" was further popularized in the 19th century by British jurist A. V. Dicey, who inspired the writings of the architects of the American Constitution.

The Rule of Law was first codified in Western European government in the Magna Carta in 1215, when English nobles demanded that King John's powers to arbitrarily arrest or imprison them be curtailed. The charter states that even the King had to follow the law:

No free man shall be taken, imprisoned, disseized, outlawed, or banished, or in any way destroyed, nor will he proceed against or prosecute him, except by the lawful judgment of his peers and the Law of the Land.

## 2. THE RULE OF LAW IN AMERICA

### 2.1. IN AMERICA, THE LAW IS KING

The founding fathers of the U.S took inspiration from A.V. Dicey in informing their notions of the Rule of Law. In his 1776 pamphlet, *Common Sense*, American founding father Thomas Paine wrote that the law itself ought to be more important and more powerful than any individual, including a king:

But where says some is the king of America? I'll tell you Friend, he reigns above, and doth not make havoc of mankind like the Royal of Britain. . . in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other. But lest any ill use should afterwards arise, let the crown at the conclusion of the ceremony be demolished, and scattered among the people whose right it is.

John Locke wrote that freedom in society means being subject only to laws made by a legislature that apply to everyone, with a person being otherwise free from both governmental and private restrictions upon liberty. With their understanding of the importance of the Rule of Law, the founding fathers set out to construct a document capable of memorializing the most fundamental rules of a society.

### 2.2. THE U.S. CONSTITUTION

#### 2.2.1. THE U.S. CONSTITUTION IS THE FUNDAMENTAL LAW OF THE LAND

The American founding fathers realized the need for a document that could establish the Rule of Law. They knew the document would need to clearly convey the laws in order to provide stability and continuity. The U.S. Constitution is that document, it is the nation's fundamental law. It codifies the core values of the people.

More than 200 years ago, Alexander Hamilton, James Madison, and John Jay published a series of essays promoting the ratification of the United States Constitution now known as the Federalist Papers. The Federalist Papers state, if any law passed by Congress conflicts with the Constitution, the Constitution is preferred to the statute.

The Federalist Papers go on to indicate the power of the people is superior to both. “Where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.”

The Constitution embodies these principles:

- Limited Government - The principle that the power of the government is limited by the Constitution; a system of government in which the government is given only the powers specifically listed in written documents.
- Separation of Powers - There are three branches of government, each with its own powers and duties.
- Checks and Balances - Each branch checks the powers of the other two branches.
- Federalism - Power is divided between the federal government and the state governments.

### 2.2.2. THE CONSTITUTION PROVIDES FOR THREE BRANCHES OF GOVERNMENT

The framers of the Constitution recognized that in order to maintain the Rule of Law as king, no one person could have too much power. To do so, the founders created three distinct branches of government, as outlined in the Constitution.

1. The Legislative Branch to make the laws. (Congress; made up of two houses, the Senate and the House of Representatives.)
2. The Executive Branch to enforce the laws.
3. The Judicial Branch to interpret the laws.

### 2.2.3. SEPARATION OF POWERS ENHANCES THE RULE OF LAW

All government officers of the United States, including the President, the Justices of the Supreme Court, state judges and legislators, and all members of Congress,

pledge first and foremost to uphold the Constitution. These oaths affirm that the Rule of Law is superior to the rule of any human leader.

However, each of the three branches has a certain degree of flexibility in the application of the Rule of Law: the legislative branch is free to decide what statutes it will write, as long as it stays within its enumerated powers and respects the constitutionally protected rights of individuals. The judicial branch has a degree of judicial discretion and the authority to interpret laws within certain limits. The executive branch has various constitutionally limited discretionary powers including prosecutorial discretion.

Each of these freedoms is kept in check by the powers of the other branches of government, further ensuring the laws are applied consistent with the Rule of Law of the U.S. Constitution.

## 2.3. RULE OF LAW AS IT APPLIES TO EXERCISING INDIVIDUAL RIGHTS

### 2.3.1. WHAT ARE INDIVIDUAL RIGHTS?

The precise meaning of the term, “*right*,” is controversial and is the subject of continued moral and philosophical debate; over the past century, however, the concept of rights has changed significantly, while there is consensus that human rights encompasses a wide variety of rights, there is disagreement about what rights and the extent of rights that should be included within that general framework of rights guaranteed to individuals.

Individual rights are commonly understood as inalienable, fundamental rights “to which a person is inherently entitled simply because she or he is a human being” and which are “inherent in all human beings”, regardless of their age, ethnic origin, location, language, religion, ethnicity, or any other status.

These rights are regarded as imposing an obligation on persons to respect the individual rights of others, and it is generally considered that they should not be taken away except as a result of due process, based on specific circumstances.

### 2.3.2. HOW DOES THE RULE OF LAW APPLY TO INDIVIDUAL RIGHTS?

There are three main categories of laws, tort law (which is a civil wrong), criminal law (which is a public wrong) and contract law (which is a wrong against a written or oral agreement).

The Laws function to keep the peace in a country, shape moral standards, promote social justice, facilitate orderly change, and provide a basis for compromise.

When the laws are written clearly (so that reasonable people can understand), publicized (so that citizens know their duties), applied evenly (to avoid discrimination); and provide protection of fundamental rights; they will be upheld as valid.

### 2.3.3. WHAT RIGHTS DO INDIVIDUALS HAVE?

#### 2.3.3.1. *Rights drafted into the Constitution*

Initially, the only individual protections enumerated by the Constitution were found in the Articles. These included prohibitions against passing ex post facto laws, bills of attainder, interference with Contracts, a right to criminal trial, the writ of habeas corpus, and privileges and immunities which provides that “the Citizens of each State shall be entitled to all privileges and Immunities of Citizens of several states.”

After the Revolutionary War, certain of the founding members of the Constitutional Convention were upset that no individual protections were included. Some of them were strong advocates for a strong federal government, while some advocated for limited federal power and a states-rights model. This difference of opinion became the tension that has been at the heart of our political system to the present.

A bill of rights is what people are entitled to against every government on earth, general, or particular, and what no just government should refuse, or rest on inference.

--Thomas Jefferson.

These founding members spent an additional four years negotiating to create what was eventually adopted and ratified as the Bill of Rights, thereby providing guarantees of protections for individual citizens.

### *2.3.3.2. Bill of Rights*

The Bill of Rights is comprised of the first ten Amendments to the United States Constitution. Initially, these only provided protection from actors from the Federal government, but following the Civil War, the Reconstruction Amendments were passed making all those protections applicable to States. These Amendments have been most scrutinized by the courts.

#### *Amendment I*

The First Amendment provides protections related to speech and religion, assembly, and petition of the government. Arguments related to speech and religion have been at the forefront of many Supreme Court decisions. The following cases are some of the decisions the courts have made concerning speech and religion in the context of schools and students:

#### **Free Speech Cases**

*Hazelwood School District v Kuhlmeier* (1998): The court held that schools do not violate First Amendment rights of students by exercising editorial control over student speech as long as the censorship is “reasonably related to legitimate pedagogical concerns.” Schools must be able to set their own high standards for student speech published in its name and may refuse to publish speech that is “inconsistent with ‘the shared values of a civilized social order.’”

*Bethel School District #43 v. Fraser* (1987): Students do not have a First Amendment right to make obscene speeches in school. Matthew N. Fraser, a student at Bethel High School, was suspended for three days for delivering an obscene and provocative speech to the student body. In this speech, he nominated his fellow classmate for an elected school office. The Supreme Court held that his free speech rights were not violated.

*Tinker v. Des Moines Independent Community School District* (1969): In this seminal case considering the First Amendment rights of students who were expelled after they wore black armbands to school in symbolic protest of the Vietnam War, the

Supreme Court held that students “do not shed their constitutional rights at the schoolhouse gate” and that the First Amendment protects public school students’ rights to express political and social views.

### **Freedom of Religion Cases**

*Lee v. Weisman* (1992) was a United States Supreme Court decision regarding school prayer. It held that schools may not sponsor clerics to conduct even non-denominational prayer.

*Engel v. Vitale* (1962) was a landmark United States Supreme Court case in which the Court ruled that it is unconstitutional for state officials to compose an official school prayer and encourage its recitation in public schools. *Engel* has been the subject of intense debate.

### *Amendment IV*

The Fourth Amendment provides protections related to unreasonable searches and seizures.

*New Jersey v. T.L.O.* (1985): The landmark case involved a high school girl who, because she was a juvenile at the time, was referred to in court and in court records by her initials – T.L.O. When she denied an allegation that she was smoking in the restroom, a school official searched her purse and found cigarettes and marijuana paraphernalia. The Supreme Court of the United States ruled that the school’s search was reasonable and had not violated T.L.O.’s Fourth Amendment rights. The Court decided that students in primary and secondary school should not have the same level of search and seizure protection as adults and as juveniles in non-school settings.

*Board of Education of Independent School District #92 of Pottawatomie County v. Earls* (2002): Random drug tests of students involved in extracurricular activities do not violate the Fourth Amendment.

In *Veronia School District v. Acton* (1995), the Supreme Court held that random drug tests of student athletes do not violate the Fourth Amendment’s prohibition of unreasonable searches and seizures. Some schools then began to require drug tests of all students in extracurricular activities. The Supreme Court in *Earls* upheld this practice.

### *Amendment V*

The Fifth Amendment provides protections related to crimes including prohibiting double jeopardy, and self-incrimination, or the government taking private property without due process.

*Ashcraft v. Tennessee* (1944): Tennessee law enforcement officials broke down a suspect during a 38-hour forced interrogation, then convinced him to sign a confession. The Supreme Court, overturned the subsequent conviction holding that

The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession. There have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.

*Miranda v. Arizona* (1966): Police must inform suspects of their rights before questioning. After hours of police interrogations, Ernesto Miranda confessed to rape and kidnapping. At trial, he sought to suppress his confession, stating that he was not advised of his rights to counsel and to remain silent. The Supreme Court agreed, holding that police must inform suspects of their rights before questioning.

### *Amendment VI*

The Sixth Amendment provides protections in all criminal prosecutions, including speedy trial, to be confronted with the witnesses against him; and to have the assistance of counsel.

*Gideon v. Wainwright* (1963): Indigent defendants must be provided representation without charge. Gideon was accused of committing a felony. Being indigent, he petitioned the judge to provide him with an attorney free of charge. The judge denied his request. The Supreme Court ruled for Gideon, saying that the Sixth Amendment requires indigent criminal defendants to be provided an attorney free of charge.

*In re Winship* (1970): A United States Supreme Court decision that held that “the Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged.” It established this burden in all cases in all states. The decision did not specify which facts constitute the charged crime. When a juvenile is charged with an act that would be a crime if committed by an adult, every element of the offense must be proved beyond a reasonable doubt, not preponderance of the evidence.

#### *Amendment VIII*

The Eighth Amendment provides protection against excessive bail, excessive fines, and cruel and unusual punishments.

*Roper v. Simmons* (2005): It is cruel and unusual punishment to execute persons for crimes they committed before age 18. Matthew Simmons was sentenced to death for the murder of a woman when he was 17 years of age. In the 1988 case, *Thompson v. Oklahoma*, the Supreme Court ruled that executing persons for crimes committed at age 15 or younger constitutes cruel and unusual punishment in violation of the Eighth Amendment. *Roper* argued that “evolving standards of decency” prevented the execution of an individual for crimes committed before the age of 18. A majority of the Supreme Court agreed with *Roper* and held that to execute him for his crime would violate the Eighth Amendment.

#### *2.3.3.3. Further Amendments*

#### *Amendment XIII*

The Thirteenth Amendment abolished slavery.

#### *Amendment XIV*

The passage of the Fourteenth Amendment gave the all-important fundamental protections to all citizens, with the due process and equal protection clauses:

*Brown v. Board of Education* (1954): A unanimous Court held that state laws requiring or allowing racially segregated schools violate the Equal Protection Clause of the Fourteenth Amendment. The Court famously stated, “separate educational facilities are inherently unequal.” The *Brown* decision is heralded as a landmark decision in Supreme Court history, overturning *Plessy v. Ferguson* (1896)

which had created the “separate but equal” doctrine. In *Plessy*, The Court held that even though a Louisiana law required rail passengers to be segregated based on race, there was no violation of the Fourteenth Amendment’s Equal Protection Clause so long as the accommodations at issue were “separate, but equal.” By overturning this doctrine, the *Brown* Court helped lay the ground for the civil rights movement and integration across the country.

*Loving v. Virginia* (1967): Under Virginia’s laws in 1967, Richard, a white man, could not marry Mildred, a woman of African American and Native American descent. The two traveled to Washington D.C. where they could be married, but they were arrested in Virginia under a state law that prohibited inter-racial marriage. Because their offense was a criminal conviction, after being found guilty, they were given a prison sentence of one year. The trial judge suspended the sentence for 25 years on the condition that the couple left Virginia. On Appeal, the Supreme Court of Appeals of Virginia ruled that the state had an interest in preserving the “racial integrity” of its constituents and that because the punishment applied equally to both races, the statute did not violate the Equal Protection Clause of the 14th Amendment. The United States Supreme Court in a unanimous decision reversed the Virginia Court’s ruling and held that the Equal Protection Clause required strict scrutiny to apply to all race-based classifications. Furthermore, the Court concluded that the law was rooted in invidious racial discrimination, making it impossible to satisfy a compelling government interest. The *Loving* decision still stands as a milestone in the Civil Rights Movement.

#### *Amendment XV*

The Fifteenth Amendment gave former male slaves the right to vote.

#### *Amendment XIX*

The Nineteenth Amendment gave women the right to vote.

#### *Amendment XXVI*

The Twenty-sixth Amendment established the nationwide voting age at 18.

*Oregon v. Mitchell* (1970): Oregon, Texas, and Idaho brought suit in the Supreme Court to challenge the Voting Rights Act Amendments of 1970. They claimed that only the States, and not Congress, have the authority to establish qualification

rules for voters in State and local elections. The Supreme Court held, with considerable disagreement, that the federal 18-year-old voting age requirement is valid for national elections, but not for State or local elections. Four justices agreed with Justice Black that the Constitution gives Congress broad powers to regulate federal elections. But they differed in thinking believing that Congress could also do so in State elections. They argued that the States have no legitimate interest in excluding 18- to 21-year-old voters, and that the Equal Protection Clause supports the right of people in this age group to vote.

Four other justices agreed with Justice Black that Congress could not regulate the minimum age in State and local elections, but they believed Congress also lacked the power to set the voting age for federal elections. They argued that under the Constitution only the States have the right to set voter qualifications.

In 1971, at the urging of the States, Congress adopted a proposed constitutional amendment setting a uniform national voting age of 18 in all elections. The States promptly ratified it.

#### 2.3.3.4. *Implied Rights*

Implied rights are those that are not explicitly mentioned in the U.S. Constitution, but have been recognized by the Supreme Court. Since 1928, in the case of *Olmstead v. United States* (1928), some justices on the Court sought to recognize rights that could reasonably be implied from rights specifically listed in the first eight amendments of the Constitution.

The Supreme Court has specifically recognized several fundamental rights, including but not limited to:

- The right to interstate travel
- The right to parent one's children
- The right to privacy

Perhaps the most controversial of the implied rights that the Court has recognized are those associated with the right to privacy. The ruling asserted that the First, Third, Fourth, and Ninth Amendments also protect a right to privacy.

- The right to marriage

- The right of self-defense
- The right to procreate
- The right to abortion

Any restrictions that a government statute or policy places on these rights are evaluated with strict scrutiny. If a right is denied to everyone, it is an issue of substantive due process. If a right is denied to some individuals but not others, it is also an issue of equal protection.

An issue that exists when discussing Implied Rights is what meaning a given word has. This can create conflict between people who have differing viewpoints over the same matter, and this is where the courts come into play.

#### 2.3.4. SO, WITH ALL THESE RIGHTS, I CAN DO WHAT I WANT, RIGHT?

##### 2.3.4.1. *What is Freedom?*

Freedom is defined as, “the power or right to act, speak, or think as one wants without hindrance or restraint.” Freedom and liberty are often thought to be the same thing, but they are not. Freedom has broad meaning; in that it represents a total lack of restraint or the unrestrained ability to fulfill one’s desires. Liberty means that even in a democracy, individuals have rights that no majority should be able to take away. Broadly speaking, liberty is the ability to do as one pleases; however, liberty entails the responsible use of freedom under the Rule of Law without depriving anyone else of their freedom.

Justice James Clark McReynolds, writing for the majority in *Meyer v. Nebraska* (1923), spoke expansively of the broad contours of the term “liberty.” He wrote,

It denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience and to enjoy those privileges ... essential to the orderly pursuit of happiness by free men.

Certainly freedom does mean the right to do as one pleases—to think, believe, speak, worship (or not worship), move about, gather, and generally act as you choose—but only until your choices start to infringe on another person’s freedom.

To most reasonable people, freedom means more than just “free to do whatever I want.” Taken literally, that approach would produce anarchy. Freedom stands for something greater than just the right to act however an individual chooses—it also stands for securing to everyone an equal opportunity for life, liberty, and the pursuit of happiness.

***Ok, so I have the responsibility to use freedom under the Rule of Law, but I also must be concerned with infringing on another’s rights, is there anything else I should be aware of?***

Yes, for clarification, the Supreme Court has made several decisions that address the limits of our rights within the context of the Rule of Law. Some good examples include the restrictions that are applied to both freedom of Speech and freedom of religion and associated with the implied right of freedom of expression. (Cases are listed in the Bill of Rights Section.)

#### *2.3.4.2. What is freedom of expression?*

Freedom of speech, of the press, of association, of assembly and petition -- this set of guarantees, protected by the First Amendment, comprises what we refer to as freedom of expression. The Supreme Court has written that this freedom is “the matrix, the indispensable condition of nearly every other form of freedom.”

Without it, other fundamental rights, like the right to vote, would wither and die.

Freedom of Expression is a fundamental right. It underpins most other rights and allows them to flourish. The right to speak your mind freely on important issues in society, access information and hold the powers that be to account, plays a vital Rule of Law in the healthy development process of any society.

While Freedom of Expression protects you from unjustified restrictions of your expressions, it does not guarantee you access to the means for expressing your ideas.

The right to freedom of expression is very broad, but it has limits and can be restricted, such as when the freedom of expression of one person violates the rights of another person or the values of society. Examples of violations include invading someone’s private life, defaming someone, hate speech, obscenity, pornography, national security, classified information and trademarks and copyrights.

Any restriction on the freedom of expression must be stated in the law, can only be applied for valid reasons (legitimate aim) and must be an exception based on the individual situation.

Unlike the Freedom of Speech which gives the right to speak freely or the Freedom to practice a religious ceremony; Freedom of Expression is the right to express oneself by methods other than speech, such as arm bands, paintings, cartoons, films and protests among others. Certain religious practices may also be restrained if they run afoul of local ordinances or are offensive to the community.

## 2.4. RULE OF LAW IN THE AMERICAN JUDICIAL PROCESS

### 2.4.1. QUALIFIED IMMUNITY

#### 2.4.1.1. *Overview*

Qualified immunity is a type of legal immunity. “Qualified immunity balances two important interests— the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” *Pearson v. Callahan* (2009).

Specifically, qualified immunity protects a government official from lawsuits alleging that the official violated a plaintiff’s rights, only allowing suits where officials violated a “clearly established” statutory or constitutional right. When determining whether a right was “clearly established,” courts consider whether a hypothetical reasonable official would have known that the defendant’s conduct violated the plaintiff’s rights. Courts conducting this analysis apply the law that was in force at the time of the alleged violation, not the law in effect when the court considers the case.

This rule can lead to absurd results. It permits officers to escape liability for egregious and obvious violations of constitutional rights so long as there has never been a published court opinion declaring that conduct wrong. Under the same federal remedy statute applying the same federal conduct standard, a Texas resident whose constitutional rights are violated may be denied depending on whether the wrongdoing occurred in Texas (5th Circuit), Arkansas (8th Circuit),

or Oklahoma (10th Circuit); each of those jurisdictions has its own body of law regarding whether a violation has been “clearly established.”

As one Federal Appellate Court Judge has opined in *Zadeh v. Robinson* (2018):

[Q]ualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the first to behave badly. Merely proving a constitutional deprivation doesn’t cut it; plaintiffs must cite functionally identical precedent that places the legal questions ‘beyond debate’ to ‘every’ reasonable officer. Put differently, it is immaterial that someone acts unconstitutionally if no prior case held such misconduct unlawful...

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. The current ‘yes harm, no foul’ imbalance leaves victims violated but not vindicated; wrongs are not righted, wrongdoers are not reproached, and those wronged are not redressed. It is indeed curious how qualified immunity excuses constitutional violations by limiting the statute Congress passed to redress constitutional violations.

#### 2.4.1.2. *Discussion questions regarding the Rule of Law:*

1. Does the doctrine of qualified immunity treat all people equally in the eyes of the law?
2. What good is a Constitutional right if there is no viable enforcement remedy for a violation of that right?
3. Do regular, non-law-enforcement citizens receive the same deference (e.g., no liability if there was no specific legal precedent criminalizing specific behavior) under the law? Should they?

#### 2.4.1.3. *Case Summaries*

##### *Saucier v. Katz*

In *Saucier v. Katz* (2001), the Supreme Court established a 2-part test for whether a government official is entitled to qualified immunity:

First, a court must look at whether the facts indicate that a constitutional right has been violated,

If so, a court must then look at whether that right was clearly established at the time of the alleged conduct

Under the *Saucier* test, qualified immunity applies unless the official's conduct violated such a right.

#### *Pearson v. Callahan*

In *Pearson v. Callahan* (2009), the Supreme Court held that while the *Saucier* test is helpful, it does not need to be applied in qualified immunity claims. Rather, a trial court should have more discretion in whether it should apply *Saucier*. The Court also held that “[a]n officer conducting a search is entitled to qualified immunity where clearly established law does not show that the search violated the Fourth Amendment.”

#### *Safford v. Redding*

In *Safford Unified School Dist. #1 v. Redding* (2009), the Supreme Court held that even when an individual's Fourth Amendment right to be safe from unreasonable search and seizure is violated, the person performing the search may still be immune under qualified immunity, if “clearly established law does not show that the search violated the Fourth Amendment.” However, this holding was in the context of a school official conducting a search of a student for illicit items. The Supreme Court has historically given more deference to searches performed on students while in school, so this holding is narrower than previous qualified immunity decisions.

### 2.4.2. EQUAL ENFORCEMENT:

#### 2.4.2.1. *Real-World Example – Cash Bail*

One of the central tenets of the Rule of Law is equal enforcement. One way the law is sometimes unevenly applied is with respect to cash bail. All criminal defendants are presumed innocent until proven guilty. Yet, that presumption of innocence is not equally enforced if a person cannot afford jail in many jurisdictions.

Money-bail systems allow criminal defendants to avoid prison while awaiting trial by posting a bond set by a fee schedule. The impact of money-bail systems on indigent criminal defendants, however, has prompted legislative interest in and legal challenges to such systems, particularly when the bail does not reflect an individual's specific circumstances, such as potential flight risk or public safety.

Critics of money-bail systems assert that fee schedules unduly burden indigent defendants, while supporters argue that fee schedules provide uniformity and ensure that defendants appear at trial. Several states and municipalities have reformed their bail systems.

Voters in New Mexico approved a constitutional amendment that allows judges to deny bail to defendants considered exceptionally dangerous, but otherwise permits pretrial release of nondangerous indigent offenders who cannot make bail. Other jurisdictions have altered or eliminated their cash bail systems in recent years, including cities in Alabama, Georgia, and Maryland. Courts have heard legal challenges regarding whether state or local money-bail systems comport with the Constitution's Due Process and Equal Protection Clauses.

The Supreme Court has established that the Constitution provides certain protections to indigents during sentencing and postconviction, including ensuring that an indigent's failure to pay a fine cannot result in an automatic revocation of probation or imprisonment beyond the statutory maximum term. The Court, however, has not addressed these rights in the bail context. Some courts have found cash bail systems that reasonably ensure a defendant's subsequent court appearance to be constitutional. Other courts have indicated that bail systems that detain indigent criminal defendants pretrial, without considering their ability to pay, may be unconstitutional.

#### *2.4.2.2. Discussion questions regarding cash bail and the Rule of Law:*

1. Does the cash bail system treat all people equally in the eyes of the law?
2. Are there good reasons for doing so?
3. Do you agree that it is important to treat everyone the same in the eyes of the law?
4. What do you think can be done to level the playing field?

## 2.5. SUMMARY OF THE RULE OF LAW IN AMERICA

John Adams said, “the true idea of a republic is an empire of laws and not of men.”

It is not the government’s job to tell people how to live their lives, what religion to believe in, or what to write about in a pamphlet or newspaper. In this sense, the idea of individual rights is the oldest and most traditional of American values.

Rule of law is primarily a protection for the ordinary person. The rich and powerful always have ability to manipulate the government on their own ends or find loopholes in the law to protect themselves. Early on the most common constitutional violations went unchallenged because the people whose rights were most often denied were precisely those members of society who were least aware of their rights and least able to afford an attorney.

Rules are necessary to live peacefully and safely in society and that there are consequences when members of society decide to ignore the rules.

### 3. THE RULE OF LAW INTERNATIONALLY

While many Americans may say the Rule of Law in the United States is more fragile than ever, and some argue it has failed on more than one occasion under our current administration, the Rule of Law is not just a domestic concept – it serves an important purpose internationally. A global Rule of Law is fundamental to international peace and security; to political stability; to achieving economic and social progress and development; and to protecting human rights and fundamental freedoms.

The concept of a peaceful community of nations dates to 1795 when Immanuel Kant outlined the idea of a league of nations to control conflict and promote peace between states. Kant argued for the establishment of a peaceful world community, not in a sense of a global government, but with the hope that each state would declare itself a free state that respects its citizens and welcomes foreign visitors as fellow rational beings, thus promoting peaceful society worldwide. International co-operation to promote collective security originated in the Concert of Europe that developed after the Napoleonic Wars in the 19th century, in an attempt to maintain the status quo between European states and to avoid war. This period also saw the development of international law, with the first Geneva Conventions establishing laws to address humanitarian relief during wartime, and the international Hague Conventions of 1899 and 1907 governing rules of war and the peaceful settlement of international disputes.

The first worldwide intergovernmental organization with the principal mission of maintaining world peace was the League of Nations, founded in 1920 following World War I. In the mid-1930's, the League of Nations had 58 members. However, the United States never joined the League of Nations and, by the late 1930's many countries began to withdraw. The onset of World War II demonstrated that the League had failed its primary purpose of preventing a future world war. The League of Nations lasted for 26 years.

### 3.1. ORGANIZATIONS FOCUSED ON PROMOTING THE RULE OF LAW INTERNATIONALLY

#### 3.1.1. UNITED NATIONS

In 1945, after the end of World War II, approximately 50 world governments came together to establish the United Nations, which replaced the ineffective League of Nations.

The United Nations (UN) is an intergovernmental organization that aims to maintain international peace and security, protect human rights, deliver humanitarian aid, promote sustainable development, and uphold international law. It is the largest, most internationally represented, and most powerful intergovernmental organization in the world.

The UN was founded on three Pillars:

1. International Peace and Security
2. Human Rights
3. Development

The UN has five principal organs:

1. The General Assembly
2. The Security Council
3. The Economic and Social Council
4. The International Court of Justice
5. The UN Secretariat

The UN system also includes a multitude of specialized agencies including the World Bank, the World Health Organization, the World Food Programme, UNESCO, and UNICEF.

The principal judicial organ of the UN is the International Court of Justice, located in The Hague, Netherlands. The ICJ, sometimes called the World Court, serves as a source of international law by settling disputes between states and giving advisory opinions on international legal issues.

There are currently 193 UN member states and 2 observer states. This represents all independent countries in the world. The UN Charter outlines the rules for membership, which state in part “membership in the United Nations is open to all...peace-loving states...”

The UN defines the Rule of Law as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”

### 3.1.2. WORLD JUSTICE PROJECT

The World Justice Project (WJP) is a non-profit international organization committed to advancing the Rule of Law worldwide. The WJP works through three programs—Research and Scholarship, the WJP Rule of Law Index, and Engagement—to increase public awareness about the foundational importance of the Rule of Law and to stimulate government reform and develop community programs.

The WJP defines Rule of Law as a durable system of laws, institutions, norms, and community commitment comprised of “four universal principles”: (1) Accountability; (2) Just Laws; (3) Open Government; and (4) Accessible and Impartial Dispute Resolution.

The WJP Rule of Law Index offers a detailed picture of the extent to which different countries adhere to the Rule of Law in practice. To determine how the Rule of Law is experienced and perceived by the general public in 126 different countries, the WJP looks at eight different factors:

- i. Constraints on Government Powers
- ii. Absence of Corruption
- iii. Open Government
- iv. Fundamental Rights
- v. Order and Security
- vi. Regulatory Enforcement

vii. Civil Justice

viii. Criminal Justice

From a collection of data derived from more than 120,00 household surveys and 3,800 expert surveys in those 126 countries, the Index gives scores and rankings based on each country's adherence to the Rule of Law.

The Top 10 countries in the 2019 WJP Index were:

- (1) Denmark
- (2) Norway
- (3) Finland
- (4) Sweden
- (5) Netherlands
- (6) Germany
- (7) Austria
- (8) New Zealand
- (9) Canada
- (10) Estonia

The United States was ranked 20th.

The Bottom 10 countries in the 2019 WJP Index were:

- (117) Pakistan
- (118) Ethiopia
- (119) Bolivia
- (120) Cameroon
- (121) Egypt
- (122) Mauritania
- (123) Afghanistan
- (124) Democratic Republic of Congo

(125) Cambodia

(126) Venezuela

The latest WJP Rule of Law Index shows a negative trend toward weaker Rule of Law around the world. The score for “Constraints on Government Powers” declined in more countries than any other factor worldwide over the past year.

### 3.1.3. OTHER NOTABLE ORGANIZATIONS FOCUSED ON PROMOTING THE RULE OF LAW INTERNATIONALLY

#### *American Bar Association – International Law Section*

Purpose is to develop policy and promote the Rule of Law in the international arena

#### *International Development Law Organization (IDLO)*

Supports emerging economies and middle-income countries to strengthen their legal capacity and Rule of Law framework for sustainable development and economic opportunity

#### *International Network to Promote the Rule of Law (INPROL)*

Network of over 3,000 law practitioners from 120 countries and 300 organizations working on Rule of Law issues in post-conflict and developing countries from a policy, practice, and research perspective.

## 3.2. SURVEY OF COUNTRIES WITH RULE OF LAW PROBLEMS

### 3.2.1. INTRODUCTION

Respect and adherence to the Rule of Law is integral to the functioning of government and society. Without it, the foundation of society is weakened. Many countries in the world struggle with upholding the Rule of Law and face serious consequences because of it, including the erosion of citizen’s trust toward government, corruption, political instability, oppression of certain groups, and economic difficulties.

According to the United Nations, “At the national level, the Rule of Law is necessary to create an environment for providing sustainable livelihoods and

eradicating poverty. Poverty often stems from disempowerment, exclusion and discrimination. The Rule of Law fosters development through strengthening the voices of individuals and communities, by providing access to justice, ensuring due process and establishing remedies for the violation of rights. Security of livelihoods, shelter, tenure and contracts can enable and empower the poor to defend themselves against violations of their rights. Legal empowerment goes beyond the provision of legal remedies and supports better economic opportunities.”

### 3.2.2. EXAMPLE OF COUNTRIES WITH WEAK LEGAL SYSTEMS

#### 3.2.2.1. *Venezuela*

In 2015, the opposition party defeated the president of Venezuela’s political party in congressional elections. The president of Venezuela at the time, Nicolas Maduro, said “I will stop by hook or by crook the opposition coming to power, whatever the costs, in any way.” He then stopped the opposition from forming a new government by replacing all the Supreme Court justices in one day with allies of his own party. His action violated the Constitution of Venezuela. Maduro then approved a new law that effectively gave him legislative and executive powers, thereby controlling all three branches of government in Venezuela.

Due to several factors, including the disregard for the Rule of Law, Venezuela has struggled with increased crime, corruption, and poverty. In 2016, consumer prices in Venezuela increased 800% and the inflation rate in 2018 was projected to be 1,000,000 percent, like Germany after World War I. President Maduro is still in power in Venezuela despite international disapproval of his disregard for the Rule of Law.

#### 3.2.2.2. *Russia*

Russia claims to be a constitutional republican government. However, many consider the government is authoritarian and effectively controlled by Vladimir Putin. Mr. Putin has been either president or prime minister of Russia since 1999. In 2018, he won the presidential election with 76% of the vote. The election was widely considered illegitimate by western governments because opposition parties were effectively barred from campaigning against him. In January 2020, the entire

Russian government resigned, including the prime minister, after Putin proposed reforms aimed at extending his power after the end of his presidential term. Putin appointed a new prime minister and new ministers.

As a result, Russia has suffered consequences including corruption and the lack of freedom of speech/political expression, and freedom of the press.

Even though the Constitution of Russia guarantees freedom of speech, there is widespread government censorship. The three main TV channels in Russia are controlled by the government. All media outlets (newspapers, radio, TV) must obtain a license from the government to operate.

People who speak against the Russian government and journalists are often imprisoned, despite the Russian constitution forbidding arbitrary detention of its citizens. Judges in Russia are appointed by the president of Russia and are then approved by the legislature, allowing Putin to effectively control the judicial branch

#### 3.2.2.3. *Mexico*

Mexico is a relatively stable democracy but struggles with upholding the Rule of Law, specifically with organized crime. For example, in October 2019, police and Mexican military forces attempted to arrest a high-ranking member of a drug cartel. When the authorities arrived to arrest him, the cartel refused to give up the member for arrest and unleashed violence across the city. The president of Mexico ordered his military to back down and not arrest the cartel member. For many, the episode was an example of the Mexican government's inability to uphold the Rule of Law.

#### 3.2.2.4. *Iran*

The country of Iran is a constitutional Islamic republic. The highest authority in Iran is the Supreme Leader. The armed forces, judiciary, state television, and other key government organizations are subject to the Supreme Leader. Ali Khamenei has been the Supreme Leader since 1989. He can make final decisions on important issues for the entire country.

Among many Rule of Law issues, women are not provided the same rights as men in Iran. In Iran, the testimony of a male witness is equivalent to that of two female

witnesses. A woman needs her husband's permission to work outside the home. In the inheritance law of the Islamic Republic there are several instances where the woman is entitled to half the inheritance of the man.

There are broadly worded "security laws" that permit Iranian authorities to suppress and punish people for speaking against the government.

#### 3.2.2.5. *China*

China has been controlled by one political party, the Communist Party of China, since 1949. It has a president and Congress (legislature) that is elected by the party. The Congress is widely perceived as being controlled by the president and his close allies. In 2018, the constitution was altered by Congress to allow its current president, Xi Jinping, to be president for life. There was previously a two-term/ten-year limit.

President Xi has increasingly suppressed political freedoms, including censorship of the internet. In China, Google, YouTube, Wikipedia, Facebook, Instagram, are among the 10,000 websites that are banned.

#### 3.2.3. DISCUSSION

- Why is it important to have a strong and fair system of laws?
- What problems can occur where there is failure to uphold the Rule of Law?
- Are there areas in the United States where the Rule of Law faces challenges?
- Do you think the law is applied equally to all people in the United States? Are there challenges to freedom of the press and religion?
- How do you think we can improve and strengthen the Rule of Law in the United States?

#### 4. SAMPLE DISCUSSION OF EFFECT ON ECONOMICS, PROSPERITY, & THE COMMON GOOD

##### 4.1. ECONOMIC OPPORTUNITY - TANGIBLE ASSET

Let's start with this: Who here thinks that having a house or apartment to live in is a good thing?

Let me ask a slightly different question: Who here is indifferent to housing? In other words, who here would be equally satisfied living in a cardboard tent as they would be living in a house or apartment?

I take it most of us would rather live in a house or apartment.

Which of the two costs more create?

Which of the two requires more planning?

Which of the two requires more effort to maintain?

Which of the two is more comfortable?

Which of the two would you expect the law to protect?

What interests are to be protected?

Owner? Tenant? Resident? Adjacent owner/tenant?

I heard some say they would expect the law to offer more protection for a house than a make-shift shelter.

Why is that?

Because more effort and resources are devoted to creating and maintaining it?

The relative permanency of the structure?

The fact its location is government approved?

The fact that the government receives taxes from its owner?

Does the permanent structure have greater value?

How do we determine value?

Is it based on the resources devoted to it?

The comfort one derives from it?

On how much a willing and able buyer offers to pay for it?

#### 4.2. RESOURCES - INVESTMENT

Before the industrial revolution, if you wanted to live in a permanent structure you might have had to build it yourself.

Let's say you were living at a time before the industrial revolution. It was time to leave your parent's home and start a family of your own. You found some land. Now you want to build a permanent structure. Is it likely that you already possessed everything you needed to build a house at that moment? Or, would you have to gather resources before you could begin construction?

Another word for "gathering resources" is "saving". Most of us would have to save, before we could build or buy a home.

Even if we wanted to rent a home, someone would have to have first built a home for us to rent.

If we found a home to buy or rent, we would then need some means of exchanging value with the owner.

A common resource is money. But throughout history, other resources were exchanged - labor, skill, crops, blankets, etc.

Gathering resources, or saving, is just the first step in building something.

Next, we need to deploy those resources. In other words, invest.

We're talking about houses, homes, and shelters, for our own use. But the concept is the same if we were talking about highways, hospitals, schools, churches, parks, utilities, internet, cell phones - you name it. Before any of things can be created, resources must be gathered and deployed - invested.

Once our investment is made. We, hopefully, are better off than before. We have our home. But, we're not the only ones made better.

If we employed anyone, they've profited.

If we purchased materials, the manufacturer and seller profited.

The seller of the land or structure profited from our exchange of value.

Our neighbors profit because our presence strengthens the community.

#### 4.3. RULE OF LAW

Earlier, we talked about our expectation of the law protecting our interests in our homes. That concept can be described as “the Rule of Law.”

The Rule of Law, in a nutshell, is the idea that governments should create and enforce laws that apply equally to every person, regardless of their status, or connections.

That’s a tall order. Even in our country, it’s not always carried out to perfection. Governments are comprised of people. People make mistakes. It’s my experience that most people are good and well-intentioned. But sometimes, people can allow other interests to influence their duties of fairness.

To achieve and maintain the Rule of Law, it’s essential to have an independent judiciary - courts and judges that are not beholden to any one person or group.

Coercion can come from one powerful person or it can come from a group. Even popular opinion can be coercive. We want rulings and judgments based only on the law and the evidence, not on coercion - don’t we?

We also want meaningful opportunities to appeal government decisions to an independent court, right? We’d also want the ability to appeal court decisions to an even higher independent court.

When we strike a bargain with a trading partner and enter a contract, we want to the government (courts) to enforce our contract - predictably, without favoritism.

We want the government and its decisions to be transparent. We want to see that decisions were made after discourse. Even if we disagree with that decision, we want to see that our concerns were considered.

We want legislation that we can understand. That we can read. That is logical.

Some governments are not structured around the “Rule of Law.” They may have courts, but those courts are not independent. A judge can be removed if her ruling is contrary to what that country’s rulers want. Where a system like that exists, relationships and connections are the deciding factor.

Earlier, we spoke about investment. Would you be willing to invest a substantial portion of your resources to create and maintain an asset in a country where you couldn't count on the Rule of Law?

#### 4.4. ECONOMIC EXAMPLE - CASE STUDY

Let's say you just won the MegaLottery. You won so much money, that after you bought everything for yourself and everyone else you could think of, you still had a gazillion dollars left.

Let's also say that with your leftover money you want to build a \_\_\_\_\_

What you would build? A hospital? A school? Refugee shelters? A soccer stadium?

And you want to build that in \_\_\_\_\_

Where would that be? Somewhere in Asia? Africa? South America? North America?

You'll first have to acquire rights to the land for your project. Is the current owner a private person? Or is the land government owned? Can you buy the land? Or will you have to lease the land from the current owner?

Next, you'll have to design your project - architectural drawings and engineering plans.

After that, you'll need the government's permission to build - permits, licenses, etc.

Then, you'll have to present the plan to potential builders - contractors - so they can bid on the plan. A bid is a written proposal showing how much that builder will charge, how much the materials will cost, and how long the project will take.

Once you've selected a builder, based on their bid, you'll enter a contract with the builder. She, in turn, will enter contracts with her sub-contractors, and specialists.

Are there sufficient roads to get the materials to the job site? Or will you have to build those, too? Does anything have to be shipped? Are there adequate shipping terminals, docks, or airports?

Will your materials be relatively safe from thieves and hijackers?

What about labor? Is there a trained labor force available to perform the work? Or will workers and laborers have to be “imported”, too?

What are the wage laws? Is there a minimum wage? Is there a maximum wage? How much tax will you have to pay for employing laborers?

What about inspections? At what stages of construction will the government require an inspection? Are there clearly written building codes? Will the inspector interpret the code in a predictable way? Will the inspector use the inspection process to shake you down for a bribe?

These are issues investors face. Whether they move forward or not depends largely on whether the Rule of Law exists and is followed.

If you’re the investor, you’ll want to know whether the country your project is in protects ownership rights.

Are contracts enforced? If one of your contracting partners breaches, will the courts enforce your contract?

Is corruption rampant? Are bribes a regular part of business? Are bribes the only way to get permits or licenses?

Is criminal activity high? How great is the risk that your skilled engineers are kidnapped for ransom?

How transparent is the government? Are government decisions made openly, after public discussion and debate? Or are those decisions made behind closed doors?

Is the law, codes, and regulations ambiguous or overly complex?

If the country does not meaningful commit to the Rule of Law, will you build your project there?

Why did you want to build your project in the first place? Did you envision that people would benefit from it when it was finished? Wouldn’t people have benefitted while it was being built? How long would a project like that take to build? How many people would have been employed? What kind of wages would they have received - high or low?

Can you see how following the Rule of Law creates prosperity for the common good? Can you see how the absence of the Rule of Law deprives the common people from economic opportunity?

I remember when I was in high school, I was eager, attentive, and motivated - sometimes. But I would get frustrated, because it seemed that my ability to act was limited by my age. I wasn't yet, an adult. I couldn't vote.

One way you can ensure that the Rule of Law remains healthy and strong here and now, is to assert your own individual rights. To do that, you first need to know what rights you have, and, just as important, what rights you don't have. Read the newspaper, listen to your teachers and parents, discuss things - important things with your fellow students.

You have the right to speak freely. We call that the right of free speech. But you don't have the right, for example, to disrupt a class.

The right of free speech can be exercised when you disagree with someone. You can speak up. But, be respectful when you do. Every other person has an equal right to disagree with you. Respect their right to disagree and to speak out, you'll be surprised how contagious respect can be.