

Part I: Philosophical and historical background

Introduction

What is the rule of law? In 40 years of legal advocacy, I can not recall hearing a reference to the “rule of law” in a brief or in any argument before a court. Yet, the words “rule of law” are almost daily before us. For instance, in naming John Roberts and Harriet Miers as candidates for Supreme Court appointment, President Bush endorsed each of them as individuals who would adhere to the “rule of law” in carrying out their duties. In supporting CAFTA, a U.S. Senator contended that the Central American republics had commenced to adhere to the rule of law.

In the New York City Bar June 2004 issue of its *Record* entitled *Upholding the Rule of Law: A Special Issue* there are three reports one concerning the arrest and deportation of aliens in secret, one on balancing due process and national security in the context of the war on terror and one on human rights standards applicable to interrogation of detainees. In November 2005, the American Bar Association convened a two day symposium in Washington D.C. on the rule of law where the three featured panelists were Supreme Court Justices Sandra Day O’Conner, Anthony M. Kennedy and Stephen Breyer.

At the November 2005 symposium, Justice Kennedy defined the rule of law as comprised of these points: “1) government must be bound by the law, 2) the law must treat all persons in an equal manner, and 3) the law must recognize within each person a core of spirituality and dignity of humanity.” In 1803, Justice Marshall, in *Marbury v. Madison*, wrote the words that “The government of the United States has been emphatically termed a government of laws, and not of men.” Justice Marshall’s words “a government of law and not of men”- I believe- represent

what most of us understand to be the rule of law, and Justice Kennedy's what many of us would expect from the rule of law.

Rule of law questions

Try your hand at answering the following "rule of law" questions to see if your understanding of the rule of law helps you in developing a position on some recent controversies about it:

1. Did President Clinton violate the rule of law when he ordered the bombing of Kosovo and U.S. troops into Serbia?

2. Would it violate the rule of law for the Supreme Court to overturn *Roe v. Wade*?

3. Was the Supreme Court's decision to uphold *Roe v. Wade* in *Planned Parenthood v. Casey* a violation of the rule of law?

Answer to question 1. In a July 2005 piece in the *New York Review of Books*, Tony Judt observed that it was a violation of the rule of sovereignty of nations for President Clinton to have ordered U.S. forces into Serbia—despite a humanitarian motivation for doing so. Judt supported a UN "Hi-level Panel's" recommendation that there needs to be a "new international system governed by the rule of law backed by deployable military resources." Although Judt opposes unilateral action by nation-states, he finds the sovereignty of nations rule outdated in circumstances where "[t]oday's wars typically happen within states" rather than between them. There are also many who have contended that the president does not have the power apart from an emergency to deploy military power without congressional authorization.

A former advisor of our current president, Berkeley Law Professor John Yoo, concedes that President Clinton's invasion of Serbia was not specifically authorized by Congress nor did

“Congress declare war and the U.S. forces engage in hostilities well past the 65 day limit of the War Powers Act.” Nevertheless, Yoo contends that Clinton’s conduct was valid under the rule of law since the Constitution grants the president power under the “commander in chief” clause subject only to “Congress’s checking power over executive war-making ... from the power of the purse.” Yoo contends that “[Congress] [a]ffirmatively providing funding for a war ... represents a political determination by Congress...” On the other hand, Yoo contends that while President Clinton clearly appears to have violated international law in Kosovo, he was free to do so under the Constitution. “[N]on treaty international law cannot bind the President as a constitutional matter.”

These answers present both a separation of powers issue (an American rule of law issue) and sovereignty of nations issues (international rule of law issues.) There is also the mixed issue of the American obligation under the Constitution to adhere to a non treaty international obligation—here the UN Charter’s emphasis on the inviolability of the territory of sovereign states.

Answers to questions 2 and 3. In *Planned Parenthood v. Casey*, the Supreme Court held (in a joint opinion by Justices O’Connor, Souter and Kennedy in which Justices Blackmun and Stevens concurred) that:

Where the Court acts to resolve the sort of unique, intensely divisive controversy reflected in *Roe*, its decision has a dimension not to present in normal cases and is entitled to rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. Only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure.

* * *

A decision to overrule *Roe*’s essential holding... would address error, if error

there was, at the cost of both profound an unnecessary damage to the Court's legitimacy and to the Nation's commitment to the rule of law. 505 U.S. at 836.

* * *

We invoke [the constitution] once again to define the freedom guaranteed by the constitution's own promise, the promise of liberty. *Id.* at 901.

Apparently the "rule of law" language was Justice Souter's. In dissenting, Justice Rehnquist insisted that respect for the rule of law required *Roe v. Wade* to be reversed. Justice Rehnquist reasoned that there was no "fundamental" right to an abortion under the Due Process Clause of the Fourteenth Amendment.

These answers are illustrative of how different justices have different concepts of the rule of law in controversies before the Supreme Court— especially in cases where our country has broad constituencies with conflicting expectations from the legal process. This article is intended to place current controversies that involve rule of law issues into the context of its historical and philosophical development. I will discuss the issues raised in the above questions and "answers" and other tough rule of law issues of the day including the power of the president, the Patriot Act, role of the press, right to counsel for detainees, etc. in a later article.

The origin and development of the rule of law concept

1. Aeschylus

The early Greeks struggled with the question of how to end the commonplace bloody chain of personal vengeance begetting vengeance in return. The problem was addressed in a trilogy of plays by Aeschylus (525-426 BC). In the third play of the trilogy, Orestes begged Athena, the Greek goddess of wisdom and war, also patron goddess of Athens, for help. The Furies (older gods assigned to the specific task of carrying out vengeance against persons who

killed blood relatives) were seeking vengeance against Orestesia for his killing of his mother. Orestesia had killed her in vengeance for his mother having murdered his father.

Upon hearing Orestesia's plight, Athena conceived of a trial to deal with the accused Orestesia, and selected twelve Athenians to hear the arguments. At the trial, Apollo spoke for Orestesia and convinced six of the twelve citizens of Athens that a mother is not the blood relative of her child. (Apollo--apparently a very good, but not a biologically or politically correct litigator--argued that a mother merely incubates the seed of the father, the true blood relative parent.) Apollo's argument also persuaded Athena to tip the even balance of the "jury's" vote to favor Orestesia and he went free. Thereupon, Athena proclaimed that all accused of violent acts in Athens would be thereafter tried in proceedings such as the trial of Orestesia. Athena convinced the Furies to be her allies in bringing about a more peaceful Athens.

2. Plato, Socrates and Aristotle

The evolution of democratic institutions to secure justice for all citizens is intertwined with the development of the concept of the rule of law. Socrates (469-399) conducted himself as a gadfly in his daily testing of the conduct of the rulers of Athens. Unsurprisingly, he was sentenced to death upon false testimony. However, he did not flee --as he apparently could have. In an early powerful endorsement of the rule of law concept, he accepted his sentence because he believed that people should be governed by law.

Plato had intended to enter into a life of public service until he became estranged from Athens' rulers when his mentor, Socrates, was unjustly put to death. Plato thereafter undertook as his life's work to study how to ground society upon a knowledge of justice. Plato rejected the idea that justice came about by mere adherence to laws, because justice depended upon laws

enacted or proclaimed according to the will of the majority. Plato feared the tyranny of the stronger over the weaker.

Plato's student, Aristotle, contended that adherence to a stable or balanced rule of conduct was necessary to lead a virtuous life and attain true happiness. As reported in James Grant's 2005 biography-- *John Adams, Party of One*-- Aristotle originated the phrase "a rule of law and not of men." John Adams picked up the phrase in 1779 from James Harrington's book *Commonwealth of Oceana* published in the 16th century--while Adams was drafting the Massachusetts constitution-- a source document for drafting the U.S. Constitution. Supreme Court Justice Scalia quoted Aristotle as follows in an article by him on the rule of law:

Rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement.

3. The Roman input into the rule of law

The twelve tables of Roman law were first codified in 450 BC which then-- in the words of John Locke --became "a standing rule to live by." They were first made of wood--later of bronze--and were erected in the Roman Forum as public property to be appealed to by every citizen. Roman law largely remained in force for a thousand years in the western empire and for two thousand years in the eastern empire. In Rome itself the citizens were not required to work and were often incited by orators to exercise mob rule which was countered only by army rule. Also, in Rome the law was often administered by tyrants.

4. The English input and John Locke

The next great step forward for the rule of law occurred in England some 2000 years after

the erection of the Roman tablets. King Charles I was executed in 1649 and Parliament commenced to rule under Oliver Cromwell. Parliament was supreme until Cromwell died in 1658 and Charles II assumed the crown. Charles II died in 1685 succeeded by his brother James II. He was an unpopular monarch and was forced to abdicate in 1688. The philosopher, John Locke had fled to Holland after being a part of the government under Charles II. Locke's sponsor Lord Shaftesbury had fled to Holland after being charged with treason. Locke carried to Holland two unpublished treatises on government and published them in England in 1689 upon his return after James II had abdicated.

Locke reasoned that government essentially existed to protect the property of individuals. For Locke, government existed by the consent of the government. He advocated that revolution was legitimate when the governor became tyrannical. He stated that: "when the governor, however entitled, makes not the law, the rule, and his commands and actions are not directed to the properties of his people, but this satisfaction of his own ambitions, revenge, covetousness, or any other irregular passion," --that under these circumstances, the citizens have a right to rebel and change their government. He felt that they have the right to insist that government must be for their own good. After Locke's treatises were published, Parliament ruled England. (However, through 1920, a minority of the British people (the men of property) comprised the electorate which elected Parliament.)

Locke turned the existing rule of law on its head. Prior to Locke, the rule of the sovereign was the law. Though people had rebelled against tyrants, Locke first created the concept of people's rights to property, to legitimate government and to rebel against illegitimate government. The law of the sovereign became conditional rather than absolute depending on the

legitimacy of the sovereign's rule.

5. The contributions of our founding fathers

Early in our history, citizens of England residing in the Americas could not vote for members of Parliament. American ferment against Parliament commenced in 1763 when England barred colonialists from moving further west into the Mississippi Valley. Parliament's taxing of them further incited the colonists.

In drafting the Declaration of Independence, Thomas Jefferson turned to Locke for his inspiration and concepts. In the Declaration of Independence, Jefferson highlighted the right to "dissolution," one of Locke's cornerstone words. Jefferson modified Locke's words "life, liberty and property" to "life, liberty and the pursuit of happiness" and Jefferson characterized these as "inalienable" rights, *i.e.*, everyone is always entitled to them.

John Adams used the phrase "a rule of law and not of men" in the pamphlet he wrote to accompany his 1779 draft of the Massachusetts constitution. Adams read a lot of Plato and was a strong believer in the separation of powers since he distrusted majority rule. Adams' take on the rule of law found its way into the U.S. Constitution. However, Madison was the primary drafter of the Constitution, the person among our founding fathers closest to being a civil libertarian. In the preamble to the Constitution are found the words "liberty" and "justice." (Nevertheless, the Constitution as adopted was a document for the benefit of white men—not women, slaves or Indians.)

With Madison as the government's leader in the House of Representatives, the House proposed ten amendments to the Constitution— all but one of which was concerned with individual rights as opposed to states rights. The Bill of Rights was ratified in 1791. In an essay

in 1792, Madison tried to reconcile the words of Locke with the words of Jefferson by reasoning that “in its larger and juster meaning, [property] embraces everything to which a man may attach a value and have a right; and which leaves to everyone else the like advantage.”

It was Madison’s conception that a man has property in his land, his money and his merchandise. He also found that a man has property in his opinions, including his religious beliefs, in the “safety and liberty of his person,” in the “free use of his faculties and free choice of the objects on which to employ.” Madison found that “as a man is said to have a right to his property, he may equally be said to have a property in his rights.” For Madison, government had been established to protect all kinds of property, “as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government which *impartially* secures to every man whatever is his *own*.”

(Emphasis in original.)

After Locke’s precepts were processed by Jefferson, Madison, Adams and the other founding fathers into the Declaration of Independence and the Constitution— and the Bill of Rights was adopted in 1791- the essential rule of law democracy principles had been established. Today not even Great Britain has a bill of rights (although some like protection is available to its citizens from the E.U.’s Court of Human Rights.) De Toqueville was the first to recognize how our system of law under a democracy promoted equality. He foresaw that the push for equality had an inevitability which has been proven up over the last two centuries as more and more of our democratic ideals have spread. In November 2005, Chief Justice Roberts proclaimed that our concept of an independent judiciary as our most important contribution to rule of law jurisprudence and which had been almost universally adopted especially by emerging

democracies since the beginning of the Second World War.

Has the rule of law protected citizens other than in democracies?

Sometimes yes, sometimes no. In Soviet Russia there was a very credible written constitution but the single party overwhelmed all of the provisions of the constitution. In the Chilean dictatorship under a four person junta, different institutions were under the influence of different members of the junta--and over time the different institutions came to operate independently enough that they felt free to rule against the junta itself and protect certain rights of the people.

A scholar's definition of the rule of law

From the historical and philosophical background briefly mentioned above, it is possible for scholars to formulate a formalized concept of the rule of law. In a 1997 *Columbia Law Review* article, Harvard law professor Richard Fallon, Jr. set forth both his conception of and the purposes of the rule of law as follows:

First, the Rule of Law shall protect against anarchy...

Second, the Rule of Law should allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions.

Third, the Rule of Law should guarantee against at least some types of official arbitrariness.

Professor Fallon also recited the following five elements which-- if present-- meet the test for realization of the rule of law:

(1) The first element is the capacity of legal rules, standards, or principles to guide people in the conduct of their affairs. People must be able to understand the law and comply with it.

(2) The second element of the Rule of Law is efficacy. The law should actually guide people, at least for the most part. In Joseph Raz's phrase. "People should be ruled by the law and obey it."

(3) The third element is stability. The law should be reasonably stable, in order to facilitate planning and coordinated action over time.

(4) The fourth element of the Rule of Law is the supremacy of legal authority. The law should rule officials, including judges, as well as ordinary citizens.

(5) The final element involves instrumentalities of impartial justice. Courts should be available to enforce the law and should employ fair procedures.

The central question: Is the rule of law the one proclaimed by the sovereign or is it one that has a moral content as was declared by Locke?

As with Justice Marshall's statement of the rule of law in *Marbury v. Madison*, and Justice Kennedy's very recent one, Professor Fallon's formulations on their face for most people invite no controversy (with the possible exception of Justice Kennedy's third precept about the law's obligation to "recognize" a person's "spiritual core.") In general terms, however, the rule of law has been advocated either 1) as requiring an inflexible adhering to the rule of the sovereign, or, 2) as one with moral content such as the rule of law declared by John Locke. The U.S. Constitution has deservedly been accorded the upmost respect--but it contained provisions such as the fugitive slave provision that supported the institution of slavery. Under these circumstances, large segments of our population rebelled against the "law of the sovereign"--either fleeing their masters as fugitives or acting as free citizens to assist the fugitive slaves in clear violation of constitutional and statutory law.

As stated by the tyrannical Roman emperor Ulpian, "[t]hat which pleases the prince has the force of law." As was stated by the philosopher Hobbs, "All laws...have their authority and

force from the will of the sovereign. No law can be unjust then, for the law is made by the sovereign power and all that is done by such a power is warranted.” As was stated by Justice

Holmes:

What constitutes the law? You will find some writers telling you that it is a system of reason, that it is a deduction from the principles of ethics or whatnot, but if we take the view of our friend the bad man, we shall find that he does not care two straws for axioms of deduction. All he wants to know is what the courts are likely to do in fact. Not merely for the bad man, the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.

In Plato’s *Republic*, the character Thrsymachus took the position that law expresses might not right.

The modern day philosopher Mortimer Adler describes those views as “arbitrary law.” He supports an “opposite view” rule of law concept which he attributes to Aristotle, Thomas Aquinas, Locke and the founding fathers that “law is then something not made in the interest of the stronger, but for the common good. He advocates that it must either be made as John Locke said, ‘with the consent of the governed’ or as Aquinas said, ‘by their representatives.’” The distinction between the two generally opposite views opens to discussion the differences between good and bad laws and as to whether disobedience of a law can ever be justified.

The issues raised by an “arbitrary” rule of law have been the subject of literature. In Alan Paton’s, *Cry, the Beloved Country*, a South African judge sentenced Absalom Kumalo to death for murder. The judge wrestled with the question of justice but determined that it was his duty under the law. In *Billy Budd* by Herman Melville, Captain Vere gave himself the same out, reasoning that “For law and the rigor of it, we are not responsible. Our vowed responsibility is in this: That however pitilessly that law may operate, we nevertheless adhere to it and administer

it...”

The rule of law in Nazi Germany and Vichy France

In a 1995 symposium at the Brooklyn Law School, the commentators explored the issues arising out of the relationship between law and morality in a World War II era context. It was agreed that lawyers and judges in Nazi Germany and Vichy, France were “compliant with evil law.” Even in the earlier Weimar Republic, the German judges found a way to back Hitler and his supporters. In Vichy France, the judges, and the lawyers as well, were compliant with laws discriminating against Jews without finding ways to oppose them on grounds of morality or human decency. Some 75,000 Jews living in France were sent to die in extermination camps, often as the result of proceedings held in the courts.

Yet Italian lawyers ignored the same laws under Mussolini and in Belgium the lawyers and judges effectively protested the Nazi laws. In Denmark the general population resisted the laws and 7,300 out of 7,800 Jews survived. In the introduction to the symposium one question asked was whether there was “excessive devotion by the German judges to the rule of law?” There was commentary that German lawyers and judges had been trained in a tradition of applying the law as it exists without regard to its content.

It was agreed that American judges also have been “compliant.” I can remember one example. As a civil rights lawyer in Grenada, Mississippi in July 1966, I was present in open court when a judge ordered the doors of the courtroom locked and banned the use of recording devices. This was at a time when a dozen Martin Luther King’s SCLC organizers were in town to help organize the local black population against discrimination, and a number of cases had been brought by a supporting legal team. The Grenada judge addressed the two or three hundred

or so local citizens in the courtroom comprising the jury pool for the term. He used graphic illustrations to influence the pool such as “when there is a snake, you should take a club and kill it.” Thereafter on the same day, I tried and lost my first jury trial before an all white male jury (from the pool the judge had addressed) that commenced for no more than five minutes in finding my client, a civil rights activist, guilty as charged.

Federal Judge Jack Weinstein, who participated in the symposium, stated that judges faced with immoral laws “can ignore neither monstrous nor routine injustices... of the various options available to American judges when faced with an immoral law, only one is ruled out; silent acquiescence.” Among options discussed at the symposium were resignation and “deliberately risking reversal.” Recently Federal Judge James Robertson resigned from the U.S.’s FISA Court in apparent protest over his perception that the government had committed misconduct by wiretapping American citizens without securing an order permitting it from his court.

“Arbitrary” law versus a “moral” rule of law in sentencing

I once represented a jazz musician in a Brooklyn traffic court with respect to dozens of moving violations. The musician had Virginia plates and a Virginia driver’s licence. He informed me that he had four different residences and that his musical career took him all over the country. Yet, every morning in Brooklyn, when he started his car to take his kids to school, the 87th precinct “ticket man” was there to give the musician two moving violations. When the case was called, the judge asked “Mr. Eikenberry, do you want mercy or justice?” I said, “Mercy, Your Honor! Mercy!” Justice for the musician that day contained an element of mercy and the court exercised its discretion when it gave him some.

A Brooklyn traffic court judge instinctively meted out justice in the way that Don Quixote recommended to Sancho Panza on the eve of his becoming governor of an island as follows:

“When equity can, and ought to take place, lay not the whole rigour of the law upon the delinquent; for the reputation of the rigorous judge is not better than that of the compassionate one.

‘If perchance the rod of justice be warped a little, let it not be by the weight of a gift, but that of mercy.’”

Before the sentencing guidelines, federal judges had wide discretion. Every person who committed the same crime was not punished the same. Thus, the legal system was more likely to do justice and retain credibility with the public. Discretion is a lubricant for the rough edges of the justice system. Under the sentencing guidelines important questions as to material disparities have arisen. I am informed that under the guidelines, transporters of drugs or “mules” must receive heavy sentences intended for large scale dealers. Before the sentencing guidelines, there was a rule of law with more of a moral content. Since their adoption, sentencing has been carried out more according to the “law of the sovereign.”

Is the U.S. rule of law complete?

Most emphatically not! For instance, there is the question of omissions. In a book edited by U.S. Second Circuit Judge Robert Katzmann, *The Law Firm and the Public Good*, he emphasizes that lawyers are not “grocers” or “taxi cab drivers,” but because of our licenses from the state--we must--as one of our “role morality” duties-- “ensure justice.” He contends that lawyers should facilitate access to the legal system because otherwise there is “no equality before the law.” Judge Katzmann addressed one inequality which undermines our commitment to the rule of law. A person who can not secure at least minimum adequate legal representation can not be said to benefit from a rule of law. As the rapid spread of our democratic system has

demonstrated, equal treatment is the major tenet of justice. The rule of law is our safeguard that justice will be done.

Leadership can cure these types of omissions. In Mississippi in the mid 60's, it was impossible for a white lawyer to represent an African-American client (or any supporter of one) in a civil rights matter without being ostracized by the white community. Despite there being only six African-American lawyers in the entire state, the representation problem was solved. President Kennedy called a group of American Bar Association leaders to the White House. Thereafter, the ABA reached an agreement with the Mississippi State Bar Association and the Mississippi court system whereby lawyers in good standing from out of state were permitted to practice in Mississippi to represent civil rights clients. The ABA bar leaders also set up their own legal services office in Jackson. That office together with the NAACP Legal Defense Fund and other non-governmental bodies staffed with a mixture of full time and volunteer lawyers provided the necessary representation. All parties exhibited courage and leadership from the President to the Mississippi bar leaders to give rule of law quality representation.

Courage, as a necessary component of a rule of law system of justice

Plato dedicated his life to the study of "justice." Like the late Supreme Court Justice White's view of pornography, most of us feel we know justice when we see it. As recently appointed Chief Justice Roberts pointed out in November 2005, "It was not long ago that we were an emerging democracy and the values that we hold dear came at a great personal price." When there is significant justice to be done—someone should "step up to the plate." Sometimes only leadership is required. In other circumstances there is physical danger.

In the November 2005 ABA Rule of Law Symposium, one segment was conducted under

the heading of “courage.” Justice O’Conner hailed the highest court in Ukraine for its judicial intelligence and courage in holding five days of televised hearings on the claims of a fraudulently conducted election-determining thereafter to overturn the election and schedule a new one. Corruption may totally undermine the administration of a rule of law democracy, but the Ukraine high court judges were able in one stroke to restore rule of law to Ukraine.

In Northern Ireland in November 1998, I, with fellow human rights mission delegates from the New York City Bar, met with solicitor Rosemary Nelson. Rosemary had driven 23 miles from her hometown of Lurgan to Belfast to meet with us over lunch. Rosemary showed us a small envelope containing a short letter threatening her life. She was a small town lawyer who handled real estate matters and such but who had also taken on defense matters for alleged terrorists. Her representation was effective and she was not only threatened but she was often vilified with obscenities by police officers. She revealed to close friends that she was very frightened by the threats but did not feel that she could end or turn down representations because she “couldn’t let people down.” She had alerted the Northern Ireland Chief Constable as to the death threats against her on more than one occasion. When we met with the Lord Chief Justice, I asked him whether he had any responsibility with respect to death threats to Rosemary Nelson—since she was part of “his” justice system. He had no reply except to suggest that we report the threat to her to the Chief Constable— which she had already done. About two months after we returned to U.S., Rosemary Nelson was blown up and killed in her car as it left her driveway. Rosemary’s children heard the explosion from their schoolyard.

Few of us take the risk of our lives in continuing to represent our clients, but all of us should feel an obligation to step forward to right a wrong when we see one. Our founding fathers

felt compelled to rebel against injustice at the risk of their being hung as traitors—but they also felt a responsibility to create a new order of justice.

Other examples of rule of law courage in U.S. history

In the context of race relations, the U.S. Constitution as adopted did not guarantee or even provide for equality for slaves. The rule of law can not be understood if its context is outside of an intent to do justice. Under the 1787 and 1850 fugitive slave laws the law was certain but justice was not served by a law mandating criminal penalties for the citizens who assisted or harbored fugitive slaves.

Throughout our history, private citizens, judicial officers, legislators, the press, and executives have each given primary leadership in the face of unjust laws to gaining justice for slaves and their descendants. In refusing to give up her seat on the bus, Rosa Parks provided the impetus for a decades long struggle which has significantly increased the liberty of the descendants of slaves. Civil rights leaders Hosea Williams, John Lewis and others lead a group of everyday citizens including children across the Selma, Alabama bridge in the face of attacks by hostile police dogs and streams of water from fire hoses under the command of Sheriff Bull Connor. Bill Connor was made a negative symbol of the civil rights movement by television coverage of the event.

Earl Warren gave leadership to the Supreme Court which rendered a unanimous decision in *Brown v. Board of Education*. Lyndon Johnson gave leadership in the wake of John Kennedy's assassination in urging the U.S. Congress to pass the 1964 civil rights laws. Abraham Lincoln and the blue clad soldiers of the Union army did their part as did Martin Luther King and Harriet Beecher Stowe. The post civil war Radical Republican legislators passed a civil rights bill

over the veto of President Johnson.

Content of remaining parts of this series

In subsequent articles of this series, I will discuss issues such as the effect of religion on the rule of law and as to how our nation has coped with the contradiction between 1) our philosophical and legal commitment to a rule of law democracy, and 2) the constitutional, statutory and judicial rulings, law and customs tending to support racial and gender discrimination.

I will also examine the debilitating effects of corruption on the rule of law. I will attempt to identify the existing rule of law constituencies in the Supreme Court and academia that lead to different approaches to interpretation of the Constitution, including federalism and the power of the president. Finally, I will examine rule of law jurisprudence internationally especially in the context of human rights crisis including torture, the rights of detainees, war powers, etc. and how the United States' role in international affairs is and is not guided by rule of law precepts.

More rule of law questions

Now that you understand the rule of law, puzzle out some more rule of law questions:

Question 4. In 1859, a Kentucky court issued an indictment against Willis Lago “a free man of color” and a fugitive from justice for the Kentucky crime of having assisted a slave to escape. Kentucky requested his extradition under the extradition clause of the Constitution from Ohio where he resided. The governor of Ohio refused to extradite him and Kentucky appealed to the U.S. Supreme Court. What was the result in the U.S. Supreme Court in its 1861 decision, *Kentucky v. Dennison*?

Answer to question 4. The Supreme Court did not order the governor of Ohio to

extradite Lago. It reasoned that although the governor had a duty to extradite, he had no obligation because Ohio was a sovereign state. The Court ruled that it could not compel the governor to do his duty.

Question 5. In 1987 Puerto Rico requested the State of Iowa to extradite a fugitive who had allegedly committed a murder in Puerto Rico and jumped bail. What was the result in the U.S. Supreme Court under the precedent of *Kentucky v. Dennison*?

Answer to question 5. In *Puerto Rico v. Branstad*, the U.S. Supreme Court overruled *Kentucky v. Dennison* and granted extradition to Puerto Rico.

Question 6. What was the basis of the opinion in *Puerto Rico v. Branstad*?

Answer to question 6. The Supreme Court reversed *Kentucky v. Dennison* because it found that the 1861 holding had been decided on the eve of the Civil War after the states of the deep south had seceded from the Union and the resignation of one of the Supreme Court Justices was imminent. “[T]he practical power of the court [was] at its lowest ebb since the adoption of the constitution.” The Court referred to *Brown v. Board of Education* as one of the precedents which permit federal courts to mandate obedience to “the requirements of the constitution.”

Comment

Puerto Rico v. Branstad seems soundly determined. Yet if *Kentucky v. Dennison* had been determined adversely to *Dennison*— it would have required Ohio to give up its citizen Lago, a free man of color, for having helped a slave escape in Kentucky. It is difficult to believe that Justice Marshall—who wrote the opinion in *Puerto Rico v. Branstad*-- would have ordered Lago extradited in 1861. Justice seems to have been done in both *Dennison* and *Branstad* but *Dennison* was overruled in deciding *Branstad*. That is just something to think about in mulling

over the practical application of the rule of law.

Random thoughts for new articles

Another thought Justice Kennedy at the November 2005 symposium stated that “we never recognize injustice in our own time.” Since I shamelessly interpret what judges mean all the time—is it not that he meant that society has not always recognized what is just at any one time. Since every citizen is a member of the justice system, do not we all have a “role morality” to speak up and help society?

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