INSIGHTS
ON LAW & SOCIETY®
A magazine for teachers of civics, government, history & law

$10.00
Winter 2003
Vol. 3, No. 2

THE
Rule of Law

American Bar Association Division for Public Education
The Rule of Law

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Come online to learn how you can make this edition a vital part of your classroom instruction. If you are a new subscriber, click “Archives” to review (and download) every print and online edition of Insights.
The publication in 1776 of Thomas Paine’s *Common Sense* produced thunderous approval. The pamphlet sold a remarkable one hundred thousand copies in only three months and became the most influential tract of the independence movement. In the midst of his fiery call for revolution, Paine paused to admit that many Englishmen in the colonies would be anxious about establishing a nation without a king. The alternative, he suggested, was for Americans to solemnly set aside a day to honor the governmental charter. More specifically, bring forth the charter itself, place it on top of the Bible, and then place a crown on top of the charter. The whole world would then know “that in America the law is king.”

A century and a half earlier, when Europeans began settling in North America, such glorification of the law would have had little appeal. Up and down the colonial seaboard, legal systems were idiosyncratic and less important than community, status, religion, and race in providing social order. Only in the eighteenth century did colonists begin truly to rely on law and legal institutions to settle their disputes and chart their social course.

What explains this development? Within the law itself, lawyering became more profitable, and the legal profession attracted many sons of the elite. On the grander social level, landowners, merchants, and financiers found the law increasingly useful in asserting their claims and resolving their disputes, and even craftsmen, farmers, and simple “mechanicks,” exposed to the vicissitudes of the market, came increasingly to believe in the utility of legal rules, actions, and officials. Although the changes did not occur overnight, colonial Americans came to see legal rights and duties as the keys to relationships, legal institutions as devices to avoid chaos and preserve liberty, and law-abiding conduct as something highly ethical.

Ironically, even the Declaration of Independence—the chief revolutionary document—shows the extent to which confidence in law had taken hold at the republic’s founding. Structured as a bill in equity, it includes a statement regarding jurisdiction, the identification of parties, a list of wrongs, an explanation of why other remedies would not suffice, a request for remedy, and even the typical concluding oath. Had Jefferson not been presenting his claim for independence to the court of world opinion, he might have used the very same form to request...
that a Virginia court of equity prevent a neighbor’s cow from trampling his client’s vegetable garden.

The content of the Declaration of Independence is also highly legalistic, with a majority of George III’s alleged offenses being law related. The king, it seems, had refused to assent to desirable laws, forbidden his governors to pass laws, and abolished valuable colonial laws and charters. Beyond the laws themselves, the king had assembled legislatures at unusual times, unduly dissolved these bodies, refused to establish courts, used salary and tenure to manipulate judges, and generally harmed the most crucial of legal institutions. In effect, the king was disrespectful of the law and in a profound sense “illegal.” The Declaration of Independence hence launched one of the most curious of revolutions: one that professed to be law abiding!

After the Revolutionary War, confidence in law and legal institutions became an even larger part of American ideology. The U.S. Constitution became an icon through which one could worship in the legal faith. Courts emerged as the most important institution, and the courtroom trial, as observed in person and as re-enacted in newspapers and fiction, served as an important secular ritual. Most important, a belief in the rule of law became a central American commitment.

**Development of the Constitution as a Legal Icon**

The most important legal icon of the early republic was not an image, carving, or statue, as is more common in traditional religion, but rather the Constitution. Glorification of the Constitution, in fact, became so pronounced that Thomas Jefferson warned before his death of treating constitutions “like an ark of the covenant, too sacred to be touched.” But the citizens of the ebullient young nation could not be deterred. Schoolbooks of the early nineteenth century spoke of the Constitution as divinely inspired and routinely employed the terms *glorious, revered,* and *sacred.* The Washington Benevolent Society, other civic organizations, and many profit-driven entrepreneurs produced not only facsimiles and elegant reproductions of the Constitution but also banners, wall hangings, and even handkerchiefs with all or part of the document. Americans could, and frequently did, carry the Constitution with them. Many could not read the Constitution, or anything else, for that matter, but that seemed to make little difference.

**Courtroom Trial as American Ritual**

While the Constitution was the most important icon in the American legal faith, courts became the most important institution, and the courtroom trial the most powerful ritual. In the second and third decades of the nineteenth century, courts and the courtroom trial came into their own.

Courtroom proceedings were especially important civic affairs in the more rural areas. Lawyers often rode together on circuit, their arrival at a county seat along with the presiding judge much heralded. Not only participants but also the curious descended on the courthouse to watch, to argue, and sometimes simply to picnic on the lawn. The courtroom proceedings and especially the trials were the most dramatic manifestations of government in rural America.

In the growing cities, Americans were less likely to gather at the courthouse. However, trial-related popular culture expanded in form and circulation, and the courtroom trial intruded more and more into the American consciousness. The penny press counted trial reporting as a journalistic staple, and cheap fiction kept trials before the American public.

**Legalism and the Rule of Law**

In addition to an icon, institution, and popular ritual, the American legal faith needed its premises, its doctrines, its system of beliefs. These came in the form of legalism, a multifaceted belief in the usefulness, fairness, and legitimacy of laws and legal institutions. Emerging at the time of the American Revolution, legalism and its defining commitment to a rule of law became even more powerful in the early nineteenth century.

Americans believed that laws were to be made in public, without bias for particular individuals or classes, and with an honest commitment to the public good. Lawmakers were to promulgate the laws in clear, general, nonretroactive, and noncontradictory form. Laws were to be feasible and predictable, known.
and understood by the people. Officials applying the law, especially judges, were to be fair and impartial, treating similar cases in similar ways, extending due process free from public pressure to everyone. Americans largely believed that, in their country, law ruled man rather than vice versa.

The American legal faith, it is fair to say, made a tremendous impression on Alexis de Tocqueville. The American people respected law itself. How curious this was, especially since in Europe the masses looked at the laws with suspicion. “However irksome an enactment may be, the citizen of the United States complies with it,” de Tocqueville wrote, “not only because it is the work of the majority, but because it originates in his own authority, and he regards it as a contract to which he is himself a party.” More so than even Thomas Paine had imagined, the law had become king in America.

**American Legal Faith Today**

In the years since de Tocqueville, the American legal faith has both changed and held firm. As for the Constitution as icon, actual physical reproductions have continued to appear. Icon avalanches, in fact, occurred during the centennial in 1887, sesquicentennial in 1937, and bicentennial in 1987. All these impressive facsimiles and reproductions, like the carvings and paintings of saints in early Christianity, represent icons of a faith, albeit a legal one.

American courts and courtroom trials have reshaped themselves over the decades, with the courtroom trial retaining its power as a ritual of the legal faith. However, the chief institution mounting the ritual is no longer the court itself. America’s courts, of course, still exist, but most Americans have never participated in or even witnessed a courtroom trial, obtaining their image of the courtroom trial instead from the countless trials in American popular culture.

Print and broadcast journalism routinely reports on trials, a cable channel features trials, and the tabloids feast on the courtroom activities of the rich and reckless. In addition, fictional trials abound in American novels, movies, and prime-time television. The courtroom trial is, in fact, so common in American popular culture that it has become taken for granted and does not even register as a convention used by writers and filmmakers.

The constitutional icon and trial ritual lead ultimately to legalism and the rule of law, the belief in impartial judgment according to neutral rules. However, during selected periods in the course of the twentieth century, the legal faith seemed to wobble. Immediately following World War I, for example, the president, Congress, the judiciary, and a majority of the population seemed inclined to cut legalism’s corners in order to suppress a perceived subversive menace. Also, the Watergate scandal in the early 1970s revealed not only election shenanigans but pervasive disrespect for legal institutions and rules by the highest rungs of government. After both these episodes the nation seemed to right itself, employing the rule of law as a political rudder, much as Abraham Lincoln suggested in the 1830s. Thus, Richard Nixon was forced from the White House, his helicopter departure signaling that Americans were more enamored with the rule of law than with the aura of the presidency.

Today, the great majority of citizens continue to hold the rule of law dear. The Danish scholar Helle Porsdam, a modern-day de Tocqueville, has asserted, “Americans practically think and breathe in legal terms.”

None of this is to argue that the rule of law really is the ultimate foundation of American life or in some grandly cross-cultural way the badge of civilization. The issue is instead legal faith, the way that by using appropriate icons and rituals Americans have, since the days of the early republic, believed in and worshiped law. The legal faith is one feature of American society that continues to distinguish it on the world stage.
What Is This Thing Called the Rule of Law?

It is a frequent boast that Americans live under the rule of law. Careful analysis shows that this rule of law is much more than rule by law.

by James W. Torke

I am a believer in the rule of law. I believe in its genuine existence and in its blessings. I believe that the rule of law is real, and that it is a coherent ideal. So, in some respects, what I have to say is a statement of faith—with some cautions appended.

Of course, this article can serve only as something of an outline or agenda for further discussion, but I do want to state some old truths. The rule of law is a reality and a blessing, but it is beset by at least two problems: one, a kind of pathology; the other, something of a paradox.

**Rule of Law’s Nature, Value, and Reality**

The rule of law may be more fully understood by looking at some of the promises it makes, its characteristics and premises, its components, and finally, its operation.

**Promises.** First, the rule of law offers the promise that only legal commands (that is, rules authoritatively promulgated) are obligatory; that government officials are subject to known, public laws; and that there exists a fair, rational process through which one can protect one’s interests. In place of arbitrary will, it requires reason—and reasons. Second, it promises individual freedom to pursue, within relatively clear limits, one’s own ends rather than reducing its subjects to serve as means for others’ purposes. It thus promises prosperity or happiness. Legitimacy, constraint, autonomy, and ample room for the pursuit of happiness—these are its promises.

**Characteristics and Premises.** The rule of law is mostly backward looking, for it prefers the keeping of promises to the promotion of ends. It is more narrative than logic. It is not scientific or philosophical, but it is not antiscience or antiphilosophy. It is neither a creation of nature nor a creature of God. It is modest in the sense that it goes only so far as it must and avoids, where possible, exposure of moral bedrock. It is founded in mistrust—in a recognition of the capacious bias, stupidity, and self-love of human beings; yet it depends on the good faith of human beings. It is anti-utopian. It is a trade-off that prefers the good to the perfect.

**Components.** With respect to its components, the rule of law has to do with much more than rules of law, or ordinary “law stuff.” The rule of law comprises formal constraints, institutional constraints, and informal constraints, so it operates at three levels.

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Condensed and adapted from James W. Torke, “What Is This Thing Called the Rule of Law?” 34 Ind. L. Rev. 1445 (2001).
To imagine the rule of law, think of a pyramid, the top third of which consists of the ordinary “stuff” of law—constitutions, statutes, rules, regulations, doctrines, principles, decisions, and the like. In part, the rule of law is a law of rules and texts. These are law’s formal constraints.

The middle third consists of institutions—constitutionalism, dispersal of power, open governmental processes, as well as a free press, decentralized law publishers, and widespread and varied access to legal education leading to an independent legal profession. These are law’s institutional constraints.

The bottom and broadest third, upon which the pyramid rests, is the rule of law culture. The rule of law is the nation’s central cultural artifact, the ruling myth of its civic faith. Americans are united as subjects of law’s empire, in liege to law. As de Tocqueville observed over a century ago, Americans turn unthinkingly to law, as if by instinct, to settle their disputes. These are law’s informal constraints.

Now how do these components—law stuff, institutions, and culture—work at ground level? How do they constitute the rule of law? What, for example, is the nature of a correct decision in law? What is a true statement of law?

Operation. Even though the amount of law that is clear should not be underestimated, much of the challenge of law involves uncertainties that people acting in good faith will see differently. What does the rule of law do in settings in which it is most severely tested?

Legal disputes are approached as if there are right answers—a kind of quasi-formalist presumption—and the job of the lawyers and decision makers is to find them. In a sense, the solutions are found in the past, for the rule of law mostly looks backward or sideways and only surreptitiously forward. In the past are reasons that do not so much cause as justify. These reasons provide normative, not causal, force. They operate not as links in a chain but more as the legs of a chair. However, these reasons (the legs of this chair) are not just any reasons.

The rule of law does not promise results so much as it promises an approach, a process, a practice of reason giving, a set of argumentative conventions. The rule of law sets bounds to its discourse. Insofar as the rule of law is itself a rule, it is a rule of inclusion and exclusion of reasons, a rule of pedigree. In that sense at least, the law is an autonomous practice.

Nonetheless, the process often results in opposed conclusions—split decisions—one of which must control. The decision may be subject to revision. It certainly may be subject to criticism as being unjust or unprincipled or as masking improper reasons. New factors and considerations—instrumental concerns—may enter law from the outside, but they must be mediated and translated into the discourse of the law.

The rule of law, properly understood, is a glory of civilization and a real, wonderful, and complex thing. However, it is not the only thing, and sometimes there can be too much of a good thing.

Two Cautions

Law’s Pathology. In his book, The Ages of American Law, Grant Gilmore wrote: “In Hell there will be nothing but law, and due process will be meticulously observed.” This is one of my favorite legal quotes, for I think it points to a real danger in too much of a good thing. Does the United States have too much law? Well, it is hard to say, but it sure has a lot of it.

In just the thirty-some years I have been professionally involved in law, at times it has seemed that the law has become smothering. At times, I feel law more as menace than as sword or shield. I feel claustrophobic amid its ever-growing baggage and clutter—and I am supposed to be an expert—to know my way around.

To some extent, such growth is inevitable as part of the natural tendency of social systems to grow in complexity. Such growth is fed by population increases and technological advances. As people have taken a more instrumental view of law, they have turned to it to solve almost every problem.
Thus the rule of law slides into the vice of legalism, a kind of *reductio ad absurdum* of the constitutional maxim that for every wrong, there must be a remedy. It all seems so fair, so enlightened, so sane. As an example of this tendency, consider the expansion of what constitutes criminal child abuse. Just a few months ago, I read of a prosecution of parents for their child’s obesity. More recently, I read of growing concern among child development experts about parents who impose diets upon their children. Next, I fear, will come more law; for here, as everywhere, the public interest is at stake.

The trend is clear. There is a cost in all this. Indeed, the rule of law itself is undermined when law spreads too far, for its promise includes that of substantial open spaces for personal choice. Moreover, too much law threatens to delegitimize law; for too much law breeds indeterminacy, inconsistency, randomness of application—the very vices that the rule of law abhors. Too much law engenders suspicion, disrespect, and cynicism.

Is there a cure? Perhaps not. Like the plain language movement, perhaps any effort to simplify law is doomed to failure. There is, after all, an irreducible complexity in law. It might, however, be wise to consider more carefully law’s costs—and its alternatives.

At a minimum, when the temptation to turn to law arises, informal cost/benefit analyses should be undertaken, keeping in mind the law of unintended consequences. Alternatives to law ought to be considered. Rather than top-down ordering, which is the way of law, the virtue of bottom-up controls should be explored.

The state, after all, is only one source of social control. Alternative sources include intermediary associations, churches, private societies, and the like. Effective social bounds often depend most upon arational elements, common narratives, objects and symbols of affection, convictions and proverbs—things that the rule of law finds hard to comprehend.

There are places law should not go. Law ought not enter certain areas where privacy, personality, politics, and power work well enough, and often better. As Aristotle observed, “[W]hen men are friends, they have no need of justice.” So too, to a great extent, in some areas efficiency and general prosperity are best promoted by minimally regulated markets. In short, idolatry of law threatens to destroy the rule of law. That is the pathology of law, but the rule of law also involves a paradox.

**Law’s Paradox.** The rule of law is real but somewhat fragile. It is made up of and depends upon the existence of certain institutions and a culture of legality and compliance. The paradox here is that, to fully understand the operation of the rule of law, one must, in a sense, turn John Marshall’s dictum that the U.S. government is “a government of laws, and not of men” on its head: A government of laws cannot exist without good people. For the law to keep its promises, it must be in the hands of persons of good faith—good faith judges, executives, and legislators. One other group seems to be key to the maintenance of the rule of law, and that group is lawyers.

The rule of law is real, but it is subject to a pathology, and it involves a paradox. Its preservation depends upon recognition of its limits, and even more important, upon an appreciation of how it works and the importance of the professional skills needed to keep it working.
For centuries, the rule of law has represented a political ideal venerated by people of virtually every political persuasion all over the world. At its core, the concept of the rule of law signifies a form of government whose actions are constrained by certain predetermined legal rules and standards and therefore are predictable, orderly, legitimate, and restrained. Many of our nation’s Founders embraced this core conception of the rule of law, which they proudly equated with the establishment of “a government of laws, and not of men.” In 1948, almost every government on earth endorsed a similar conception by ratifying the Universal Declaration of Human Rights.

Ideally, under this core “procedural” (or “thin”) conception, the rule of law protects people against arbitrary victimization by government officials, foreign enemies, or their fellow citizens. To this end, it requires citizens as well as government officials to obey the law. The thin rule of law has also been said to require, at a minimum, that laws must be general in scope, prospective in application (rather than retroactive), announced in advance, published and readily accessible to the citizenry, clear in meaning, enacted in conformity with existing legislative procedure, possible for people to obey, stable enough to allow the citizenry to keep up with pertinent changes, and enforced in accordance with their settled meanings. The rule of law has been lauded as a crowning human achievement, able to tame the brutality of the Hobbesian “law of the jungle” and thereby mitigate the misery that the strong might otherwise be expected to visit upon the weak.

Even while extolling its virtue, however, many commentators have argued that a purely procedural conception of the rule of law is not sufficient to fully protect human rights and individual liberty. For example, the Nuremberg laws of Nazi Germany, which denied basic civil and political rights to non-Aryans, arguably satisfied a purely procedural conception of the rule of law: the laws were duly enacted and were enforced in accordance with their plain and well-understood meaning. Similarly, the slavery laws of the antebellum American South and the Islamic Sharia law of the former Taliban government in Afghanistan also exemplify legal orders whose fundamental injustice did not stem primarily from “lawless” or arbitrary action by government officials, but instead from the profound inequity in the substance of laws that those officials were duty bound to enforce.

For these and other reasons, some commentators have argued that a complete and salutary conception of the rule of law must go beyond merely constraining...
the discretion of government officials. It must also guarantee the protection of important political values such as democracy, individual liberty, equality, and fundamental human rights. In the words of Justice Cardozo, the rule of law prohibits government ever from invading those personal freedoms that constitute “the very essence of a scheme of ordered liberty, [such that] to abolish them [would] violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” The specification and desirability of these “substantive” (or “thick”) conceptions of the rule of law have proven more controversial than strictly “procedural” conceptions.

The U.S. Constitution embraces both procedural and substantive theories of the rule of law. The procedural rule of law theory is reflected in the Constitution’s structural principles of dual federalism (division of power between state governments and a national government) and separation of powers (division of federal power among the president, Congress, and the judiciary). These structural “checks and balances” were designed to hinder individual public officials from exercising government power unilaterally to ensure that government action conforms to law. Substantive rule of law theories, in contrast, are reflected most directly in the First Amendment, which guarantees that no law may violate the fundamental human freedoms of speech, press, and religion, and in the Fourteenth Amendment, which guarantees the equality of all persons under law.

Rule of Law Around the World

Over centuries of Western political thought, a relatively broad consensus has formed around the idea that government action should be constrained by law. In principle, this consensus now extends far beyond the West. In 1948, acting through the UN General Assembly, virtually every nation proclaimed in the Universal Declaration of Human Rights that “it is essential … that human rights [everywhere on earth] should be protected by the rule of law.”

Beyond reflecting procedural rule of law values, however, the Universal Declaration of Human Rights also reflects certain substantive conceptions of the rule of law. Thus, in addition to decrying “lawless” action by government officials, the declaration also repudiates the enactment or enforcement of laws that contravene such core substantive political values as nondiscrimination, democracy, and the protection of individual liberty, dignity, and security.

Discretion and Innovation

Presidential Power. Because lawmakers cannot anticipate every eventuality, legislation invariably must allow for some discretion on the part of those who enforce the law. The existence of discretion, however, conflicts to some extent with an ideal for government action to be predetermined by law. Moreover, the vast accrual of power in the U.S. presidency has given rise to persistent questions about whether the actions of presidents are truly controlled by preexisting law. Whether for good or ill, some of our most celebrated presidents have wielded their power in innovative or unexpected ways.

During the Civil War, for instance, President Abraham Lincoln followed no preexisting law when he unilaterally suspended the writ of habeas corpus, freed the slaves in every Confederate state, and recognized the self-appointed minority government in Wheeling—rather than the duly elected government in Richmond—as the legitimate government of the Commonwealth of Virginia. In the 1930s, President Franklin Roosevelt crafted the modern administrative state, which recombines within an unelected bureaucracy various executive, legislative, and judicial powers that the constitutional design had separated in order to preserve the rule of law. To ensure that this program survived Supreme Court review, in 1937, President Roosevelt threatened to pack the Court with six friendly justices who, together, would be...
able to outvote any skeptical holdovers. In 1943, President Roosevelt ordered the indefinite internment in special detention camps of all persons of Japanese descent living in coastal areas of California.

Today’s war on terrorism has raised new challenges to both procedural and substantive conceptions of the rule of law. Since early 2002, on the sole authority of President George W. Bush, 598 men alleged to be members of the Taliban or al-Qaida organizations have been detained at a U.S. military base in Guantánamo Bay, Cuba. None has been accused of any crime, nor have any been classified as military prisoners-of-war. Nonetheless, in violation of both the U.S. Constitution and international law, these men remain in indefinite detention with no opportunity to appear before an independent and impartial tribunal.

**Supreme Court.** The unconstrained power of the contemporary president is mirrored by that of the contemporary Supreme Court. In the seminal case *Marbury v. Madison*, the Supreme Court established the doctrine of judicial review, under which state and federal statutes that violate the written commands of the U.S. Constitution are invalidated by the Court. More controversial, however, has been the Court’s almost equally longstanding practice of enforcing the justices’ personal understandings of “natural law,” which is sometimes called the *unwritten* Constitution.

This challenge to the rule of law posed by nontextual judicial review is well illustrated by two recent Supreme Court decisions in which the Court openly relied on its own position of power—rather than on any underlying law—as the primary determinant of the decisions that it reached. In the first such case, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Court was asked to reconsider whether the U.S. Constitution protects the right of women to choose abortion. The deciding votes in *Casey* were cast by three justices who declared that the Constitution itself protects no such right, but that the Court would nonetheless continue to protect abortion rights so as not to be seen as having acquiesced to pressure to overrule its earlier decisions. If the Constitution, however, does not protect a woman’s right to choose abortion, then the Court’s decision to do so on its own initiative could fairly be called lawless.

Similar rule of law difficulties arose in *Bush v. Gore*, 531 U.S. 98 (2000), the 5-4 Supreme Court decision that resolved the 2000 presidential election by stopping a statewide vote recount in Florida, thereby awarding the presidency to second-place finisher in the popular vote, George W. Bush. The decision has been widely criticized as fundamentally irreconcilable with the preexisting “law” that pertained to the case and therefore a violation of thin-rule-of-law values. Indeed, by warning future courts against relying on the decision as valid precedent, the *Bush* Court itself appeared to acknowledge that its decision transcended (or transgressed against) ordinary conceptions of law. Defenders of the decision have largely conceded the novelty of the Court’s decision but have defended its action as a form of rough justice that was needed to counterbalance lawless Florida officials or avert an impending national constitutional crisis. In contrast, critics have echoed Justice Stevens’s dissenting view: “Although we may never know with complete certainty the identity of the winner of this year’s Presidential election, the identity of the loser is perfectly clear. It is the Nation’s confidence in the judge as an impartial guardian of the rule of law.”

The *Bush v. Gore* decision, like *Casey* before it, raises age-old questions about whether the rule of law can be flexible enough to allow public officials, including Supreme Court justices, to occasionally bend the law in order to advance their
own conceptions of the greater public good. In 1861, President Abraham Lincoln addressed this issue when he was asked to explain why he continued to suspend the writ of habeas corpus, even after the Supreme Court had ruled the suspension unconstitutional. In his own defense, Lincoln famously asked: “Are all the laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?”

In conclusion, ideally, the rule of law can be a powerful tool both for establishing social order and for protecting individual liberty. Yet the meaning of the rule of law remains fundamentally contested. In some cases, the thin and thick conceptions may be logically irreconcilable. Yet for as long as laws continue to be written and enforced by human beings, actual legal systems will likely, and rightly, continue to combine both conceptions.

Q: What efforts would you endorse for helping the younger generation subscribe to the rule of law?

Appelwick: I strongly believe that mock trials, youth court, and mock legislatures are powerful tools to teach the values of rule of law. Youth that get involved in the public legal education efforts use the law within their own peer group settings. They can see how it applies to them. They can also sense then how it will apply when they are older. Just telling them it is relevant can’t make it real.

Judge Marlin Appelwick has served on the Washington State Court of Appeals since 1998 and is now a judge in Division I in Seattle.

would not have even crossed the minds of white South Africans. This is illustrated in a number of the Street Law exercises that we introduced in 1985 during apartheid. For example, we discussed a scenario that raised questions of law and morality. At one stage, one of the white kids put up a hand and said, “Professor, why are we criticizing all these laws that our parents voted for?” A number of black kids suddenly put up their hands and said, “But our parents haven’t got a vote.” The white kid just put her head in her hands; it would never have crossed her mind that black people didn’t have a vote.

David McQuoid Mason is a law professor and former dean of the University of Natal School of Law in Durban, South Africa.

from interest groups to judicial candidates. This threatens the independence of the judiciary. The financial stakes are huge for judges once they are in office. If they lose an election, they lose all that they had. Judges can’t help but know that those partisan and interest group currents are out there. Yet every judge wants to be above and beyond the pressures of interest groups.

Q: Do you consider living under the rule of law as a human right?

O’Brien: Definitely. The Universal Declaration of Human Rights has several provisions that reflect the rule of law, guaranteeing due process for people who are arrested and the equal application of the law. The very essence of human rights is the dignity of each individual—that the law will treat each person with dignity.

Q: What strategies do you think are most viable for promoting a society to live under the rule of law?

O’Brien: Education is extremely important. It is also crucial for the media to pick up on the rule of law. I don’t think the media use the term because they don’t really understand it either. We have to change the vernacular in society and the media.

Ed O’Brien is the director of Street Law, Inc., in Washington, D.C. He has worked throughout the world establishing human rights education programs.
What Does Rule of Law Mean—in the United States and Around the World?

Here, read an interview with the former dean of a South African law school about interpreting the rule of law. Explore the views of an elected state court judge on the impact of elections on an independent judiciary and its relationship to rule of law. Finally, consider the views of the director of an international organization for public legal education to understand the fit between the rule of law and educating the public in the law. —Interviews by Margaret Fisher

Q: As a lawyer and law school dean in South Africa both during and after apartheid, how would you define rule of law?

McQuoid Mason: A society that is governed under the rule of law reflects the separation of powers doctrine. There must be a parliament, or a law-making body, that is elected by the people. This grants legitimacy to laws. There must be accountability so that laws can be changed by the electorate in cases where they don’t like the laws. There must be an executive to administer the laws in a nondiscriminatory way. Most important, there must be an independent and impartial judiciary to apply the laws, to ensure that people have an opportunity to present their side of a case, and to ensure that people follow procedures.

Q: Is it an essential characteristic of rule of law for there to be individual rights embedded in a Constitution that is supreme?

McQuoid Mason: I think so. This is what we didn’t have under apartheid. We had the British sovereignty system in which the Parliament was supreme. The South African Parliament could pass any law it liked, as long as the manner in which the law was passed was formally and procedurally correct. There was minority white government built into the Constitution, and Parliament passed laws that favored the minority.

Q: How, if at all, does the new Constitution or legislation of South Africa contain the concept of the rule of law?

McQuoid Mason: It is fully enshrined in the new Constitution. South Africa had the advantage of being able to pick and choose from several constitutions, including those from the United States, Canada, India, and other countries.

Q: Would the various ethnic groups that make up South Africa in general agree with your analysis of rule of law?

McQuoid Mason: I think so now. Certainly in the days of white privilege, it was easier. But now, there is some commonality and fairness in how we are treated, what is expected of us, and what happens when we fall short. In essence, it assures that we are equal.

Q: As an appellate judge and former state legislator, how would you define rule of law?

Appelwick: Rule of law is the social fabric, the expectation that law is the authority by which we are bound together. It is also the specific rules that we ought to follow and the system of government that provides the process. Being a nation governed by the rule of law assures us that there is some commonality and fairness in how we are treated, what is expected of us, and what happens when we fall short. It is a coming of age that every generation must go through.

Margaret Fisher is an adjunct professor at the Seattle University School of Law, and she assists the state courts of Washington with educational programs.
Q: Do you agree that the independence of the judiciary is a key element in having a society based on rule of law?

Appelwick: Judicial independence is absolutely critical to our democratic form of government. It is the check and balance to ensure fairness in the system. It ensures that the constitutional doctrines are protected and that we do not get people in positions of power who defy the constitutional order to have their own way.

Q: What impact does the recent U.S. Supreme Court decision on judicial free speech have on the selection of judges?

Appelwick: The Supreme Court basically said that judges may talk about anything and everything. That case involved the Minnesota Republican Party. This has sent the message that partisan affiliation is okay in judicial campaigns, interactions, or contributions... [But it] is important for judges who are elected to be very clear in their own minds that they are not there to serve those constituencies. Instead, they are there to serve the Constitution, the laws of the state, and the people of the state.

Q: Is there evidence that interest groups’ influence is growing in judicial elections?

Appelwick: Yes, there is increasing evidence of major financial contributions... [continued on page 13]

Q: Mr. O’Brien, you have had a long history of educating people on law and human rights around the world as well as in the United States. How do you understand rule of law?

O’Brien: Laws have to be reasonable, understandable, and written clearly. A rule of law system is one in which people have some opportunity of changing things and citizen participation is possible. Voting people out through free and fair elections must be possible. I would add that rule of law requires that people understand the law. There really needs to be a good system of educating the people about law in order to have a society based on the rule of law.

Q: In your experience, what do people understand rule of law to mean?

O’Brien: Most people don’t know what it means. We just went through a process at Street Law during which we identified the organization’s values, and we had no value that said law. We had democracy and human rights, but we didn’t say anything about law. It wasn’t even clear to our Street Law staff what rule of law meant. Some people said it means that people will follow the law, and others said it means that the laws are just and reasonable. Rule of law is a problematic term because it is not really understood.

Q: How is rule of law viewed internationally?

O’Brien: What the World Bank means by rule of law and what most lawyers mean by rule of law is a legal system in which laws are passed democratically and enforced by the courts fairly, equally, and reasonably. I doubt that they would go so far as to say that the laws must really reflect human rights, in a broad sense, with a social safety net.

Q: If you had to identify one element of rule of law as the most important, which would it be?

O’Brien: Access to the courts and an independent judiciary. Without an independent judiciary to step in when the executive or legislative branch really goes out of bounds, there is no way to have rule of law. I do think that the United States has one of the strongest judiciaries, which is one of the really good things about the American system. However, I believe there are efforts to weaken the judiciary here in the United States.

Q: Is the selection of judges through elections in the U.S. problematic?

O’Brien: The issue of elected judges is a critical one in the United States. Eighty percent of state court judges in the... [continued on page 13]
We are a nation under the rule of law. But what does that mean? For one thing, rule of law means that the law itself is the highest authority in the land. No person or institution is above it. Even so, law is subject to interpretation. This means that its application doesn’t necessarily have a guaranteed outcome. The courts are an important testing ground for the rule of law.

In this edition, Students in Action looks at the rule of law in the United States. You will learn about four court cases that have tested the rule of law. The first two, recently decided and likely to be appealed, involve the First Amendment right of access and the Fifth Amendment right of due process. Next, you will read the stories of two landmark cases that finally resolved disputes involving the right to an equal education for all Americans and the Fourth Amendment right against unlawful search and seizure.

“Deportation Hearings—Should They Be Secret?” is a news story that explores the first two decisions, which were arrived at in separate federal courts and which actually contradict each other, even though the facts of the cases are closely related. The U.S. government has detained aliens who, it asserts, may be involved in terrorism. In the interests of national security, the government argues that their deportation hearings must be closed. The detainees, politicians, and media who are challenging this assertion disagree, saying that the detainees’ relatives and the media have the right to attend the hearings under the First and Fifth Amendments. The dispute will most likely be appealed to, and finally decided by, the Supreme Court.

As times change, society and the Supreme Court also change. Sometimes this means that the Court’s interpretation of the Constitution changes too, even though the rule of law is commonly thought of as “constant.” Read how its interpretation of equal education under the law changed dramatically in 1954 in “Thurgood Marshall and the Case Called Brown.” Finally, in “Searching the Home of Dollree Mapp,” you will read about Mapp v. Ohio, a case that tested and finally strengthened the Fourth Amendment guarantee against unreasonable searches.

Completing the Take Action! activities at the end of each article will help you begin to participate in and influence the public debate surrounding the rule of law—a debate that your generation is encountering today and one that it will encounter in the future when you become parents and caretakers of the next generation of Americans. For additional activities, be sure to visit insightsmagazine.org (click on “Students in Action” when you get there).
The threshold question before two different federal appeals courts was the same: Is there a First Amendment right to attend deportation hearings?

One court said yes, and the other said no.

The decisions about whether relatives and the media should have access to hearings of those suspected of terrorism were at such odds that legal experts say the U.S. Supreme Court will eventually have to resolve the matter. “There’s no way the two opinions can be squared with one another,” said Newark lawyer Lawrence S. Lustberg, who represented New Jersey newspapers seeking access to the deportation hearings in one case.

The 2-1 ruling in that case by the Third U.S. Circuit Court of Appeals in Philadelphia held that blanket closure of special-interest deportation hearings is lawful. The decision directly conflicted with one made earlier by the Sixth U.S. Circuit Court of Appeals in Cincinnati—that deportation hearings can be closed only on a case-by-case basis. The decision in the Third Circuit reversed a preliminary injunction by U.S. District Judge John W. Bissell, who had ordered all deportation hearings open unless the government could show why secrecy was needed in a particular case.

The two cases followed Chief Immigration Judge Michael Creppy’s administrative order closing all deportation hearings involving detainees of “special interest.” Attorney General Ashcroft included in that category those who might have connections to the September 11 terrorist attacks. Detainees, politicians, and the media in Detroit and Newark then challenged the closures on the grounds they violated First Amendment access and Fifth Amendment due process.

According to the Department of Justice, 763 persons were detained on alleged immigration violations in the wake of September 11. That number dwindled, however, with most either released or deported. Lustberg, however, says that holding secret hearings means there’s no way to know for sure how many individuals were detained and how many have been released.

**Take Action!**

1. Read the First and the Fifth Amendments—the bases of the plaintiffs’ cases. Review also the powers of the executive branch—the basis of the Department of Justice’s case. Then decide which ruling—that of the Third or Sixth Circuit—you feel follows the “rule of law.” Argue your case with someone who holds the opposite view.

Adapted and reprinted from Molly McDonough, “Circuits Split on Deportation Hearings: First Amendment Argument Worked in Narrower Case,” ABA Journal Ereport (October 10, 2002), courtesy of the ABA Journal. The ABA Ereport is an ABA member benefit.
At one time “separate but equal” ruled many of the nation’s school systems. This policy forced African-American students to attend schools separate from white children. Such segregation had been upheld by a Supreme Court decision in 1896 called *Plessy v. Ferguson*. This is the story of how in 1954 the Supreme Court justices and African-American lawyers led by Thurgood Marshall, who would one day sit on the high court himself, overturned this unfair and hurtful practice.

Thurgood Marshall was no stranger to the Supreme Court when he stood before the Justices in the autumn of 1952. Since the 1930s, Marshall and the legal staff of the National Association for the Advancement of Colored People (NAACP) had appeared before the Court in Washington, D.C., as well as countless southern courts, arguing case after case in their effort to chip away at segregation.

When Marshall had joined the NAACP as a young lawyer in 1936, the association was divided over how to legally attack the separate-but-equal doctrine. One strategy was to show that the separate facilities were not equal and thereby force states to spend more money on black schools and teachers. This legal campaign had produced a string of victories.

Yet Marshall and other NAACP lawyers saw this line of reasoning as merely laying the groundwork for a more direct attack on segregation—one that would demonstrate that separate schools could never be equal. And because separate schools were inherently unequal, they were unconstitutional.

During 1951, attorneys from the NAACP Legal Defense Fund represented African-American parents in Delaware, Virginia, South Carolina, Kansas, and the District of Columbia who were seeking to have their children admitted to white schools. The attorneys were directly challenging the constitutionality of “separate but equal” by using the second, more direct argument—that segregated schools could not be equal. To support their argument, they pointed to social science research that showed segregation had a devastating effect on black children; it destroyed their self-esteem and desire to learn.

In 1952, the Supreme Court agreed to hear appeals in these cases. The four state cases were grouped under the title of the Kansas case, *Brown v. Board of Education of Topeka*. Brown was Oliver Brown, the father of a young schoolgirl named Linda who was forced to attend a distant all-black school, even though a white school was only four blocks from her home. By grouping all the state cases into one, the Justices provided the opportunity for the ultimate debate over segregated education. On one side of the debate were the states, arguing that segregation was indeed constitutional. On the other side were the African-American students and parents, whose main attorney, Thurgood Marshall, led the attack on its constitutionality.

This debate over segregation made some Supreme Court Justices extremely anxious. Even though all the Justices except Stanley Reed, from Kentucky, found segregation offensive, they hesitated to declare it unconstitutional. They feared that many white southerners would bitterly and even violently fight to keep their schools segregated. And if the Court’s order to desegregate was not enforced by President Dwight Eisenhower and the Congress, the Court’s standing in the eyes of the public would be severely damaged.

Even more important, several of the Justices worried that they would be exceeding the limits of judicial power if they reversed the earlier *Plessy* decision. This was especially true of Justices Felix Frankfurter and Robert Jackson. They believed that judges should overturn a law only when it clearly violated the Constitution. Frankfurter and Jackson worried that if they struck down
segregation, they would be making their personal preference the law.

The case dragged into 1953. During the spring of that year, members of the Court remained uncertain as they considered the arguments that had been presented by Marshall and his colleagues on one side and lawyers for the states on the other. Justice Reed supported segregation, Chief Justice Vinson leaned toward that opinion, and several other members of the Court were undecided.

Then in early September, Chief Justice Vinson died. President Dwight D. Eisenhower appointed a new Chief Justice, Earl Warren, the governor of California. While Vinson had leaned in the direction of segregation, Warren firmly opposed it. It would be Warren who would write the majority opinion explaining the Court's decision in Brown. That decision was announced on May 17, 1954.

That day began as many other days at the Supreme Court. But just before one o'clock, Chief Justice Warren picked up a paper and said, “I have for announcement the judgment and opinion of the Court in Oliver Brown v. Board of Education of Topeka.” The news reporters erupted into action. The Associated Press sent out a flash. Loudly and firmly, Warren read the decision of the Court: “In approaching this problem, we cannot turn the clock back to ... 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. …

“Does segregation of children in public schools solely on the base of race ... deprive the children of the minority group of equal educational opportunities? We believe that it does.”

Chief Justice Warren then pointed to the social science research cited by Marshall and the NAACP lawyers to argue that segregation denied African-American children the full benefit of education: “To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority ... that may affect their hearts and minds in a way unlikely ever to be undone.”

Therefore, the Chief Justice announced, “We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”

The Supreme Court’s decision was certainly not the end of segregation. Desegregating schools would take years. But Brown was a most significant step—both for the nation and for Thurgood Marshall. From this case, Marshall would go on to be appointed to the U.S. Court of Appeals in 1961 and then to the position of solicitor general of the United States in 1965. Two years later, President Lyndon Johnson would appoint him Associate Justice of the Supreme Court—the first African American to sit on the Court, the same Court he persuaded to outlaw segregated education.

Take Action!

1. Research school integration efforts in your community or state. What efforts were made directly after Brown vs. Board to comply with the decision? In the 1960s and 1970s? What is the status in your school district today? Form a committee to investigate ways to ensure the right of all races to an equal education.

2. Which Amendment guarantees “equal protection under the laws”? In your experience, can you think of any situations in which students were denied an equal education because of racism or other reasons? What were specific ways this right was denied? With other students, create a list titled “Ensuring All Students an Equal Education.” Include several ways to overcome situations in which the right to an equal education is being denied today.

continued from page 17

2. Research and draw a diagram of the federal court system. If appeals are filed in the rulings discussed in this article, show how they would reach the Supreme Court. Share your diagram with your class as you explain the process. Use either of the next two articles to illustrate why the appeals process can be crucially important in safeguarding the rule of law.
Sitting at home, enjoying one’s privacy. Americans take that right for granted. Yet the founders of our country did not. They wrote that right into law as the Fourth Amendment. The amendment does not forbid the police to search a person’s home for evidence of a crime, but as a general rule it does require for a search warrant to be legally obtained beforehand. Unfortunately, there are numerous cases on record in which the authorities have violated this constitutional guarantee. The case of Dollree Mapp was one such incident.

It was May 23, 1957. A woman named Dollree Mapp was alone in her home on the second floor of a two-family house in Cleveland, Ohio. The doorbell rang. What happened next would help establish a rule of law that would affect trials in state courts throughout the country. It would affect what evidence may be presented at a trial and what evidence must be thrown out.

When Dollree Mapp’s doorbell rang that afternoon of May 23, she went downstairs and saw three police officers at her door. One of the police officers announced that they were looking for a man in order to question him about a recent bombing. They had reason to believe the man was in that house. The police officers also said they were looking for evidence of an illegal gambling operation. Mapp said she would have to talk to her lawyer before letting the police in. The officers waited outside while she phoned her attorney. He advised Mapp to ask whether the police had a search warrant. A search warrant is a legal document that must describe the place to be searched. It must specify what the police are searching for, and it must be signed by a judge. Mapp’s attorney told her that if the police didn’t show her a search warrant, she did not have to let them in.

Mapp went back to the door and asked to see a search warrant. The police officers admitted that they did not have one. Mapp then locked the downstairs door on them. After one of the police radioed the station to explain what had happened, the three officers waited outside at the front entrance of Mapp’s house.

Needless to say, Dollree Mapp became more than a little nervous and upset as she watched the police from her upstairs window. A little while later, her phone rang. On the other end of the line was a police lieutenant who told Mapp to let the police search her house. Instead, Mapp called her lawyer again. He told her he would come over. Meanwhile, two more squad cars with four more police officers appeared outside Mapp’s house.

When Mapp finally saw her lawyer’s car pull up, she started down the stairs to let him in. By that time, however, several of the police officers had already broken into her hallway. Outside, the other officers were preventing Mapp’s lawyer from entering the house.

Mapp demanded to see a search warrant. One of the officers held up a piece of paper, which Mapp grabbed and hid inside her clothing. A struggle followed. The police managed to wrest the paper away from Mapp, who was then handcuffed and led upstairs to her bedroom. Telling her to sit on the bed and not to bother anyone, the police began to search her home—her dresser and closet and suitcases, her living room and kitchen, even her daughter’s bedroom. Outside Mapp’s lawyer declared that what they were doing was against the law. The police ignored him.

When no evidence of any crime was found in Mapp’s second-floor home, the police officers went down to the basement of the house to continue their search. There they noticed an old trunk, opened it, and found some books and pictures that they claimed were obscene. The police seized the material as evidence and arrested Mapp for possession of obscene materials, a violation of a state law in Ohio.

Mapp protested. She tried to convince the police that the materials were not hers but belonged to a former tenant. Nonetheless, she was arrested and brought to trial.

Mapp pleaded “not guilty” to the charge. During her trial, no search warrant was ever produced. The books and pictures, therefore, had been illegally seized. Yet despite this fact, the evidence was introduced at her trial. Since 1914, it had been the

law that such illegally seized evidence could not be admitted in federal court. But Mapp was being tried in a state court. She was found guilty and sentenced to one to eight years in prison.

Mapp and her lawyer appealed her case to the Ohio Supreme Court. That court affirmed her conviction on technical grounds related to Ohio state law, not the Fourth Amendment.

Mapp then appealed to the U.S. Supreme Court to review her case. In 1961, four years after her conviction, the Court agreed to hear *Mapp v. Ohio*. The issues that the justices decided to consider were not whether the Ohio state law was unconstitutional but rather (1) whether the police had the right to enter Mapp’s home without a search warrant and (2) whether the evidence taken could be admitted in a state court.

The Supreme Court decided 6-3 in Dollree Mapp’s favor. It ruled that the officers had not had the right to enter and search her home without a warrant and that no evidence seized during such an illegal search could be used against her in a state court. Justice Thomas C. Clark wrote the majority opinion, citing the Fourth Amendment’s ban on illegal searches and seizures—“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures—‘The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Justice Clark concluded: “We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by the same authority, inadmissible in a state court.”

With this ruling, the Court was extending the exclusionary rule that federal judges sometimes exercised—throwing out evidence that does not conform to exact constitutional standards. The *Mapp* decision applied the exclusionary rule to state as well as federal courts.

Dollree Mapp was therefore free. Her conviction was overturned. The Supreme Court of the United States had safeguarded an important constitutional right, and the rule of law had finally prevailed.

**Take Action!**

1. Read the Fourth Amendment barring illegal search. Role-play Mapp’s lawyer, developing your argument that the search of her home was illegal and that, therefore, the evidence acquired during it should not be allowed in court. List your specific points.

2. Write an essay about how the Dollree Mapp case demonstrates how the rule of law in the United States can be perverted but finally applied.

3. Investigate how the law regarding search applies to recent cases involving Internet use. (Hint: To start your search, visit www.abanet.org/publiced, click “Search Public Ed.,” and key in “Internet, juvenile.”)

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**Freedom of Information Act.** *U.S. Department of the Treasury, ATF Bureau v. City of Chicago*, No. 02-322, slated for argument in March, involves the application of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, to two computer databases maintained by the Bureau of Alcohol, Tobacco and Firearms (ATF). Those databases document the tracing of firearms believed to be involved in crimes (the Trace Database) and information provided by licensed dealers regarding multiple sales of handguns (the Multiple Sales Database). The questions for the Court concern whether individual names and addresses in the Trace Database and the Multiple Sales Database are subject to disclosure under FOIA or whether they are exempt on the grounds that their release “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”
Learning Gateways

by Dale Greenawald

See Strategies Here

This teaching strategy enhances student understanding of the rule of law’s importance in U.S. society. Students will conduct a poll to determine whether there is general support for the law. They will also research specific time periods in U.S. history during which adherence to laws and legal procedures was largely abandoned. To extend this lesson, follow up with additional activities and strategies at insightsmagazine.org.

Lesson Overview

Objectives

As a result of this lesson, students will:

• Understand the pervasiveness and importance of the rule of law in our society.
• Learn about historical incidents in which the rule of law may have been violated in response to perceived threats to society.

Target Group: Secondary students

Time Needed: 2 to 3 class meetings

Materials: Student Handouts on page 23

Procedures

2. Discuss with students Papke’s contention that the Constitution evolved into an icon of U.S. legal faith. Ask them what an icon is. Have students give examples of well-known icons. Discuss whether they agree with Papke. Why or why not?
3. Explain how Alexis de Tocqueville, a Frenchman, visited the United States during the early 1830s and wrote one of the most perceptive analyses of American society ever recorded. Write de Tocqueville’s quoted observation on the board: “However irksome an enactment may be, the citizen of the United States complies with it not only because it is the work of the majority, but because it originated in his own authority and he regards it as a contract to which he himself is party.” Have students paraphrase this comment. Ask whether they agree that Americans obey the law because they feel that it comes from them.
4. Distribute copies of Student Handout 1. Have each student interview five persons of different ages, asking them if they generally support the law. Have them explain their answers. Share all the responses, and have students try to categorize them. What do the answers suggest about Americans’ belief in the rule of law?
5. It has been suggested that, whenever Americans have thought their security is threatened, they have responded by abandoning their belief in the fairness of existing laws and legal procedures and moving to restrict

right and freedoms. Have students investigate this perception. Divide the class into groups. Distribute copies of Student Handout 2. Assign each group one of these times/incidents:

a. Alien and Sedition Acts
b. Suspension of habeas corpus during the Civil War
c. Response to antiwar protestors during WWI
d. Red Scare after WWI
e. Treatment of West Coast Japanese Americans during WWII
f. Second Red Scare and the McCarthy Era
g. Antiwar protests during the Vietnam War

Each group should do research to determine whether civil liberties and freedoms were reduced during its assigned time. If so, was there an effort to restore the lost freedoms later? Conduct a hearing during which each group presents its findings. Finally, as a class, discuss what your research suggests about the stability of the rule of law in U.S. history.

Dale Greenawald is the executive director of Colorado Close Up and CEO of Learning Improvement Services, a comprehensive educational consulting service in Boulder.

Teaching Standards for This Issue

Each edition of Insights on Law & Society is designed to support national standards of major educational organizations. To see the national standards supported by this Insights edition, visit insightsmagazine.org (click “Learning Gateways”).
Belief in the Rule of Law

Directions: Interview five persons of different ages, and record their answers to the question.

Do you generally support the law? (Circle one.)

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Civil Liberties and National Security

Directions: Research your assigned time/incident, and fill in each column with what you learn.

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On the Docket


Since the Court’s December announcement that it would review two cases challenging the University of Michigan’s use of race in its admissions process, supporters and critics of affirmative action have been eagerly anticipating the Court’s ruling, noting that the long-running affirmative action debate is finally coming to a head.

*Grutter v. Bollinger*, No. 02-241, is scheduled to be the first case argued on April 1. It was brought by Barbara Grutter, an unsuccessful white applicant to the university’s law school. The second case the Court agreed to hear that morning is *Gratz v. Bollinger*, No. 02-516, in which Jennifer Gratz and Patrick Hamacher, unsuccessful white applicants to the University of Michigan’s College of Literature, Science and the Arts, are challenging the university’s use of race in its undergraduate admissions decisions.

Together, these cases will mark the justices’ first return to the question of affirmative action in higher education since 1978. In *Regents of the University of California v. Bakke*, a badly fractured Court ruled 5-4 that the Constitution’s equal-protection clause forbid the University of California Medical School at Davis from “setting aside” spaces for which only minority applicants could compete but (according to Justice Powell’s controlling opinion) allowed it to treat membership in a minority race as a “plus factor” in the admissions criteria.

Critics of the Michigan admission policies contend that the university has gone beyond treating race as a plus factor and created what President Bush described as “a quota system” that unfairly rewards or penalizes prospective students “based solely on their race.” In announcing his administration’s support for the white plaintiffs, Bush objected that, at the undergraduate level, “African-American students and some Hispanic and Native-American students receive 20 points out of a maximum of 150” solely because of their race. “To put this in perspective,” he said, “a perfect SAT score is worth only 12 points in the Michigan system. Students who accumulate 100 points are generally admitted, so those 20 points awarded solely based on race are often the decisive factor.” At the law school, Bush said, “some minority students are admitted to meet percentage targets while other applicants with higher grades and better scores are passed over.”

The University of Michigan and its defenders have responded that its admissions policies fall well on the “safe” side of the *Bakke* no-quota line. As University of Michigan President Mary Sue Coleman said in response to the president, “We do not have and have never had quotas or numerical targets in either the undergraduate or Law School admissions program. Academic qualifications are the overwhelming consideration for admission to both [the undergraduate and law] programs.”

As far as the school’s undergraduate admissions system goes, Coleman says “fully 110 points out of 150 are given for academic factors including grades, test scores, and curriculum.” Michigan only counts 12 points for test scores, she said, “but that is because we value high school grades to a much greater extent—they can earn up to 80 points.” The school considers other factors, including race, “but a student who is socioeconomically disadvantaged also can earn 20 points,” and students from Michigan’s Upper Peninsula earn 16 points.

Interestingly, both the white petitioners and the university respondents agree that a diverse student body is an important and valid goal for institutions of higher education. The parties strongly disagree, however, about whether racial diversity can be achieved without giving any weight to the minority applicants’ race.

Another legal doubleheader took place in December when the Court heard back-to-back arguments in two important Native American rights cases that ask the Court to clarify the “trust relationship” between Native American tribes and the federal government.

In one case, United States v. White Mountain Apache Tribe, No. 01-1067, the tribe seeks damages for the U.S. failure to protect and preserve Fort Apache. In the other, United States v. Navajo Nation, No. 01-1375, the Navajo Nation seeks damages for the government’s mismanagement of a tribal mineral lease.

To say that the federal government has a trust responsibility to Native American tribes means that it has a legal obligation to act in the tribes’ best interests with respect to tribal funds and resources. While this relationship between the federal government and Native American tribes has been recognized in treaties and statutes, the precise remedy available in the event the government breaches this duty has been much less clear.

Like virtually every Native American law case to reach the Supreme Court, United States v. White Mountain Apache Tribe, No. 01-1067, involves issues that are grounded in history. Fort Apache was built in 1870 to be a base from which the U.S. Cavalry could conduct its running battles with the Apache warrior Geronimo and other Apache bands. In 1960, Congress declared the fort “to be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose.”

Among other things, the tribe would now like to develop the fort’s potential for tourism. In 1976, portions of the fort were named a national historic district, and in 1993, the tribe adopted a plan to rehabilitate the buildings that had been allowed to fall into disrepair while under the government’s control. The United States said that while it was willing to transfer some of the buildings to the tribe, it was not willing to pay for any repairs. In 1999, the tribe sued the United States for the $14 million in damages caused by the government’s failure to preserve and repair the fort. The government responds that it cannot be made to pay damages because the 1960 law that created its trust relationship with the tribe did not specifically say it could be subjected to such liability.

Similarly, in United States v. Navajo Nation, No. 01-1375, the United States has argued that even if it did mismanage a tribal mineral lease, as the Navajo allege, it still cannot be made to pay damages because the laws that created its trust relationship with the tribe did not mention money damages.

In 1964, the Navajo Nation entered into a fixed-price lease entitling the Peabody Coal Company to mine coal from Navajo land for twenty years at a royalty rate of 37.5 cents per ton. When the lease came up for renewal in 1984, federal studies concluded that a 20-percent royalty increase would be reasonable. However, after the Secretary of the Interior attended a secret ex parte meeting (that is, a meeting with only the coal company officials and no representatives from the Navajo Nation), he decided to delay issuing a final decision approving that 20-percent increase and later approved a much lower royalty rate.

The tribe is seeking $600 million in damages for the secretary’s alleged breach of trust in a suit that claims he suppressed “a well-supported decision raising Navajo coal royalties from extremely low rates, deceived the Navajo Nation and withheld from it key information, forced it to negotiate at a decided disadvantage, and ultimately approved a lease of Navajo coal for far less than every federal study had found reasonable, all in violation of applicable statutes, departmental regulations, and the core trust duties of loyalty, candor, and care.”

Together, the Apache and Navajo cases have enormous importance, both for the tribes, who are seeking to hold the federal government to a high standard of care, and for the United States, which fears it could face huge liabilities if forced to pay damages when it violates its trust responsibilities to Native American tribes.

More Notable Cases
Forced Medication. Sell v. United States, No. 02-5664, slated for argument in March, asks whether allowing the government to administer antipsychotic medication to a defendant against his will solely to render him competent to stand trial for nonviolent offenses could violate his rights under the First, Fifth, and Sixth Amendments.

First Amendment. United States et al. v. American Library Assn., Inc. et al., No. 02-361, slated for argument in March, asks whether the Children’s Internet Protection Act induces public libraries to violate the First Amendment, thereby

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Research Tool
For updates, more information, and additional resources about these and other Supreme Court cases, visit insightsmagazine.org (click “Supreme Court Roundup”).
Enacted Legislation

Department of Homeland Security. President Bush signed legislation (H.R. 5005) to establish a new cabinet-level Department of Homeland Security incorporating twenty-two existing federal agencies and more than 170,000 employees in an effort to prepare for and prevent terrorist attacks in the United States. The new department will be organized into four primary divisions: Border and Transportation Security, Emergency Preparedness and Response, Science and Technology, and Information Analysis and Infrastructure Protection. The Immigration and Naturalization Service, which had been housed within the Department of Justice, will be abolished, and its functions of enforcement and citizenship will be in separate entities within the new department.

Terrorism Insurance. On November 26, President Bush signed H.R. 3210, which established a federal terrorism insurance program to help pay commercial property and casualty claims arising from acts of foreign terrorism. The law allows punitive damages to be assessed against insurers but does not count those damages as insured losses subject to government payment.

Federal Judgeships. Eight new permanent judgeships were created when President Bush signed legislation that reauthorized the Department of Justice for fiscal years 2002–2003. The new judgeships established by P.L. 107-273 (H.R. 2215) include five in the Southern District of California, two in the Western District of Texas, and one in the Western District of North Carolina. In addition, four temporary judgeships become permanent in the Central District of Illinois, the Southern District of Illinois, the Northern District of New York, and the Eastern District of Virginia.

Election Reform. President Bush signed H.R. 3295, which seeks to overhaul the nation’s voting system in an effort to prevent the chaos of the November 2000 presidential election. The legislation sets national standards for conducting elections and creates new rights for voters, including the right to cast a provisional ballot, the right to check and correct a ballot if the voter makes a mistake, and the right of all voters to cast private and independent ballots. Antifraud provisions require new voters who choose to register by mail to provide proof of identity before the first time they vote.

Proposed Legislation

Terrorist Threat Integration Center. Legislation has been proposed to create a Terrorist Threat Integration Center that would analyze intelligence information gathered by the CIA, FBI, Department of Defense, and Department of Homeland Security; it would be staffed by top counterterrorism officials from each of these agencies. The center’s main responsibility would be to relay threat analysis to the president and to compile a “daily threat matrix.”

Economic Stimulus Plan. In his State of the Union address, President Bush unveiled an economic plan to strengthen the economy. Members of both parties are currently debating these proposals, which include tax cuts, ending the taxation of dividends, creating new types of savings accounts, and providing...
additional benefits for unemployed Americans. Critics have attacked the cost of President Bush's plan, noting that it would cost over $600 billion in a time of growing budget deficits. Supporters, however, insist that the president’s plan will spur economic growth and create more jobs.

Human Cloning Ban. The Human Cloning Prohibition Act of 2003 (H.R. 234) was introduced earlier this year. The bill would prohibit any person or entity from knowingly performing or attempting to perform human cloning, participating in such attempts, shipping or receiving embryos produced by human cloning, or importing such embryos. Criminal and civil penalties could be imposed for violating the act. A version of the bill was also introduced in the Senate; it would ban the creation of any cloned human embryos.

Identity Theft. Legislation was introduced in the Senate that would reduce identity theft by protecting Americans' Social Security numbers. The Social Security Number Misuse Prevention Act would ban the sale and display of Social Security numbers and restrict the ability of government agencies and private businesses to use those numbers. Specifically, the act would prohibit the government from displaying Social Security numbers on public records posted on the Internet or other electronic media and would limit when businesses could require customers to provide their Social Security numbers.

Faith-Based Initiatives. Legislation was introduced (S. 272) that would implement President Bush's faith-based initiative plan. Specifically, the bill would provide tax breaks to encourage charitable giving and would give grants to churches and charities that provide social services. Last year, similar legislation stalled in the Senate when an attempt was made to add language to ban discrimination in hiring by churches and charities that receive federal grants.

Learn More About Proposed Bills

Students and teachers can review an annotated inventory of selected congressional bills proposed during this congressional session by visiting insightsmagazine.org (click “News from Capitol Hill”). Grouped by subject such as “Election Law” and “Health Law,” these bills have been chosen because of their probable interest and usefulness in educational settings. To research any congressional bill by bill name or number, visit www.thomas.loc.gov

State of the Union Address

President Bush's State of the Union address owes its existence to Article II, Section 3 of the Constitution. According to this section, “The President … shall from time to time give to the Congress information of the State of the Union, and recommend to their consideration such Measures as he shall judge necessary and expedient.” The country’s first two presidents, George Washington and John Adams, gave their State of the Union addresses in person before Congress in elaborate proceedings filled with much of the ceremony used by the British monarchy. However, Thomas Jefferson, averse to any practice resembling British royal behavior, sent his State of the Union speeches in writing to Congress, where a Clerk of the House read them.

Presidents continued this practice for the next 100 years until Woodrow Wilson broke with the written tradition in 1913. Since that time, every president except Herbert Hoover has delivered most of his State of the Union speeches in person. In 1986, the State of the Union address was postponed for the first time when the space shuttle Challenger exploded the morning of the scheduled speech.

In 1947, Harry Truman gave the first televised State of the Union speech. Noting the importance of television coverage, President Lyndon Johnson began the tradition of delivering the State of the Union address during prime time evening hours rather than during the day. With the advent of television and radio coverage, State of the Union addresses have evolved into an event wrought with drama and pageantry, as presidents strategically place guests in the audience to symbolize points made in the speech, and party members rehearse the points at which applause will be given.

On the night of the State of the Union speech, both chambers of Congress meet in joint session in the House. Also attending the proceedings are the vice president, the president’s cabinet, the Supreme Court justices, and foreign diplomats. Because all the individuals in the line of succession to the presidency are together in one place, for national security reasons one cabinet member is asked to stay away from the Capitol during the speech. Each year, the choice of absentee rotates among the cabinet members.

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Smallpox Eradicated?

In 1977, the last known natural case of smallpox was reported in the East African nation of Somalia. Three years later, the members of the World Health Organization, which had led a global eradication campaign that began in 1967, declared that smallpox had indeed been eradicated throughout the world.

By international agreement, all remaining stocks of the virus were to be destroyed or transferred to one of two secure laboratory facilities, one in the United States and one in the former Soviet Union (now Russia). It is believed, however, that some of the remaining stockpiles of the virus have fallen into the hands of governments or terrorist organizations that have developed biological weapons designed to spread the disease among targeted populations. The new vaccination program in the United States is a response to this threat.

The Vaccine

The vaccine for smallpox is based upon live vaccinia virus, a virus closely related to smallpox. Most individuals have no complications from the vaccine—usually only a small depression left in the skin. Many Americans over thirty have such depressions, the result of a vaccination campaign that continued into the early 1970s.

Based on earlier experiences with the vaccine in the 1960s and 1970s, the Centers for Disease Control and Prevention (CDC) estimates that

- 1,000 of every 1,000,000 persons vaccinated will experience serious, but not life-threatening, side effects.
- Between 14 and 52 of every 1,000,000 persons vaccinated will suffer potentially life-threatening side effects, which may result in brain damage, blindness, or serious scarring.
- 1 or 2 persons per 1,000,000 vaccinated may die as a result of the vaccine.

Limited Liability

The government’s new vaccination program raises several legal issues. First, and most immediate, is the question of liability if any of the volunteers vaccinated for the Smallpox Response Teams suffer serious side effects or death. Section 304 of the Homeland Security Act, passed by Congress in November 2002, grants immunity from liability to manufacturers of vaccine, health-care entities such as hospitals under whose auspices the vaccine is administered, and the licensed health-care professionals who administer the vaccine. This means that someone who suffers injury as a result of the vaccination has legal recourse only against the federal government in a federal court under the Federal Tort Claims Act, which requires injured parties to prove negligence and forecloses recovery of punitive damages.

Because it is based on live vaccinia virus, which may be shed before the sore created by vaccination heals over, the smallpox vaccination also poses a risk of infection to other individuals who may come into contact with the sore or anything—such as bandages or clothing.

Additional Information

For the online text of this article, plus FAQs, useful links, and teaching ideas, visit insightsmagazine.org

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—that has touched the sore. Under the Homeland Security Act, any individuals who contract vaccinia are presumed to have contracted the disease through contact with someone vaccinated pursuant to the act’s provisions. In most instances, these individuals would also be subject to the Federal Tort Claims Act and have the same limited recourse to damages resulting from the vaccinia virus as those who have been vaccinated.

Several organizations, including the American Public Health Association, have urged the government to consider a better mechanism for compensating individuals injured as a result of the smallpox vaccination program. One possible model is the National Vaccine Injury Compensation Program (VICP), which was established by Congress in 1986 to compensate individuals who are injured by common childhood vaccines such as measles, mumps, or polio. VICP offers a “no-fault” alternative to litigation against vaccine manufacturers or administrators, funded through an excise tax on every dose of covered vaccine that is purchased.

**Public Health and Civil Liberties**

Serious constitutional issues would arise if the smallpox virus was released in the United States, resulting in a public health emergency. Public health issues have traditionally been left to the states. Bioterrorism, however, with its threat to national security, would also involve the federal government, which has the constitutional authority to oversee national defense. Strategies at both the state and federal levels to combat a smallpox attack might involve compulsory vaccination and quarantine programs, which would have a significant impact on civil liberties.

Bioterrorism is a relatively new threat to the United States, and the legal issues it raises are similarly new. There is, however, related Supreme Court precedent. In *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), the Court upheld the conviction of a man who refused to be vaccinated for smallpox under a Massachusetts law requiring that all the inhabitants of Cambridge receive a free vaccination. “In every well-ordered society charged with the duty of conserving the safety of its members,” the Court declared, “the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand” (197 U.S. 29).

Since the *Jacobson* decision, further developments in constitutional law suggest that the courts may give greater weight to civil liberties concerns than was the case in 1905, particularly in the area of religious beliefs. Most states today offer a religious exemption from childhood vaccination laws, although there is no clear Supreme Court precedent requiring them to do so. In the face of a possible outbreak of smallpox, it is likely that such exemptions would disappear or that individuals refusing vaccination on religious grounds would face other constraints on their civil liberties. A discussion draft of a Model State Emergency Health Powers Act, written by the Center for Law and the Public’s Health at Georgetown and Johns Hopkins Universities, provides, for example, that health authorities may isolate or quarantine “persons who are unable or unwilling” to be vaccinated “for reasons of health, religion, or conscience” (Discussion draft *Model State Emergency Health Powers Act* [Dec. 21, 2001], Sec. 603).

Ideally, our nation will never face the decisions that a release of smallpox virus would force upon us. So long as the threat of bioterrorism persists, however, debates over national preparedness and our ability to respond to a biological attack are likely to continue.

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**Teaching Resources**

- Centers for Disease Control and Prevention, [www.cdc.gov](http://www.cdc.gov)
  The CDC offers a comprehensive Web site on smallpox, including a “Basics for the Public” feature, information on smallpox vaccination, and a collection of news articles. The site also provides the feature “Terrorism and Public Health,” which offers facts on a variety of biological and chemical agents that could be used in terrorist attacks, including anthrax, ricin, and plague.

- Center for Law and the Public’s Health, [www.publichealthlaw.net](http://www.publichealthlaw.net)
  Founded in 2000 with support from the CDC, the Center for Law and the Public’s Health, based at Johns Hopkins and Georgetown Universities, oversaw the drafting of the Model State Emergency Health Powers Act. The center’s Web site offers an update on state legislatures that have adopted all or part of the model act, as well as the full text of the act.

  *The New England Journal of Medicine* has made available online the contents of its April 25, 2002, issue, addressing various aspects of the new threat posed by the smallpox virus. Of particular interest is George J. Annas’s article, “Legal Issues in Medicine: Bioterrorism, Public Health, and Civil Liberties.”
Here’s a Useful Tool …

We hope you will find this department useful, whether you are a student researching the issue’s theme, a teacher preparing a lesson, or a library media specialist assisting students or teachers in tracking down additional resources for their course work. Library media specialists might also find this department helpful as a selection tool for collection development purposes. Each print edition offers, among other resources, annotated Web sites with primary documents that students may need to locate and annotated booklists that relate to the issue’s topic. The Web site features full bibliographic information as well as Web links to additional research and instructional support. Your feedback is always appreciated. Visit insightsmagazine.org.

Primary Documents for Students


Response to questions about how independent colonies should govern themselves.


Includes a discussion of the rule of law versus the rule of individuals.


Full text of the famous fifty-page booklet that urged the colonies to break free of British control.


States that human rights should be protected by the rule of law.

Books


Provides a detailed analysis of Book 3 of Aristotle’s Politics and argues that, contrary to the widely held scholarly view, Aristotle was a defender of liberal democracy. In author’s view, popular rule under the rule of law is the best form of democracy for Aristotle.


Seeks to answer the questions What is the rule of law? Why does it matter? How well does the United States conform to it? Why do Americans proclaim respect for the rule of law while complaining so much about it?


Contains papers from a 1979 conference held in San Francisco.


Provides an overview of the early history of democracy, democratic ideas, differences among democracies, democratic processes, democratic institutions, and the necessary conditions for development and sustenance of democracies.


Provides insights on the modern English constitution and its guiding principles, which include the rule of law. Originally published in the late nineteenth century.


Provides an accessible overview of the basics of legal thought and philosophy for the nonlawyer—from an introduction to the concept of the rule of law to legal values in legal judgment that lend legal culture its legitimacy.


Examines what leads to the belief in the rule of law. Argues that the belief in the rule of law is America’s greatest political myth. Reviews that myth and the way it is maintained through an analysis of the events of Marbury v. Madison.


For legal scholars but with revelations about the contemporary legal debates among legal theorists that are valuable for other audiences; seeks to explore the social meaning of the rule of law.


Includes a chapter on the rule of the law and the myth of the Magna Carta.


Discusses the role that the rule of law has played in regulating and restraining state authority, as well as the challenges that the rule of law faces in modern liberal democracy.

Michelle Parrini and Jennifer Kittlaus are editors and program managers for school programs at the ABA Division for Public Education in Chicago.

Explores potentially threatening political disagreements and the ability of constitutions to help facilitate agreement without compromising democratic integrity.


A series of essays that critique the influence of philosophical approaches to the law such as utilitarianism, egalitarianism, secularism, feminism, and pragmatism; argues that a return to application of the ideas of natural law can restore respect for the rule of law.

Online Articles


Offers a three-paragraph definition of the rule of law and discusses “rule of law reform” as a solution to world economic and social problems.


Discusses how rules of law guard against arbitrariness and rule by popular opinion.

Web Sites


Provides tips on finding online information on human rights. Contains links to international human rights groups and agencies.

Constitution Finder (Univ. of Richmond School of Law) confinder.richmond.edu

Contains constitutions, charters, amendments, and other related documents from nations around the world.

Constitutions, Statutes, and Codes (Legal Information Institute at Cornell Law School) www.law.cornell.edu/statutes.html

Includes links to U.S. state constitutions, statutes, and legislative information.

Foreign Governments: Constitutions, Law, and Treaties (Univ. of Michigan) www.lib.umich.edu/govdocs/forcons.html

Offers links to constitutions, laws, and international treaties.

Human Rights Library (Univ. of Minnesota) www1.umn.edu/humanrts

Contains over 10,000 human rights documents and materials, including UN documents, bibliographies and research guides, treaties, and links to over 3,600 sites.

In Search of de Tocqueville’s Democracy in America (C-SPAN) www.tocqueville.org

Contains excerpts from Alexis de Tocqueville’s Democracy in America.

Law in Popular Culture Collection of the Tarlton Law Library, Univ. of Texas School of Law
www.law.utexas.edu/lpop/lpop.htm

Provides a bibliography of “The Lawyer in Popular Culture,” an essay on the history of the legal thriller, a filmography, links to legal narrative e-texts, an online exhibit of “Law in Popular Culture” posters, and related links.

Picturing Justice: The On-Line Journal of Law & Popular Culture (Univ. of San Francisco School of Law) www.usfca.edu/pj

Offers articles about law and popular culture; vocabulary and syntax suitable for sixth- to twelfth-grade readers.

Political Resources on the Net www.politicalresources.net

Provides links to political parties, organizations, governments, and media from around the world.


Offers concise, introductory information about the rule of law, democracy, the culture of democracy, and other pertinent ideas.

Online Lesson

Citizenship and Character Lesson: Justice (Bill of Rights Institute) www.billofrightsinstitute.org/article.php?sid=298

Explores a variety of historical approaches to justice and its application in criminal cases.

Activities

1. Have students research the government’s strategy to institute a “pre-attack” smallpox vaccination plan. (They might start with information on pages 28–29 and an online search at www.pbs.org). Have students poll classmates and others to see who and how many would be willing to be vaccinated, knowing the risks. As a class, discuss whether all Americans or only certain groups should be vaccinated. Ask for other recommendations for fighting smallpox bioterrorism.

2. Have students research cloning and human cloning in particular. What are the benefits? What are the drawbacks? As students report their findings, chart these on the board. Discuss the ethical issues involved that might make human cloning the subject of a legal ban. Encourage students to write to their representatives expressing their opinion.

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Here’s Important News for You …

Are You Ready for Law Day?
Law Day, May 1, is right around the corner—a wonderful opportunity for your school to celebrate America’s many freedoms. For program and activity ideas, visit lawday.org. Have some questions? Call (312) 988-5735.

Gideon 40th Anniversary Lesson Plan
Use the National Association of Criminal Defense Lawyers’ lesson plan to commemorate Gideon v. Wainwright. For details, visit www.nacdl.org/gideon, or call (202) 872-8600, x248.

ABA National Issues Forum
Join a network of forums exploring concerns about the administration of justice; materials at www.abanet.org/justice/nif/home.html. As an ideal companion program, see ABA Dialogue on Freedom at dialogueonfreedom.org.

Must-Have Civic Education Report