

The Rule of Law

By: Jim Shelson



Jim Shelson has more than 30 years of experience in first party property coverage and defense, third party insurance defense, bad faith, complex civil litigation, commercial disputes, and appeals. He has a history of giving clients a candid assessment of their matter to deliver predictability and avoid surprises. His practice includes a broad array of challenging subject matter across many industries, often involving technical expert evidence in engineering, science, toxicology, epidemiology, and causation. He has substantial jury and bench trial and appellate experience in state and federal courts. Mr. Shelson is licensed in Mississippi, Alabama, and Florida. He is also the author of a book about Mississippi chancery court practice.

THE rule of law is often invoked but is not easily defined. “Many people admire the idea of the rule of law, but the admiration masks very different understandings of what the idea is and what it specifically entails.”¹ High-minded quotes regarding the rule of law are legion.

From Justice Anthony Kennedy: “The only way to a fair society is if the rule of law is respected by all.”²

From Justice Ruth Bader Ginsburg: “Without the rule of law, we would live in a world of chaos and uncertainty.”³

From Nancy Pelosi: “The rule of law means that no one is above the law, even the government, and that everyone is subject to the same laws and treated equally.”⁴

From Margaret Thatcher: “Being democratic is not enough, a majority cannot turn what is wrong into right. In order to be considered truly free, countries must also have a deep love of liberty and an abiding respect for the rule of law.”⁵

From Barack Obama: “One of the challenges of a democratic government is making sure that even in the midst of emergencies

¹ Cass R. Sunstein, *The Rule of Law*, 4 AM. J.L. & EQUAL. 498 (2024).

² Powerful Quotes About the Rule of Law, <https://quotesanity.com/powerful-quotes-about-the-rule-of-law-inspiring-quotes-on-justice-and-fairness/>.

³ *Id.*

⁴ *Id.*

⁵ Rule of Law Quotes, https://www.azquotes.com/quotes/topics/rule-of-law.html#google_vignette.

and passions, we make sure that the rule of law and the basic precepts of justice and liberty prevail.”⁶

From Aristotle: “Law is order, and good law is good order.”⁷

I. Defining the Rule of Law

Definitions of the rule of law typically include procedural elements and sometimes include substantive elements.⁸ “The procedural principles concern the processes by which these norms are administered, and the institutions—like courts and an independent judiciary[—]that their administration requires.”⁹ In this sense, the “rule of law’ is used to denote crucial procedural elements of a legal system, particularly that ordinary people should be able to readily determine what laws they are required to obey, and that whether or not you get charged by the authorities depends mostly on objective legal rules rather than the exercise of official discretion (thus, the contrast between the rule of law

and the ‘rule of men’).”¹⁰ In turn, “this in turn requires the independence of the judiciary, the accountability of government officials, the transparency of public business, and the integrity of the legal procedures.”¹¹

“On some accounts, the [r]ule of [l]aw also comprises certain substantive ideals like a presumption of liberty and respect for private property rights. But these are much more controversial.”¹² The rule of law “bars—or at least presumptively forbids—discrimination on the basis of certain morally irrelevant characteristics, such as race, ethnicity, and gender. By contrast, ‘justice’ is a broader notion that focuses on the substantive rightness of the legal rule in question. Laws protecting freedom are (at least usually) just. Laws promoting slavery are not. And so on. Understood in this way, it is easy to see how legislation that meets the requirements of the rule of law can nonetheless be profoundly unjust.”¹³

Some believe that “the rule of law is just one of the virtues which

⁶ *Id.*

⁷ *Id.*

⁸ Jeremy Waldron, *The Rule of Law*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Fall 2023 Ed.) Edward N. Zalta and Uri Nodelman eds. (Jun. 22, 2016), <https://plato.stanford.edu/archives/fall2023/entries/rule-of-law/> (last accessed October 27, 2025).

⁹ *Id.*

¹⁰ Ilya Somin, *The Difference Between Justice and the Rule of Law*, The Volokh Conspiracy (April 30, 2024), <https://reason.com/volokh/2024/04/30/the-difference-between-justice-and-the-rule-of-law/>.

¹¹ Waldron, *supra* note 8.

¹² *Id.*

¹³ Somin, *supra* note 10.

a legal system may possess and by which it is to be judged,' and that we should not try to read into it other considerations about democracy, human rights, and social justice."¹⁴ Others disagree and argue that "[a] state which savagely represses or persecutes sections of its people cannot ... be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed."¹⁵

In its April 2015 "Statement Regarding Attacks on the Rule of Law," the IADC said that "[t]he rule of law ensures that all individuals and institutions, including the government, are accountable under the law. It guarantees equality before the law, fair legal processes, and the protection of fundamental rights." The "protection of fundamental rights" is substantive and so too is defining what rights are fundamental.

II. The Partisan Divide Regarding the Rule of Law

Controversies regarding a substantive component of the rule of law are compounded by partisan differences regarding the meaning and application of the rule of law.

Many on the right believe the rule of law is abused by the left for political purposes. For example, one commentator wrote that:

[m]uch of what we see today is the elevation of the rule of lawyers over the rule of law. Instead of passing laws through the people's representatives, executives and administrative agencies scour the lawbooks for something vague enough to use as cover for rulemaking by fiat. Instead of repealing laws through the people's representatives, progressive prosecutors and federal immigration authorities simply refuse on a blanket basis to enforce them. Instead of persuading voters to adopt amendments, the meaning of the Constitution is changed by creative judges. Control the lawyers, and you control the law—and cut the people out of the picture. Nowhere is this clearer than in politically

¹⁴ Waldron, *supra* note 8, quoting JOSEPH RAZ, *THE AUTHORITY OF LAW*, 211 (1979).

¹⁵ *Id.*, quoting TOM BINGHAM, *THE RULE OF LAW*, 67 (2010).

charged investigations and prosecutions.¹⁶

In this view, the rule of law has been rewritten to get Donald Trump, which “undermines rather than vindicates the rule of written law. Trump has been investigated and, in some cases, charged under a variety of generally phrased laws that were not written to cover his type of conduct and had never been so enforced in any similar case. The hush-money case against Trump in New York ... was the first time a state prosecution was ever used to charge a violation of federal election laws.”¹⁷

In an opinion piece for Fox News, Ben Carson argued in August 2022 that “[t]he FBI propped up a 2-year long hoax investigation on President Trump over suspected interference by Russia in the 2020 election that was rooted in lies and deception and not only did they get away with it, but the President was impeached by a Congress that amplified those efforts. And just last week, ... we learned that the

preeminent law enforcement agency of the United States raided a former President’s home to apparently regain classified documents The House of Representatives, led by President Biden’s party, is in the middle of a partisan witch hunt as they continue their January 6th committee. His press secretary speaks at the White House podium daily to undermine the Supreme Court and decisions they have lawfully made simply because they don’t agree with them Our country was built on the rule of law, but this [Biden] White House appears to only selectively believe in the rule of law.”¹⁸

Senator Ted Cruz asserted that “[t]he arrest and arraignment of [then] former President Donald Trump [in New York] by a left-wing Soros prosecutor ... is making a mockery of the rule of law. Not only is the indictment frivolous, this political persecution marks a dark day for our country.”¹⁹

On May 1, 2025, President Trump issued a proclamation,

¹⁶ Dan McLaughlin, “The Rule of Law vs. the Rule of Lawyers,” NATIONAL REVIEW (July 25, 2024), available at <https://www.nationalreview.com/magazine/2024/09/the-rule-of-law-vs-the-rule-of-lawyers/>.

¹⁷ *Id.*

¹⁸ Ben Carson, “America was built on the rule of law but Joe Biden and his team are tearing it apart at the seams,” FOX NEWS (August 18, 2022), available at <https://www.foxnews.com/opinion/america-built-rule-of-law-joe-biden-team-tearing-apart-seams>.

¹⁹ Elizabeth Elkind, “Trump allies slam his arrest as attack on rule of law: ‘A dark day for our country,’” FOX NEWS (April 4, 2023), available at <https://www.foxnews.com/politics/trump-allies-slam-arrest-attack-rule-law-dark-day-country>.

stating that “[u]nder the previous administration, Federal law enforcement agencies outrageously allowed violent criminals to roam our streets with impunity while targeting parents, churchgoers, political opponents, and ordinary citizens. This weaponization of our government is a threat to our sovereignty and is antithetical to our Nation’s most sacred principles, reminiscent of evil communist regimes. This erosion of the American justice system ended the moment I took the oath of office.”²⁰

Many on the left disagree. “President Donald Trump is at war with the rule of law in the United States He has issued trollish and almost certainly unconstitutional executive orders, unleashed verbal fusillades against jurists (as well as various law-enforcement officials and prosecutors), and forced government lawyers to stand tongue-tied as they struggled to answer simple questions from judges. He has sent his minions,

including the Vice President of the United States, out in public to argue that a President has the right to ignore court orders, making an eventual showdown with the federal bench practically inevitable. Worse, Trump supporters have stepped up physical threats and various other forms of harassment against judges and their families.”²¹

Mother Jones argued that the Trump Administration’s handling of the deportation of Maryland resident Kilmar Abrego Garcia to El Salvador “sent a clear message to the nation: There is no rule of law in the United States.”²²

The *New York Times* reported that the National Law Day of Action on May 1, 2025, drew roughly 1,500 people in New York, and “was organized to resist the President’s threats against judges and the nation’s jurisprudence.”²³ “The President’s targeting of elite law firms was a particular focus. Mr. Trump has unleashed a flurry of executive orders aimed at crippling

²⁰ The White House, Proclamation, “Loyalty and Law Day, U.S.A., 2025,” (May 1, 2025), available at <https://www.whitehouse.gov/Presidential-actions/2025/05/loyalty-day-and-law-day-u-s-a-2025/>.

²¹ Tom Nichols, “The Judiciary’s Last Stand,” *THE ATLANTIC* (March 24, 2025), <https://www.theatlantic.com/ideas/archive/2025/03/judiciarys-last-stand/682149/>.

²² David Corn, “Trump to USA: There Is No Rule of Law,” *MOTHER JONES* (April 14, 2025), <https://www.motherjones.com/politics/2025/04/trump-rule-law-cecot-abrego-garcia/>.

²³ Santul Nerkar, “In Suits and Ties, Lawyers Protest Trump’s Attacks on the Legal System,” *N.Y. TIMES* (May 1, 2025), <https://www.nytimes.com/2025/05/01/nregion/national-law-day-courthouse-protests.html>.

firms he says have used the justice system against him.²⁴ The orders have limited the firms' access to federal buildings and canceled their government contracts ...In Los Angeles, Michele Anderson, a former prosecutor, said jurists were uniquely positioned to preserve American jurisprudence. 'If lawyers cannot stand up for the rule of law and for justice, who can?'"²⁵

J. Michael Luttig, a former judge on the U.S. Court of Appeals for the Fourth Circuit, has noted that "a television journalist asked Trump the simple question 'Don't you need to uphold the Constitution of the United States as President?' Astonishingly, the President answered, 'I don't know.' The interviewer then asked, 'Don't you agree that every person in the United States is entitled to due process?' The President again replied, 'I don't know.' This is not a man who respects the rule of law, nor one who seeks to understand it. Thus far, Trump's presidency has been a reign of lawless aggression by a tyrannical wannabe king, a

rampage of presidential lawlessness in which Trump has proudly wielded the powers of the office and the federal government to persecute his enemies, while at the same time pardoning, glorifying, and favoring his political allies and friends—among them those who attacked the U.S. Capitol during the insurrection that Trump fomented on January 6, 2021. The President's utter contempt for the Constitution and laws of the United States has been on spectacular display since Inauguration Day."²⁶

III. The Rule of Law and Unjust Laws

"Both 'justice' and 'rule of law' are fuzzy terms that different people use in different ways."²⁷ Some argue that there is no possibility "that legislation that meets rule-of-law requirements could ever be unjust."²⁸ Others argue "that gravely unjust rules and regulations (like those of Nazi Germany) could never be real laws ... and enforcing such mandates can never be squared

²⁴ "No American President has ever before issued executive orders like the one at issue in this lawsuit targeting a prominent law firm with adverse actions to be executed by all executive branch agencies but, in purpose and effect, this action draws from a playbook as old as Shakespeare, who penned the phrase: 'The first thing we do, let's kill all the lawyers.'" Perkins Coie LLP v. U.S. Dep't of Justice, No. 25-716 ---

F.Supp.3d ---, 2025 WL 1276857, *1 (D. D.C. May 2, 2025) (citation omitted).

²⁵ Nerkar, *supra* note 23.

²⁶ J. Michael Luttig, "The End of the Rule of Law in America," THE ATLANTIC, (May 14, 2025), <https://www.theatlantic.com/ideas/archive/2025/05/law-america-trump-constitution/682793/>.

²⁷ Somin, *supra* note 10.

²⁸ *Id.*

with the rule of law.”²⁹ The issue of unjust laws relates to whether the rule of law should include substantive elements.

In his *Letter from Birmingham Jail*, Martin Luther King, Jr. wrote, “One may well ask, ‘How can you advocate breaking some laws and obeying others?’ The answer is found in the fact that there are two types of laws: there are just laws, and there are unjust laws. I would agree with St. Augustine that ‘An unjust law is no law at all.’”³⁰

In 1967, before he became a Supreme Court Justice, Lewis Powell, Jr. disagreed. Powell asserted that the doctrine of civil disobedience was a “heresy ... dramatically associated with” King’s “famous letter.”³¹ Powell argues that “we must avoid the mindless folly of appeasing and even rewarding the extremists who incite or participate in civil disobedience. There must be a clearer understanding that those who preach, practice and condone lawlessness are the enemies of social reform and freedom itself. In short, the one indispensable

prerequisite to all progress is an ordered society governed by the rule of law.”³² Powell further argued that “only those who are blinded by their prejudices, or who are indifferent to the consequences of lawlessness, will deliberately incite disobedience of valid laws.”³³

If by “valid” Powell meant any law that is on the books, then, as King argued, “[w]e can never forget that everything Hitler did in Germany was ‘legal’ and everything the Hungarian freedom fighters did in Hungary was ‘illegal.’ It was ‘illegal’ to aid and comfort a Jew in Hitler’s Germany.”³⁴ History shows that the rule of law without a substantive component is no panacea, at times untethered to any reasonable conception of justice, and at other times genocidal.

Adolf Hitler used the Weimer Republic’s constitution to shatter and systematically disable and then dismantle his country’s democratic structure in a remarkably short time:³⁵

On February 28, 1933, an executive decree popularly

²⁹ *Id.*

³⁰ Martin Luther King, Jr., *Letter from Birmingham Jail*, 3 (Aug. 1963), available at https://www.csuchico.edu/iege/_assets/documents/susi-letter-from-birmingham-jail.pdf.

³¹ Lewis F. Powell, Jr., “Civil Disobedience: Prelude to Revolution,” Speech to Southern Company Conference of Directors and Executives (Oct. 5, 1967), Lewis F. Powell Jr. Papers, box 117/folder 9, p. 1,

<https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1024&context=powellspeeches>.

³² *Id.* at 25.

³³ *Id.* at 17.

³⁴ King, *supra* note 30, at 3.

³⁵ Timothy W. Ryback, “How Hitler Dismantled a Democracy in 53 Days,” *THE ATLANTIC* (Jan. 8, 2025), <https://www.theatlantic.com/ideas/archive/2025/01/hitler-germany-constitution-authoritarianism/681233/>.

known as the Reichstag Fire Decree suspended important provisions of the Weimar Constitution, particularly those safeguarding individual rights and due process of law. The decree permitted restrictions on the right to assemble, freedom of speech, and freedom of the press and removed all restraints on police investigations. With the decree in place, the police were free to arrest and incarcerate anyone without a specific charge, dissolve political organizations, and suppress publications

A month later, on March 24, 1933, the Reichstag passed the Law to Remedy the Distress of the People and the Reich, known as the Enabling Act, which ... permitted Hitler to enact laws—including ones in conflict with the Weimar Constitution—without approval of either the

Reichstag or President von Hindenburg.

Laws marginalizing the Jewish community and increasing the government's authoritarian powers swiftly followed. For example, the Law for the Restoration of the Professional Civil Service, passed on April 7, 1933, excluded all Jewish people from civil service, including the ability to serve as judges or government attorneys. In July 1933, the National Socialist German Workers (Nazi) Party was declared to be the only political party in Germany.³⁶

It did not stop in 1933. "German society—including, shamefully, the courts, judges, lawyers, and legal theorists—accepted and in many cases promoted Nazi power and race-based injustice. Adolf Hitler's absolute power as Führer was achieved incrementally, in plain sight, and purportedly under law."³⁷ In August 1934, German judges

³⁶ Richard D. Fybel, *Judges, Lawyers, Legal Theorists, and the Law in Nazi Germany (1933-1938); Kristallnacht and My Parents' Escape from the Nazis*, UCLA L. REV., In Discourse, (Sept. 10, 2022). See also Cynthia Fountaine, *Complicity in the Perversion of Justice: The Role of Lawyers in Eroding the Rule of Law in the Third Reich*, 10 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 198 (2020);

William F. Meinecke, Jr. and Alexandra Zaprunder, United States Holocaust Memorial Museum, *Law, Justice, and the Holocaust*, (July 2014), <https://case.edu/law/sites/default/files/2020-06/Reading%20Materials%20PDF%20sm%20all.pdf>.

³⁷ Fybel, *supra* note 36.

stopped taking an oath to the constitution and began taking the following oath to Hitler: "I swear loyalty to the Führer of the German Reich and people, Adolf Hitler, obedience to the law, and conscientious fulfillment of the duties of my office, so help me God."³⁸ State bar associations were complicit:

The Bar association of Berlin declared that establishing or maintaining a law firm with partners of both "Aryan" and "non-Aryan" descent was unethical. The Bar Association of Düsseldorf decreed that it was a violation of professional standards for anyone to take over the practice of an attorney whose membership in a bar association had been revoked, to employ former "non-Aryan" attorneys, or to take over their clients. It concluded with the sweeping statement: "Every professional contact with disbarred, non-Aryan attorneys is a violation of standards."³⁹

It did not stop in 1934. "On September 15, 1935, the Reichstag passed two new laws, now known collectively as the Nuremberg Race Laws. The Reich Citizenship Law decreed that only persons with German blood could be citizens; Jewish people lost their citizenship and their right to vote. The Law for Protection of German Blood and Honor prohibited marriage between Germans and Jewish people and any sexual relations between Jewish and non-Jewish persons. More laws restricting and marginalizing the Jewish population followed. By December 1935, the dismissal of all Jewish professors, teachers, physicians, and lawyers had been ordered."⁴⁰

Hans Frank, a lawyer, was the architect of the Nazi legal system.⁴¹ In a speech to German judges, Frank said, "Formerly we were in the habit of saying: 'This is right or wrong.' Today we must ask the question: 'What would the Führer say?' We are under the great obligation of recognizing as a holy work of our Folk Spirit the laws signed by Adolf Hitler. Hitler has received his authority from God."⁴²

In 1960, the International Commission of Jurists issued a report regarding South Africa and the rule of law, finding that South

³⁸ *Id.*

³⁹ Fountaine, *supra* note 36, at 223.

⁴⁰ Fybel, *supra* note 36. *See also* Fountaine, *supra* note 36; Meinecke and Zapruder, *supra* note 36.

⁴¹ Fountaine, *supra* note 36, at 208.

⁴² *Id.* at 228.

Africa had “established a rigid and all-embracing network of legislation which denies to a vast majority of the population those opportunities without which the legitimate aspirations and dignity of a human being cannot be realized Denied the right to vote in general elections or plebiscite ... more than 10,000,000 people are to all intents and purposes precluded from having any effective political voice or organization. Moreover, the very expression of opposition to or protest against the present policy of apartheid constitutes a criminal offence. The non-white is therefore by law relegated to a permanently unequal status If then there exists little justice for many in South Africa today, it is primarily because the laws themselves are not just.”⁴³

Upon its adoption in 1789, the Constitution of the United States provided that any person who was not free would be counted as three-fifths of a free individual to determine congressional representation. The three-fifths clause was not superseded until 1868 when the Fourteenth Amendment was ratified.

In *Dred Scott v. Sandford*,⁴⁴ the Supreme Court held that enslaved people were not citizens of the United States and, therefore, could not expect any protection from the

federal government or the courts. The opinion also stated that Congress had no authority to ban slavery from a federal territory. The opinion was blind to its own candor:

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument

[T]he men who framed [the Declaration of Independence] perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized

⁴³ International Commission of Jurists Geneva, *South Africa and the Rule of Law*, 91-92 (1960).

⁴⁴ 60 U.S. 393 (1856).

Governments and the family of nations, and doomed to slavery

This state of public opinion had undergone no change when the Constitution was adopted, as is equally evident from its provisions and language⁴⁵

Dred Scott was the law of the land until it was effectively overruled by the adoption of the Thirteenth and Fourteenth Amendments.

In 1896 in,⁴⁶ the Supreme Court held that “separate but equal” facilities were constitutional. *Plessy v. Ferguson* “The object of the [fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based on color, or to enforce social, as distinguished from political, equality, or commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been

generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.”⁴⁷ The Supreme Court concluded that “the enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws within the meaning of the Fourteenth Amendment.”⁴⁸

Jim Crow used the rule of law to enforce racial segregation. “By the turn of the twentieth century, every state in the South had laws on the books that disenfranchised blacks and discriminated against them in virtually every sphere of life,”⁴⁹ and “[j]ust as Southern legislatures had passed the black codes in response to the early steps of Reconstruction, in the years immediately following *Brown v. Board*, five Southern legislatures passed nearly fifty new Jim Crow laws.”⁵⁰ Further, “[a]lthough it is common to think of Jim Crow as an explicitly race-based system, in fact a number of the key policies were officially colorblind ... [P]oll taxes, literacy tests, and felon

⁴⁵ *Id.* at 407, 410-412.

⁴⁶ 163 U.S. 537 (1896).

⁴⁷ *Id.* at 544.

⁴⁸ *Id.* at 548.

⁴⁹ MICHELLE ALEXANDER, *THE NEW JIM CROW MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS*, 35 (New Press, 2012).

⁵⁰ *Id.* at 37.

disenfranchisement laws were all formerly race-neutral practices that were employed in order to avoid the prohibition on race discrimination in voting contained in the Fifteenth Amendment. These laws operated to create an all-white electorate because they excluded African Americans from the franchise but were not generally applied to whites.”⁵¹

Rosa Parks experienced the rule of (unjust) law firsthand. “I did not give up my seat because I was tired. I did not think of being physically tired. My feet were not hurting. I was tired in a different way. I was tired of seeing so many men treated as boys and not called by their proper names or titles. I was tired of seeing children and women mistreated and disrespected because of the color of their skin. I was tired of Jim Crow laws, of legally enforced racial segregation.”⁵²

In 1927 in *Buck v. Bell*,⁵³ the Supreme Court held that a Virginia statute providing for the sterilization of inmates in state institutions that were found to have a hereditary form of insanity or imbecility was constitutional under

the Fourteenth Amendment. “Carrie Buck is a feeble-minded white woman who was committed to [a Virginia] State Colony ... in due form. She is the daughter of a feeble-minded mother in the same institution, and the mother of an illegitimate feeble-minded child.”⁵⁴ The Supreme Court declared that “[t]hree generations of imbeciles are enough.”⁵⁵ *Buck* has not been overruled.

In 1944 in *Korematsu v. United States*,⁵⁶ the Supreme Court held that excluding persons of Japanese ancestry, including the petitioner Fred Korematsu, whose loyalty was not questioned, from designated “military areas” in 1942 was within the war power of Congress and the Executive.⁵⁷ Although persons subject to the exclusion order were not free to leave the area as they would choose, and instead had to go to an “Assembly Center,” the Supreme Court avoided the Assembly Center issue by stating that it was dealing with only the exclusion order.⁵⁸ *Korematsu* was abrogated in 2018.⁵⁹

⁵¹ *Id.* at 201.

⁵² Rosa Parks Quotes, <https://www.quoteswise.com/rosa-parks-quotes-4.html>.

⁵³ 274 U.S. 200 (1927).

⁵⁴ *Id.* at 205.

⁵⁵ *Id.* at 207.

⁵⁶ 323 U.S. 214 (1944).

⁵⁷ *Id.* at 217-218.

⁵⁸ *Id.* at 223.

⁵⁹ See *Trump v. Hawaii*, 585 U.S. 667, 710 (2018) (“*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and – to be clear – ‘has no place in law under the Constitution’”).

In 1986 in *Bowers v. Hardwick*,⁶⁰ the Supreme Court held that a Georgia statute criminalizing sodomy was constitutional, finding that there is not “a fundamental right for homosexuals to engage in acts of consensual sodomy.”⁶¹ *Bowers* was the law of the land for seventeen years until it was overruled in 2003.⁶² The criminalization of homosexuality in America goes back to colonial times. “The first colonial settlers in North America passed laws punishing gay sex with the death penalty. In 1636, the Plymouth Colony wrote a simple list of ‘Capital offenses lyable (sic) to death’ that included sodomy, treason, witchcraft, arson, rape, murder, bestiality, and adultery. In 1641, the Massachusetts Bay Colony adopted the Body of Laws and Liberties, which established twelve capital offenses including sodomy. The Bay Colony’s statutes directly reflected the language of the Old Testament, quoting Leviticus 20:13. This language would remain on the books in Connecticut until 1822.”⁶³ North Carolina repealed the death penalty

for sodomy in 1869; South Carolina did so in 1873, which was twelve years after England did so.⁶⁴ In 1953 President Dwight Eisenhower signed an executive order banning homosexuals from working for the federal government, claiming they were a security risk.⁶⁵ In 1973 Maryland became the first state to statutorily ban same-sex marriage.⁶⁶ In 1993, President Bill Clinton signed the “Don’t Ask, Don’t Tell” military policy directive that prohibited openly gay and lesbian Americans from serving in the military, while also prohibiting the harassment of “closeted” homosexuals.⁶⁷ In 1996 President Clinton signed the Defense of Marriage Act which banned federal recognition of same-sex marriage and defined marriage as “a legal union between one man and one woman as husband and wife.”⁶⁸ In 2008 California voters approved Proposition 8 which made same-sex marriage illegal.⁶⁹ In 2015, the United States Supreme Court’s decision in *Obergefell v. Hodges*⁷⁰ legalized same-sex marriage nationwide. As of February 2025,

⁶⁰ 478 U.S. 186.

⁶¹ *Id.* at 192.

⁶² See *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁶³ “Criminalization of Homosexuality in American History,” Death Penalty Information Center, <https://deathpenaltyinfo.org/policy-issues/biases-and-vulnerabilities/lgbtq-people/criminalization-of-homosexuality-in-american-history>.

⁶⁴ *Id.*

⁶⁵ CNN Editorial Research, “LGBTQ Rights Milestones Fast Facts,” CNN (Mar. 19, 2025), <https://www.cnn.com/2015/06/19/us/lgbt-rights-milestones-fast-facts/index.html>.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ 576 U.S. 644 (2015).

legislatures in five states passed resolutions urging the Supreme Court to overturn *Obergefell*.

IV. Lawyers and the Rule of Law in These Contentious Times

The procedural elements of the rule of law must be observed, most especially the independence of lawyers and the judiciary. As Chief Justice John Roberts stated, “President Ronald Reagan used to speak of the Soviet constitution, and he noted that it purported to grant wonderful rights of all sorts to people. But those rights were empty promises, because that system did not have an independent judiciary to uphold the rule of law and enforce those rights.”⁷¹ Leon Jaworski similarly noted that “[w]hen dictators and tyrants seek to destroy the freedoms of men, their first target is the legal profession and through it the rule of law.”⁷²

Although there will be controversies, the substantive elements of the rule of law should not be ignored to preclude governance by systemically unjust laws. Even if the arc of the moral

universe bends toward justice, some try to bend it away from justice.⁷³

Finally, lawyers must vigorously defend the rule of law. “Hitler used the legal system to legitimize his terroristic dictatorship and, while eventually there was a complete breakdown in the Rule of Law, it did not happen all at once; it happened over time and with the complicity of the legal profession.”⁷⁴ It must never be forgotten that “[t]he rule of law is not a given in this Nation, nor any other.”⁷⁵ It can be lost, and it can happen here. At a minimum, do not be complicit.

⁷¹ John Roberts, “Opening Statement Before the Senate Judiciary Committee,” (Sept. 12, 2006), available at <https://www.nbcnews.com/id/wbna9316063>.

⁷² Rule of Law Quotes, <https://www.azquotes.com/quotes/topics/rule-of-law.html>.

⁷³ Natalie Prieb, “Jon Stewart: Supreme Court is ‘the Fox News of justice,’” THE HILL

(July 1, 2022), available at <https://thehill.com/blogs/in-the-know/3543836-jon-stewart-supreme-court-is-the-fox-news-of-justice/>.

⁷⁴ Fountaine, *supra* note 36, at 202.

⁷⁵ *Trump v. Casa, Inc.* 606 U.S. ___ (2025) (Sotomayor, J., dissenting).