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*307 SEARCHING FOR THE RULE OF LAW [\[FNa1\]](#)[\[FNa1\]](#)

[David Kairys](#) [\[FNd1\]](#)[\[FNd1\]](#)

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I. INTRODUCTION

I recently spoke at a conference at the Tsinghua University Law School in Beijing, China on the interpretation and application of law. The context for the conference was the considerable pressure on China, from external and internal sources, to change its legal system. Much of this pressure is focused on China's participation in the global economy. Foreign corporations, international trade organizations, a range of governments (particularly western governments), and pro-business internal interests want certain business rules and rights to be reliably established by Chinese law. Others find the Chinese legal system lacking in terms of human rights protections. There is also a strong internal move to reform the legal system because that is best for China, which seemed the predominant view among the legal scholars at the *308 conference. The judiciary is not highly regarded in China. It is basically understood to be controlled by the party and viewed as corrupt.

The way that this message comes, at least from the outside world to the Chinese, and to many other nonwestern nations, is that China does not have something that we call the rule of law. This particular use of the rule of law, one of many I am going to talk about, is often meant and understood more as an accusation that a country or culture is deviant than as a description of a legal system. It places one's status outside of the community of nations.

The Chinese have to figure out whether they want to embrace some version of the rule of law and what that might mean for their social and political system and their economy. I am not going to address the Chinese context, which I do not feel I know much about in any event. But it started me on a search for what we, in the United States and in western nations generally, mean by the rule of law. We are exporting it and demanding it of others, and, as I will explain, it is playing an increasing role in our own legal system, politics, and popular culture. Yet, there is an incredible fuzziness about it. Fundamental principles generally tend to gain some fuzziness because, for starters, they are used frequently and with the assumption that everybody knows just what they mean. But something much deeper is going on here.

I found a huge range of formulations and meanings for the rule of law in legal, historical, academic, and popular usages, starting with the simple requirements of a legal system that one could list, which I will attempt to do in a moment. Beyond those, some emphasize process and, often, the content of law. Does the rule of law require certain laws, certain substantive rules, or is it just about a process or a legal apparatus? Others focus on justice. Does the rule of law require justice, and, if so, whose version of justice? We have trouble ourselves agreeing on exactly what justice means in our own context. There is a lot of discussion about the legitimacy of laws and the processes by which laws are arrived at. Is it democratic? Can a king or emperor adopt a principle or rule that is legitimate? There

are often formulations that go to separation of powers issues—the competence and role of the judiciary versus the legislature and the executive. Finally, the phrase seems to be increasingly used as if the rule of law is a political or social system. At times it seems that the rule of law is evolving or emerging as the latest of the grand systems.

Two early observations emerged as I slogged through the often dense and rhetorical literature on the rule of law. First, the expansive meanings and uses of the rule of law seem related to the unusually broad scope of judicial power in the United States. After all, we turn over to courts not only the resolution of disputes among people and broad authority to interpret statutes and constitutions, but also, essentially, all questions of freedom, democracy and equality—our most cherished principles. Sometimes, there are statutes related to these fundamental tenets, but those, too, are given meaning mostly by courts through broad powers of interpretation. This is not typical around the world. It ***309** is very difficult for people in our country, and in law school, particularly, to imagine it any other way, but this enormous role of law is unusual. Second, the rule of law, whatever it means, is contested and is being seriously tested here in the United States, particularly since the events of September 11th.

But before elaborating, I am going to begin with two of my own encounters with the rule of law—situations in my own experience when I felt the rule of law was at issue and I was concerned and upset about it. The rule of law is one of those basic principles, the violation of which is felt deeply. You do not want that to happen, particularly if you are on the losing end.

II. TWO ENCOUNTERS WITH THE RULE OF LAW

One was, going way back, during the Vietnam War. Many people, including supporters and opponents of the war, had the idea that a war should not be conducted by the United States in the absence of a declaration of war by Congress. The Constitution directly addresses this point. [\[FN1\]](#)^[FN1] Using strict construction and original intent arguments, one can say that Clause 11 of Article I means and should be interpreted to mean exactly what it says. The answers to all of the modern counter arguments is straightforward: the framers wanted it to be hard to go to war. So the arguments that the executive has to be free in the modern world to act quickly (beyond the uncontested power to repel attacks on us), that only the executive has the information, and other arguments along those lines were considered and rejected. The predominant sentiment was that executives, be they kings, premiers, or presidents, had tended to take the people too quickly and too easily into foreign wars that killed lots of citizens and bankrupted the treasury. [\[FN2\]](#)^[FN2]

I represented a group of plaintiffs who challenged the war in Vietnam because it was not declared by Congress in *Atlee v. Laird*, one of a number of such cases. [\[FN3\]](#)^[FN3] I felt a deep sense that the rule of law was being violated because the Constitution and this history were being ignored. The rule of law aspect of it was heightened because this particular law embodies a significant limit on ***310** government aimed at protecting the citizenry and the treasury. Limits on government are the focus of much of the rule of law literature.

There is a related question in such a case about the relief that a court can or should order. During a break at one of the arguments, one of the law clerks asked me what relief I would request if we prevailed. When a clerk asks you something, you have to assume you are also talking to the judge. I suggested, first, that the judge could pick the most unpopular guy in the marshal's office (which, as I remember, was all guys at that time), hand him an order, put him on the train down to the Pentagon, and have him knock on the door and say something like, “You are running a war here and you're going to have to stop it. I have an order from a judge in Philadelphia that says it's illegal.” He might never be heard from again. I thought the situation called for a little humor, but I worried about it later. I also told him that the actual relief we would request was a set time period in which Congress would have the ability to either declare war or not. After that there would be a declaration of war or a slow withdrawal with, of course, all due precautions for the safety of the troops.

But it did not come to that. The district judge, under a procedure that was unusual then and is even more

unusual now, convened a three-judge federal court. What was significant was that in convening it, the judge had to find some substantial merit to our claim. It was one of the few decisions of that time that seemed to say that Clause 11 means what it says. However, the three-judge court convened and he was out-voted, two to one. We lost principally on something called the political question doctrine. [\[FN4\]](#)^[FN4] There is an interesting question whether the political question doctrine is contrary to or part of the rule of law.

My second encounter is more recent, but related. A petition was recently circulated on the Internet, seeking signatures of law professors in opposition to the resolution before Congress authorizing the war in Iraq. The argument was basically that international law had established, after fifty years of very tough work by many people and nations, that preemptive wars violate international law, and that this basic accomplishment of that body of law should be honored. What interested me for present purposes was the group's name, "Law Professors for the Rule of Law." It was not named Law Professors for International Law, or Law Professors for Following the Rules Laid Down, but Law Professors for the Rule of Law. You could take such use of the rule of law as adding a little umph to an argument; it is not only unlawful, it also violates the rule of law. This usage prompted me and my research assistants to find out how often and in what ways the rule of law is used along these lines, and we discovered some interesting results.

***311** Since I am going to say some pretty critical things about the ways the rule of law is used and the meanings some have given to it, I want to emphasize here what may already be evident from the discussion of these encounters. There is something fundamental to me about a system of rules and laws, an achievement of humankind that one can see develop in history at great costs. This was most effectively articulated by British historian Edward P. Thompson, who said that rule through law, though it can be oppressive, is preferable to "the exercise of unmediated force. The forms and rhetoric of law acquire a distinct identity which may, on occasion, inhibit power and afford some protection to the powerless." [\[FN5\]](#)^[FN5]

When I was in China, one of the things that struck me was the usual tour of the Forbidden City, where the emperors lived. The Forbidden City covers a large area in Beijing with many buildings, all for the emperor and his many wives, assistants, and servants. As I listened to the guide's description of what happened in various spaces, buildings, and rooms, it became clear and concrete that the emperor could say who lived and who died. If you did something the emperor did not like, your head might be chopped off. No trial, no appeal, no lawyer, no process. [\[FN6\]](#)^[FN6] It is hard for us to imagine that, but it was that way most everywhere not all that long ago.

The law has also developed to provide an important source of inspiration, and we need not look very far in time for examples. At the mass gathering that preceded the Montgomery bus boycott, Martin Luther King, Jr. explained to an audience of hundreds of people packed into a church why they should boycott segregated buses. At the height of the speech, King said, "If we are wrong"- meaning that if we are wrong in boycotting-"then the Constitution of the United States is wrong." He culminated a series of such formulations with: "If we are wrong, then great God Almighty is wrong." The ensuing cheer and celebration in the room jump out at you. [\[FN7\]](#)^[FN7] There is something very deep in us and in our culture about rules, following rules, and expecting justice to be done by the legal system.

III. THE RANGE OF USES AND A ROUGH CONTINUUM

So I started searching for the rule of law. The best way that I can report what I found is to list a series of characteristics or criteria, or categories of characteristics or criteria, that have been ascribed to, or seen as requirements of, the rule of law. [\[FN8\]](#)^[FN8] They are placed on a continuum going roughly from the ***312** least to the most significant. [\[FN9\]](#)^[FN9]

First, certain relationships, occurrences and events should be governed by rules. This is perhaps the most elementary aspect of the rule of law, though it is often left out in much of the literature.

Second, the rules should be accessible and available to everyone, so that everyone might know the rules upon which society operates.

Third, the rules should be applicable to everyone. There should not be an exception for officials or people with more power or more money; everyone should have to abide by the same rules.

Fourth, follow the rules laid down. This might be the deepest of them; it is certainly one of the most consistent I found. We all expect that the rules laid down be followed.

Fifth, the legal process should be fair. A process emphasis is very strong in American law. Some writers basically require our version of due process for the rule of law to be satisfied. So there has to be notice and hearing and the other aspects of due process that we are accustomed to. This can get rather obsessive, as process often can in American Law. Alan Dershowitz has a recent book out in which he justifies torture as long as there is a warrant for it. [\[FN10\]](#)^[FN10] A kind of rule of law torture. I do not know if it would be much consolation to a person whose fingernails are being pulled out, or whether it would resolve the big questions torture raises for society as a whole, to know that somewhere there is a warrant for it.

Sixth, the rules should be legitimately arrived at by an established process.

Seventh, the process has to be democratic, often defined as synonymous with our system, not in a more general sense. If you look at the history of civil ***313** rights, some of the earliest civil rights actually appeared in the Napoleonic Codes. [\[FN11\]](#)^[FN11] These were edicts from a single ruler establishing, for instance, rights for women that had never before been established in the laws of any country. This would not qualify to a lot of writers because these rights were not established by a democratic process. Other writers say that as long as there is an established process and it is followed, that would be sufficient.

Notice that I have been through seven characteristics of or criteria for the rule of law, and so far there is no concern for content or for justice. You could have a system that cuts off the hands of thieves, that subjects women to mutilation, or that executes the mentally ill and children—all of those would qualify. Consistent, well reasoned, non-discriminatory obedience to oppressive laws arrived at democratically is still oppression.

Eighth is the matter of justice. There are a range of meanings of and standards for justice. Many writers believe some concept of justice must be part of any system that can be fairly called the rule of law.

Ninth, there should be certain basic rules. This goes directly to the content of laws; you have to have certain rules in your system in order for it to be a rule-of-law system. One such rule might be no mutilation. To many writers, the rules must include a series of human rights, often equivalent to our Bill of Rights. To others, the rules must include certain aspects of business law, property, and contracts. There are a whole range of these content-based requirements.

Tenth, the rules should constrain or limit the government as well as the individual. This is very important; it appears in almost all of the rule-of-law formulations. It is interesting to me that this is regularly not defined more broadly to include the range of institutions and individuals that wield considerable power. In our system, we tend to accept restrained government. For the last few decades, however, we have been removing restraints on corporations and businesses. That is the kind of rule of law that China is being asked to adopt—one that has a content that will impose restraints on government and lift restraints on businesses and corporations.

Eleventh, judicial decision-making is better and preferable to other forms.

Twelfth is judicial review. Many writers believe that you cannot have a rule-of-law system unless the judiciary has the power to invalidate measures of the legislative and executive branches. Judicial review, though, is not a widely accepted facet of legal systems around the world. We are accustomed to it, but it is not universal, even among countries generally thought to have the rule of law.

***314** Thirteenth, there must be a legal basis for decisions. They have to be expressed in a legal way and justified on legal grounds.

The last three of these criteria or categories are significantly about separation of powers. In this regard, *Bush v. Gore*, [\[FN12\]](#)^[FN12] which most of us do not want to talk about for some odd reason, is important because it emphasizes this strong judicial preference. The majority justified the decision, in large part, by saying that it would be lawless if the courts did not decide and essentially resolve the election. The alternative to the Supreme Court doing what it did was depicted as lawlessness, the absence or neglect of the rule of law. Although if you look at the Constitution, there is a specific process set out for resolving disputed elections, and that process is under the control of the democratically elected legislature, Congress. The alternative was not lawless at all, and more democratic as well.

Fourteenth, the rule of law is a social or political system. There are many writings in this mold, often employing grandiose rhetoric.

IV. THE RULE OF LAW AS A SOCIAL OR POLITICAL SYSTEM

One of the interesting things about the last category, the rule of law as a social or political system, is that instead of the rule of law being part of, or following from, our great systemic principles, everything else, including the grandest of our principles, is seen as following from the rule of law. Democracy is seen not as an organizing principle of the highest order for our society, but as a requirement of the rule of law. We need democracy, and laws arrived at democratically, in order to have the rule of law. This logic seems backwards and inappropriately law-centric. We need democracy because we need democracy, and we need freedom and equality because we need freedom and equality. For democracy to work, we need a reliable legal system. So there is a flip, a turning of things upside down: the rule of law becomes the central principle and the system. Under it, or among its requirements, are what, in my view, are the more basic principles. This is quite a significant flip, and it is gaining momentum without any real debate or discussion.

Here I am going to make an empirical argument of sorts. I had two research assistants look in a variety of places over a period that included the last two or three decades to determine how, and how frequently, the rule of law was used. [\[FN13\]](#)^[FN13] They found, as I suspected but did not know, a substantial increase in the use of the term and the idea in legal decisions and briefs, legal scholarship, ***315** and popular literature gleaned from newspapers, magazines, and TV.

For example, we looked at briefs before the Supreme Court and found that the rule of law is increasingly used as an argument. [\[FN14\]](#)^[FN14] One version is a very interesting argument that tends to be made more frequently these days, which goes like this: The actions of which we complain violate, say, the First and Fourteenth Amendments; worse yet, they amount to a contravention of the rule of law. The contravention of the rule of law is a higher-order argument than a violation of the Constitution. You can see this idea in the Law Professors for the Rule of Law group that I mentioned earlier. It is a higher level violation. What such an argument means beyond a statement of unlawfulness, I was often not able to figure out. The argument simple gets asserted. There is not a section in such briefs saying the rule of law is violated and providing reasoning and authority. It is conclusory. What is going on is not only really bad, as in unconstitutional, but violates the system-the rule of law.

Some good examples of use of the rule of law as a highest-level system that I selected, not because they are rhetorical but because they actually present a thoughtful analysis, are the publications of the Mansfield Center for Pacific Affairs (MCPA), which took up the issue in response to conflicts with Asian countries about what the rule of law means. [\[FN15\]](#)^[FN15] The MCPA got some lawyers and scholars together and tried to define the rule of law. The results include, among a list of nine requirements: the process must be democratic and there must be judicial review, human rights, intellectual rights, economic rights, and property rights. This is a wide array, a grand system rather than a set of characteristics of a good legal system.

In politics, media, and popular culture, again, we found increasing use of the phrase and idea of the rule of law. Here are some examples. In a column opposing campaign finance legislation, George Will criticized particular wording for not providing “due notice,” concluding that “this is not the rule of law.” [\[FN16\]](#)^[FN16] In an episode of *Law & Order*, a vigilante was criticized for, in addition to murdering an innocent person, insufficient respect for the rule of law. [\[FN17\]](#)^[FN17] Ally McBeal is popular in East Timor, according to an NPR report, *316 because it provides “exactly what they need. Rule of law in fun, bite-sized pieces, accessible perhaps in a way that no dry UN training courses could be.” [\[FN18\]](#)^[FN18]

An article in the National Review recently said: “It’s very important that we not place political expediency above the rule of law as liberals often do.” [\[FN19\]](#)^[FN19] The report on the Iran-Contra scandal said of the Reagan administration, “[t]he rule of law was subverted.” [\[FN20\]](#)^[FN20] In his first state of the union address, President Ronald Reagan listed “our great civilized ideas: individual liberty, representative government, the rule of law under God.” [\[FN21\]](#)^[FN21] Among the articles of impeachment of President Clinton was that he “acted in a manner subversive of the rule of law.” [\[FN22\]](#)^[FN22]

After *Bush v. Gore*, [\[FN23\]](#)^[FN23] James Baker, the leader of George W. Bush’s team, said: “The rule of law has prevailed.” [\[FN24\]](#)^[FN24] Janet Reno, after the Elian Gonzalez controversy, issued a statement in which her representative said that “her concern was strictly that the rule of law prevail.” [\[FN25\]](#)^[FN25] Note that they are not only saying that these decisions were right or went the way the law requires. The rule of law prevailed. Ari Fleischer, spokesman for President George W. Bush, recently commenting on a controversy about the President’s assertion of executive privilege, said that “[w]e are guided only by the rule of law.” [\[FN26\]](#)^[FN26] That’s all?

A phenomenon seems to be developing: When my side wins, the rule of law has prevailed. It reminds me of something I find irritating in watching sports. After a touchdown or a three-point shot, or whenever someone does something really good in sports, they go: [pointing skyward to God]. You know that move. It means something like thank God, or I didn’t really do it, God did it or enabled me to do it. I can never figure out if they are also meaning to say that God favored them over their adversaries, or that God is on their side. What if the other guy is also a devout person and also worships and leads a good a life; do they really mean that God chose between them? Things are getting more adversarial and hostile in litigation these days. We might get to the point where *317 we see lawyers in court after winning a motion say, “The Rule of Law prevailed” and go: [pointing skyward]. I hope it does not come to that, but you never know.

Among legal scholars, we found in the law reviews, again, increasing use of the term rule of law, along with an increasing tendency I have noticed for some time to avoid values and politics and to legitimize any decision that can claim some rational explanation. [\[FN27\]](#)^[FN27] Although there is much grand rhetoric in the legal writings, there is also, increasingly, acknowledgment that the definition and the meaning of the rule of law are problematic. A good example of differences among law professors regarding the meaning of the rule of law is the current controversy over President Bush’s nomination of Professor Michael McConnell for the Seventh Circuit Court of Appeals. McConnell is a well known scholar, and by all accounts a fine person, who advocates little or no separation between church and state and is a strong opponent of abortion rights. I assume that these views would affect his decisions, as anyone’s views would. What is interesting is that a large number of law professors who one would consider liberal, or liberal-to-moderate, many of whom disagree with these views, have signed a letter accepting McConnell’s nomination and urging senators to vote for him. The reason is that Professor McConnell has an “abiding

commitment to fairness and the rule of law.” [FN28][FN28] What bewilders me about this is the lack of political symmetry. Conservatives seem content with the goal of achieving a conservative judiciary and senators' voting to accomplish that. Liberals get waylaid by the rule of law and tend to think that anyone qualified should be acceptable, although they know that conservatives reject that approach. [FN29][FN29] How could they miss the intense contest over values going on in courtrooms around the country? It is not illegitimate for one to affect that contest in ways that further one's views. I think the conservatives have it right; I am just not on their side.

V. A MINIMALIST PERSPECTIVE

All this led me to try to formulate a minimalist rule of law thesis. [FN30][FN30] There is *318 an essential or minimal sense in which the rule of law, or a society having and adhering to rules, is positive and worth defending and celebrating. Even this isn't easy. But when you get beyond it, the rule of law becomes undefinable and incoherent, and uses of the rule of law as a system or ideal can be destructive of our highest principles, both domestically and in relation to other countries.

At home, the expansive and increasing uses of the rule of law are becoming a threat to democracy, freedom, and equality. This will be my focus in the remaining time. In foreign relations, it is a club, an accusation, a moralistic, neutral-sounding way of labeling countries, cultures or religions as outside civilization and the community of nations. It slides easily into a justification for ignoring their interests, taking their resources, overthrowing or killing their leaders, and invading them. This has become a rationalization, in my view, for a new form of what we used to call colonialism or imperialism.

In this minimalist sense (which is not without its own definitional and boundary problems), there are three essential requirements for the rule of law: certain relationships, events and transactions should be subject to rules; the rules laid down should be followed and should apply to everyone, including limits on the government and on the powerful; [FN31][FN31] and the rules should be enforced with some mechanism for seeking redress. [FN32][FN32]

Since these requirements seem rather basic and do not require our type of elaborate legal system, and perhaps to get a break from the grandiosity of the legal writings, I looked to some anthropological literature. [FN33][FN33] For them, at least the first two requirements are rather uncontroversial and seem to be characteristics of almost every society. People seem to want rules. The rules are not always written in a law book or codified in a code. You sometimes learn them through culture and interaction with other people, but such rules can be just as strong, and their violation can be enforced just as strongly, without our kind of legal system.

I do not mean by any of this that it is somehow illegitimate to criticize another country's laws or process for adopting laws. Not at all. If a country's political process is undemocratic, by all means, let's say so. If there are not sufficient limits on government, such as human rights, or sufficiently reliable *319 contractual rights, let's say that, too. That is different than saying another country does not have the rule of law. This is the line I am attempting to draw. Conversely, if another country's system allows, for example, everybody to speak their minds without the need for courts, lawyers, or section 1983 actions, perhaps because there is a widespread, deep belief in freedom of speech, they should be praised on that score. Such criticism or praise is directed precisely where it should be. Criticism or praise in terms of a grand, amorphous notion of the rule of law, which we cannot define without controversy among ourselves, is not constructively focused, useful, or fair.

This all raises a series of basic questions. Why are we going in the direction of the grandiose conceptions of the rule of law? What do we, or some of us, get out of this? And what are the consequences and costs?

VI. LAW RULES?

Justifications are not often offered for fundamental, society-defining principles. Everyone is supposed to know

what they mean, and their importance is a given. Writings about the rule of law tend not to address its justifications or the reasons it came to be fundamental. Writers are more apt to show the breadth and depth of their dedication.

So one has to look below the surface to the role of law and the ways that law is discussed and used. I have engaged in this sort of investigation in earlier writings, usually focused on the related notion of government of law, not people. [FN34][FN34] That passage appears in *Marbury v. Madison*, [FN35][FN35] there expressly limited to men and limited, in fact, to white men who had substantial property. In recent times you hear it uttered by every president a few times a week, no matter what party, no matter what politics.

One central justification for the notion of government of law and the rule of law is the claim that law avoids or transcends the usual problem with government, which is that no matter how democratic or well designed a governmental system may be, it still requires leaders who have values and political ideas and preferences that are controversial, and who have their own ways, foibles, and ambitions. [FN36][FN36]

Law claims to resolve disputes, conflicts over values, and policy issues independently of the values or the politics of its officials, judges. It claims to be neutral, self-executing, and apolitical. But what this means, even if it were attainable, is that law provides a way to free ourselves from ourselves. We can, we are told, eliminate the human element in decision-making. It sounds like, and seems to mean, law rules. Not in the MTV-vernacular sense, which might *320 mean law is cool or powerful. Law rules, law governs, law is capable of removing the human element, of telling us how to do things without any human agency and independent of anyone's values or judgments.

The central problem with this is that law simply does not and cannot deliver. Law shifts the debate over values and politics to a limited access arena dominated by lawyers and judges, without eliminating people as decision-makers or the role of values and politics. One consequence is the removal of a crucial, large set of issues from public debate. The broad, grandiose vision of the rule of law tends to displace and limit democracy. Another consequence is the casting of the structure and distribution of things as they are as objective, neutral and natural, and as constructed without any human agency. It lends a false legitimacy to existing social and power relations.

We do not debate or meaningfully discuss, as a democracy should, for instance, whether factory closings are something that society should have some hand in. There are rules in various countries requiring notice to the community before a factory leaves, or retraining of the workers as one of the costs of leaving. Countries adopting such rules tend not to see workers as an old machine that one can just walk away from. We do not meaningfully discuss any of these issues or view the effects on the community as significant concerns. The question of a factory closing or moving in the United States is one of property, corporations, contract, and labor law. The issue might go to court, if anyone harmed has the resources to sue and a court does not throw it out for, inter alia, lack of standing.

This is an example of what I mean by the overly broad scope and power of the law in our system depoliticizing an issue and displacing a political process, which makes our politics and elections less interesting and less significant, with a legal process that is closed to most people. Formal legal hearings and arguments are open to the public, but the deliberations of courts are not. People cannot participate in the process unless they go to Suffolk, get a license, and represent a client whom a court decides to hear. And courtroom argument and debate involves the same or similar conflicting considerations as one would hear in a public debate, laden with values and politics, but the decision will be made by a judge and articulated as if it were required by law.

One danger in the United States, where the broad or grandiose conception of the rule of law is most accepted, is rule by lawyers. There are still people with particular values and politics in control, just different people: judges. And they have a different relationship to the people, the American people. Judges have little or no responsibility to them.

This raises the question of whether the legal system lives up to the claims made for it. Does the legal system, in

its decision-making process and results, achieve separation from values, politics, religion, culture, and so on, or does it shift the contest over values to a different, exclusive venue? The answer depends on whether the law and the legal process yield required rules or results *321 for particular cases.

For the students here, I remember well my early experience with this question. Law school is so confusing because you read a majority opinion, and it has indicia of correctness and legitimacy-it might cite some cases, some constitutional provision or statute, and maybe throw in a little Latin. I particularly liked the section signs, which look like a squashed down integral symbol in calculus, familiar from my earlier education. Then you read the dissent, which also has cases, constitutional provisions, section signs, and so on, but it comes out the other way. And you are supposed to be able to figure this out, and perhaps to place it in a line of related cases, without applying your own values, which is particularly difficult if it raises issues you care about. Values tend to get wrung out of you as you go through law school.

The major features of legal analysis that render it incapable of yielding required rules or results in particular cases can be briefly described. First is the limits of language. Language is just too subjective, particularly when it is about something that is contested and that people care about. Interpretation of language is intensely subjective. Second, the law embraces conflicting values without providing any methodology or any rules about which one should be prioritized. And third, the law embraces a range of methods and strategies of argumentation without specifying which particular one should be used in a particular case.

Let me offer one example that I think will make this clear: abortion, which is not usually considered an easy example of anything. The law places a very high value on the control that each person should have over his or her physical body. You can find lots of cases and authorities saying that, even before the 1960s. And then, of course, you have the *Griswold* [FN37][FN37] line of privacy cases and many cases placing a new emphasis on equality and the revitalized Equal Protection Clause after *Brown*. But the law also embraces and provides strong authority for the argument that life should be protected. You can find numerous cases and lots of constitutional decisions holding that protection of life is a high-level priority.

The law does not tell you how to reach a decision, or which decision to reach, when these principles or values seem to conflict, or even how to resolve the issue of whether a fetus is a life. Legitimate opinions could be written coming out either way, including a range of different ones coming out each way. Judges are left with a series of choices, and values and politics play a central role in those choices. [FN38][FN38]

There are easy cases and there is considerable predictability; sometimes cases can seem so easy that certain results appear to be required. But this *322 occurs when people are in agreement and the matter is not controversial. There are also constraints; a meaningful engagement with legal rules and materials; and a system of discourse, a body of knowledge, and a distinct language to the law. Those can become annoying to non-lawyer spouses, lovers and friends. But the common theme of legal opinions-the law made me do it-is wrong and misleading.

VII. HUMAN RIGHTS AND THE RULE OF LAW

In spite of or even accepting all of this, there are commonly accepted benefits of expansive judicial power. These are, in my view, at least exaggerated. I will take up the one that is most important to me and I suspect to most of you. We usually think of the judiciary as the place where human rights are protected, and we usually think of a strong judiciary as a way-in our system the way-of assuring protection of human rights. We tell other countries that this is one of the reasons why they need the rule of law. If you have the rule of law, we regularly assume, one of the benefits you will enjoy is the protection of human rights.

The connection between human rights and the rule of law is so heavily hardwired in our legal and popular culture that we tend to ignore even obvious examples of its contradiction. South Africa, before apartheid was

abolished, had an elaborate judiciary and a history of law that was predominantly drawn, like ours, from British origins. Since apartheid was the law, following the law to the letter, or following the spirit of the law, was oppressive. Protection of human rights, as occurred in the occasional court ruling, required judges to place certain values negated by their laws and system, like equality, above what the law said and had been interpreted to mean. The law and the legal system were part of the problem, not the origin of or a force for the solution. The changes that finally came, including a level of equality and other basic human rights for black South Africans, did not emerge from or because of the law or the rule of law, but from political movements and activism that was often outside of the law. [FN39][FN39]

If we go beyond the usual mantras and look realistically at our own legal history, it is often not very different from this South African example and is frequently characterized by judicial human rights failures. The crucial test lies in instances when courts have been called upon to provide human rights protection for people or groups being suppressed or oppressed because many or a majority dislike, hate, or fear them or what they stand for. [FN40][FN40] In other words, *323 the question is whether the law and the rule of law in the United States have provided counter-majoritarian [FN41][FN41] protection to the range of minorities, individuals, and groups (defined broadly to encompass racial, ethnic, religious, sexual, political, and otherwise oppressed groups). [FN42][FN42]

One immediately thinks of twentieth century examples like *Brown v. Board of Education* [FN43][FN43] and the *Korematsu* [FN44][FN44] case, which go in opposite directions. *West Virginia Board of Education v. Barnette* [FN45][FN45] protected Jehovah's Witnesses who refused to salute the flag in school during World War II. *Bowers v. Hardwick* [FN46][FN46] approved the criminalization of consenting adults engaging in gay sex. In the 1950s, the courts caved in to the excesses of McCarthyism, in effect carving out an exception to the protections of the First Amendment for socialists, communists, and other left or progressive dissenters. Going further back, the Supreme Court's *Dred Scott* decision overturned the Missouri Compromise on slavery and was a contributing cause of the Civil War; after the Civil War amendments, the *Civil Rights Cases* invalidated the Civil Rights Act of 1875, which had prohibited discrimination in public accommodations, and *Plessy v. Ferguson* approved and justified segregation; the *Slaughter-house Cases* negated the privileges and immunities clause of the Fourteenth Amendment; and the courts failed to protect even the most basic free speech rights until the 1930s. [FN47][FN47] If one includes humanitarian economic rights as human rights, as the U.N. Charter and Declaration of Human Rights do, the Court has often been a major barrier, as in the *Lochner* era. [FN48][FN48]

Overall, looking fairly at our history, the courts have more often been a barrier to human rights than a means for their realization. There are really only two periods in our history characterized by sustained judicial counter-majoritarian protection: from about 1937-1944 and 1961-1973. [FN49][FN49] In both of *324 these periods, it is hard not to notice that there were also strong and sustained progressive movements pushing in those directions. And a lot of the protection of minorities that we tend to credit rather reflexively to courts or to the Supreme Court actually came from Congress. [FN50][FN50] Most people in law, and most people generally, tend to think of civil rights achievements as a series of pro-civil rights decisions by the Supreme Court. But even in the 1960s, many or most of the significant gains were accomplished by Congress: forbidding discrimination in voting, employment, housing, and public accommodations. [FN51][FN51] It is easy for us to recognize that mass movements affect and move Congress, which usually does not tend to originate or pursue such matters out of the goodness of its hearts. Imagining or even considering the role or impact of political and cultural changes and movements on courts is more difficult and challenges the comfortable assumptions about the rule of law I addressed earlier. [FN52][FN52]

Further, the instances of judicial counter-majoritarian protection do not occur automatically or as a function of the rule of law or any legal analysis or process, but because judges place a priority on-rather than eschew-particular values. [FN53][FN53] In *Brown*, following the rules laid down would have meant reaffirming segregated schools. The decision resulted not from any legal reasoning, required or not, but from a deep and courageous commitment to equality not previously or often exhibited by the courts. Similarly, in *Barnette*, a classic example of counter-majoritarian protection, the majority justices' strong commitment to the values of religious freedom and of restrained government power even when the country is at war, perhaps affected by recent news of the Holocaust in Germany,

was not deterred by a contrary precedent only three years before. [\[FN54\]](#)[\[FN54\]](#)

A more current example from my experience shows the central significance of particular values in the protection of human rights. In 1985, a Philadelphia police officer was killed near a predominantly Hispanic neighborhood. The police rushed into the neighborhood, taking into custody almost every Hispanic man they found. I represented a neighborhood group and individuals taken into custody in a class action suit seeking preliminary injunctive relief and damages. *325 The police and city denied it was a sweep of Hispanic men, but there was little or no individualized basis to pick up any of the men, except that they were found close to the murder scene soon after it occurred. There was a factual basis and legal reasoning available to support a ruling either way. Particularly troubling for my side were recent higher court decisions making it more difficult to bring a class action or to obtain injunctive relief in civil rights cases. But the judge, usually thought of as a moderate, issued the injunction. I have no inside information about why he ruled as he did, but during the hearing, he seemed most moved by the testimony of some of the men that showed how broad and arbitrary the sweep was. One elderly man was arrested while sitting on his front stoop after he put a pork roast for his invalid wife's dinner in the oven. The police would not let him turn off the oven or tell his wife they were taking him. In any event, this case could not be resolved based solely on legal reasoning; it required, no matter which side won, a choice between, and a balancing of, conflicting concerns nowhere resolved by law or the rule of law. It required a person to apply particular values. [\[FN55\]](#)[\[FN55\]](#)

And as the values of those in control of the judicial system have turned decidedly more conservative since the mid-1970s, so have the rules and results in civil rights cases. For example, a series of First Amendment decisions in the 1930s and early 1940s and in the 1960s and early 1970s established broad rights of expression that significantly enabled people of ordinary means to participate in debate on the issues of the day. Since the mid-1970s, however, the Supreme Court has maintained and extended speech rights available to corporations and wealthy people while retrenching speech rights available to people of ordinary means. For instance, money gathered in the usual way from large contributors to support speech by electoral campaigns is now itself fully protected speech, while money gathered in the usual way to support the speech of people of ordinary means-asking for donations connected to speech in public places-is not protected. [\[FN56\]](#)[\[FN56\]](#) In race discrimination cases since the mid-1970s, almost all of the winning plaintiffs claiming discrimination have been white, as the Court has erected insurmountable barriers to discrimination claims by racial minorities, even claims challenging obvious remnants and replicas of the era of segregation, while adopting rules that make "reverse discrimination" claims by whites quite easy. [\[FN57\]](#)[\[FN57\]](#) None of this was required by law or legal reasoning, nor were the earlier liberal rules and results required. There has *326 been a change of values and politics. We tend to ignore this, focusing instead on cyclic debates about judicial restraint in which those who lose control of the courts accuse those in control of straying from proper, neutral decision-making and of applying values and politics. [\[FN58\]](#)[\[FN58\]](#)

Nor has the rule of law, even as we parade and attempt to export it, immunized us from our own human rights crisis now going on within our midst. [\[FN59\]](#)[\[FN59\]](#) There are two American citizens, Yaser Hamdi and Jose Padilla, who are being imprisoned by our federal government without any charge, counsel, or judicial scrutiny. The government claims they are "unlawful combatants" and "terrorists." Those are the labels the government uses. These men may or may not be terrorists or dangerous. But the government asserts the power to suspend their, or any citizen's, rights based only on such government labeling-to hold them indefinitely without making any showing (in camera, not public), although it is clear that the courts would not, in such circumstances, require much of a showing, and without providing them counsel. This is a violation of the writ of habeas corpus, isn't it? Isn't that about as basic as you can get, going back to the Magna Carta and to the beginnings of the whole notion of the rule of law? Nothing could be more basic. Among our current leaders, the ones who trumpet the rule of law the loudest and most often seem to be the first to give up human rights protections, and to repudiate the promise of international rules that restrain use of force and promote peace, justice and safety, such as the International Criminal Court, Kyoto Agreement, and treaties or agreements on anti-ballistic missiles, small arms, and biological and chemical weapons. It is not clear how this will come out. So far, the federal courts have disagreed. [\[FN60\]](#)[\[FN60\]](#) There is both law supporting these men's minimal rights and law supporting their denial. If human rights prevail, it will be based on and because of values.

There is hypocrisy in all of this. We demand human rights in countries that have hostile armies on their borders and civil wars going on. Pakistan and India have a million troops on each side of a contested border. Nevertheless, we condemn them if they do not protect human rights. An enemy army poised on your border or in your region or a civil war is not an adequate excuse. North and South Korea have a border that has seen war and occasionally boils over. *327 We condemn mainly North Korea because of human rights violations, although they face an armed enemy across their border. September 11th was bad enough, but we do not face anything like that. We do not have a foreign government or an army of another country attacking us or poised on our borders or outside our land in the ocean. We do not have a civil war going on in our midst. We suffered a great loss on that day, we were shocked, and our government, in response, just turns around and dumps the most basic human rights.

In any event, the rule of law is not self-executing, does not guarantee human rights through the power of its ideas or the processes of its tribunals, and has posed a barrier to human rights at least as often as it has protected them. Protection of human rights depends on people-within the judiciary and throughout society-committed to particular values.

VIII. A CRISIS OF DEMOCRACY AND LEGITIMACY

In the limited remaining time, I want to sketch out what I see as the context for the emergence and popularity of the systemic formulations and uses of the rule of law and to suggest a constructive direction. This will involve some speculation on my part.

The burgeoning use of grandiose versions of the rule of law, even as scholars increasingly acknowledge the lack of minimal agreement about its definition or scope, has a grasping quality to it. Why would we be grasping, and what is it we are missing and looking for? I see this in the context of several difficult, jarring decades in which most of our major institutions have lost legitimacy: The civil rights revolution, the Vietnam War and movement to stop it, assassinations (Kennedys, King, Malcolm X, John Lennon), Watergate, Iran-Contra, money-dominated elections, savings and loan failures, Clinton's impeachment, the 2000 election, Enron/Worldcom, and September 11th, to name a few. These and other events have left us with a palpable breakdown of a sense of community and common purpose, and we have been for some time, it seems to me, looking for something to fill the void.

For a while, communism and government were defining anti's-what we are against-but for a long time, it has been hard to reach a common understanding of what we are for. [FN61][FN61] Freedom and capitalism work as common ideals only if we talk about them very generally; the details matter. For example, in the 1990s, there was what I would call market mania, a rather extreme version of freedom and capitalism that emphasized the merits of unfettered market solutions to just about everything. The goal seemed to be freedom for people and institutions with wealth and power to use them how they please, with the *328 assumption that all of us would benefit. [FN62][FN62]

The result has been an extreme maldistribution of wealth and a boom bubble that burst, hurting a lot of people. And if we are honest, our electoral and political institutions are in disarray. [FN63][FN63] What is left as a primary common purpose, particularly after September 11th, is fear of terrorism. This is dangerous, especially in the absence of an agreed upon positive ideal or direction, as current plans for an ill-advised, unjustifiable preemptive war against Iraq attest. Perhaps it is not surprising, then, that the rule of law is so appealing in this period. It differentiates us from others and suggests that everything is really okay.

But the grandiose versions of the rule of law avoid and distract from the central questions we should be addressing, and they do more harm than good in our relations with other countries [FN64][FN64] and at home. The undefined, overblown rule-of-law notion inaccurately conveys that freedom, democracy, and equality will be or can be reliably guaranteed by operation of law and irrespective of values or politics. This disregards the significance and

courage required of judges asked to protect the rights of minorities against measures adopted at the behest of angry or fearful majorities. It also places the law and its actors, judges and lawyers-rather than the people, acting through democratic and political processes and institutions-at the center of our social and political *329 system. [FN65] [FN65] There is a false comfort offered here: no need for the kind of effort, courage and sacrifice demonstrated by those gathered in that church in Montgomery, Alabama to prepare their historic boycott of segregated buses, despite the risks of loss of employment and income and of violence from local police and groups like the Ku Klux Klan. Somehow, we are told, the law will take care of such matters. This is misleading; it will not happen that way. Anyone who doubts that should at least notice that although we have the rule of law, we are in the midst right now of a major human rights crisis that will not and cannot be resolved by any required or reliable rules of law or legal process.

The rule of law cannot reliably guarantee much, and it is not a social or political system of a higher or lower order. Decision-making without people is not desirable or possible. Protection of civil or human rights without people motivated by particular values and prepared to take risks will not happen. What we should be looking for and working toward, in my view, is a revitalization of American democracy and a positive sense of common purpose. [FN66][FN66]

[FN1]. This Article is based on a speech that Professor Kairys delivered on November 7, 2002 as part of the Donahue Lecture Series. The Donahue Lecture Series is a program instituted by the *Suffolk University Law Review* to commemorate the Honorable Frank J. Donahue, former faculty member, trustee, and treasurer of Suffolk University. The Lecture Series serves as a tribute to Judge Donahue's accomplishments in encouraging academic excellence at Suffolk University Law School. Each lecture in the series is designed to address contemporary legal issues and expose the Suffolk University community to outstanding authorities in various fields of law.

[FN1]. James E. Beasley Professor of Law, Beasley School of Law, Temple University. This lecture and my interest in the topic were prompted by an invitation to speak in May 2002 at the Tsinghua University School of Law in Beijing, China. I appreciate support for my trip to China and for research and preparation of this lecture and Article from Temple Law School, the U.S. Agency for International Development, and the Ford Foundation; the many courtesies of our hosts at Tsinghua, especially Professor (now Dean) Wangchenguang; research assistance by Temple law students Stephanie Daniels and Jennifer Wolbransky; and support for the Donahue Lecture from Jessica Munyon, Paul Bagley, and Tom Rankin of the *Suffolk University Law Review*. This is an edited and somewhat elaborated version of a transcript of the lecture; occasional footnotes have been added, mostly limited to citations for quotes and references to my writings that elaborate or explain a point made briefly in the lecture.

[FN1]. See [U.S. CONST. art. I, § 8, cl. 11](#).

[FN2]. E.g., Jules Lobel, *Foreign Affairs and the Constitution: The Transformation of the Original Understanding*, in *THE POLITICS OF LAW* (D. Kairys ed., 1990).

[FN3]. [Atlee v. Laird, 336 F. Supp. 790 \(E.D. Pa. 1972\)](#) (denying motion to dismiss President Nixon as defendant), [339 F. Supp. 1347 \(E.D. Pa. 1972\)](#) (convening three-judge court), [347 F. Supp. 689 \(E.D. Pa. 1972\)](#). The theory of the case was conceived and researched by the National Emergency Civil Liberties Committee, and lawsuits based on it were filed throughout the country. I was honored to brief and split the argument for our side in *Atlee* with a more experienced civil rights lawyer and friend, Victor Rabinowitz of Rabinowitz & Boudin. Some references to this case in the media erroneously attribute my role to my partner; it was not unusual for us to be credited with each other's work, in part because we have the same first name and worked on many cases together. See Rod Nordland, *The Lonely, Lethal Rebels of the Law*, PHILA. INQUIRER, Nov. 4, 1973 (Sunday Magazine), at 20; *Four with Philadelphia Ties Are Among Winners of "Genius Awards,"* PHILA. INQUIRER, July 15, 1986, at A1 (also erroneously attributing my role in the "Camden 28" case); *Collaboration*, Letter to the Editor, PHILA. INQUIRER, July 30, 1986, at A10.

[FN4]. The doctrine, for which the *Atlee* opinions provide citations to cases and articles, is a maze of multiple criteria and rules that fail to explain decisions in other highly charged “political” cases such as [Brown v. Board of Education](#), 347 U.S. 483 (1954), [Roe v. Wade](#), 410 U.S. 113 (1973), and *Bush v. Gore*, 531 U.S. 138 (2000).

[FN5]. EDWARD P. THOMPSON, WHIGS AND HUNTERS 266 (1975).

[FN6]. The rights of people accused of crime, including those the state intends to execute, are still very much contested.

[FN7]. *See Awakenings: 1954-56, Eyes on the Prize* (PBS television broadcast, 1986).

[FN8]. With an emphasis on recent scholarship, see, for example, Randall Peerenboom, [Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China](#), 23 MICH. J. INT'L L. 471 (2002); Frank Lovett, *A Positivist Account of the Rule of Law*, 27 L. & SOC. INQUIRY 41 (2002) (stressing that rule of law must limit what government can do); F.C. DeCoste, Review Essay, *Redeeming the Rule of Law: Constitutional Justice: A Liberal Theory of the Rule of Law*, by T.R.S. Allan, 39 ALBERTA L. REV. 1004 (2002); James W. Torke, [What Is This Thing Called the Rule of Law?](#), 34 IND. L. REV. 1445 (2001); T.R.S. ALLAN, CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW (2001); RONALD A. CASS, THE RULE OF LAW IN AMERICA (2001); *The Rule of Law*, in PERSPECTIVES FROM THE PACIFIC RIM (Mansfield Ctr. for Pac. Aff. 2000) [hereinafter PERSPECTIVES]; Barry Hager, *The Rule of Law*, in A LEXICON FOR POLICY MAKERS (Mansfield Ctr. for Pac. Aff. 2000); GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT (1996) (regarding law as our “civil religion” but noting meaning of rule of law and role of morals and justice not clear); ROBERT C. CANNADA, AMERICA'S RULE OF LAW (2001) (the rule of law means enforcing, in the words of the Declaration of Independence, “the laws of nature and of nature's God”); Allan Hutchinson, *The Rule of Law Revisited: Democracy and Courts*, in RECRAFTING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER (David Dyzenhaus ed., 1999); Richard H. Fallon, [“The Rule of Law” as a Concept in Constitutional Discourse](#), 97 COLUM. L. REV. 1 (1997) (stating meaning of rule of law “less clear than ever before”); Margaret Radin, [Reconsidering the Rule of Law](#), 69 B.U. L. REV. 781 (1989); Joseph Raz, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (Joseph Raz ed., 1983); LON FULLER, THE MORALITY OF LAW (1969); F.S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

[FN9]. I have not attempted to precisely define or differentiate the terms of the characteristics or categories listed here; they are meant to show the variety and range of claimed attributes of and assumptions about the rule of law.

[FN10]. *See* ALAN DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE (2002).

[FN11]. David Kairys, *Civil Rights*, in THE INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES (2001). These formulations often tend to place all systems outside of the rule of law in which an official has broad discretion to make law or, as in some Muslim traditions, is synonymous with law. *See* BERNARD LEWIS, WHAT WENT WRONG? (2002).

[FN12]. [531 U.S. 98 \(2000\)](#); *see also* David Kairys, *Bush v. Gore Blues*, JURIST (May 2001), available at <http://jurist.law.pitt.edu/forum/forumnew23.htm> (last visited Feb. 11, 2003).

[FN13]. This was not a rigorous or scientific study. We looked at uses of the rule of law in the relevant databases covering three or four full years over the last two or three decades. We checked to make sure that the uses of rule of law that we found were relevant to this discussion. For example, we did not include uses of “rule of law” to describe

the rule governing a case or issue.

[FN14]. *See, e.g.*, Brief of Amicus Curiae, *Bush v. Gore*, 531 U.S. 138 (2000) (No. 00-949), [available at 2000 WL 1845981, at *2](#) (counting “undervotes” violates equal protection and due process and “is totally unacceptable in a democratic republic governed by the rule of law”); [Brief of Amicus Curiae of Law Professors in Support of Respondents, *Calcano-Martinez v. INS*, 521 U.S. 793 \(1997\)](#) (Nos. 95-1858, 96-110), [available at 2001 WL 219309](#) (noting writ of habeas corpus is “indispensable” to rule of law); Brief in Favor of Physician-Respondent, [Vacco v. Quill](#), 521 U.S. 793 (1997) (holding uniform rules for assisted suicide required by the rule of law, stating “our nation is built upon the rule of law, not winks and nods”); Brief of Amici Curiae on Behalf of International Law Scholars and Human Rights, [Brzonkala/United States v. Morrison](#), 529 U.S. 598 (2000), [available at 1999 WL 1037253](#) (determining Congress' power to enact Violence Against Women Act is part of rule of law).

[FN15]. *See* Hager, *supra* note 8; PERSPECTIVES, *supra* note 8.

[FN16]. George F. Will, *Virtue at Last!*, NEWSWEEK, Feb. 25, 2002, at 64.

[FN17]. *Law & Order: Patriot* (NBC television broadcast, Sept. 4, 2002).

[FN18]. All Things Considered: America's “Ally McBeal” Shown in East Timor (NPR radio broadcast, Sept. 5, 2001).

[FN19]. Mark R. Levin, *Silence of the New Jersey Lambs*, NAT'L REVIEW ONLINE, Oct. 10, 2002.

[FN20]. David E. Rosenbaum, *Iran-Contra Report Says President Bears 'Ultimate Responsibility' for Wrongdoing*, N.Y. TIMES, Nov. 19, 1987, at A1.

[FN21]. *Transcript of President's State of the Union Message to Nation*, N.Y. TIMES, Jan. 27, 1982, at A16. I would not have noticed before doing the research for this lecture, but the formulation “rule of law under God” seems to be a reference to the fundamentalist conception of the rule of law as the rule of God and God's commands. *See generally* CANNADA, *supra* note 8.

[FN22]. *A Draft of the Four Articles of Impeachment and a Censure Alternative*, N.Y. TIMES, Dec. 19, 1998, at A27.

[FN23]. [531 U.S. 98 \(2000\)](#).

[FN24]. Jeffrey Toobin, *The Counting House: Have the Presidency and Litigation Become Permanently Entwined?*, NEW YORKER, Dec. 4, 2000, at 42.

[FN25]. Jerry Seper, *Reno to Seek Peaceful Transfer in Elian Case*, WASH. TIMES, April 19, 2000, at A18.

[FN26]. *CNN Transcript*, Dec. 31, 2001, at 10.

[FN27]. *See* William Simon, *Fear and Loathing of Politics in the Legal Academy*, 51 J. OF LEGAL EDUC. 175 (2002); David Kairys, *Reason Worship*, JURIST (May 1998), [available at http://jurist.law.pitt.edu/lawbooks/revmay98.htm](#) (last visited Feb. 3, 2003). The combination of deference to courts and judges, suspension of doubt and critical faculties, blindness to the realities of the political world around us, and the lack of legally required rules and results, as discussed *infra*, increasingly render legal scholarship and criticism an elaborate justification mechanism for whatever the Supreme Court decides. For a recent example that includes

some reflection on the problem, see Jack Balkin, [Bush v. Gore and the Boundary Between Law and Politics](#), 110 *YALE L.J.* 1407 (2001).

[FN28]. *Impaired Faculties*, AM. PROSPECT, Nov. 4, 2002, at 12; *Judicial Nominee Says His Views Will Not Sway Him on the Bench*, N.Y. TIMES, Sept. 19, 2002.

[FN29]. David Kairys, *Clinton's Judicial Retreat*, WASH. POST, Sept. 7, 1997.

[FN30]. An alternative approach would be to reject the term entirely because of its excess baggage and widespread use. I have not pursued this course, perhaps out of sentimentality, but also because I do find a meaningful core that is worth preserving.

[FN31]. This does not include or require, as a matter of the rule of law, any particular limits or laws, only that limits, like other rules, be followed.

[FN32]. This formulation is similar to, though considerably more minimalist than, that proposed by Lon Fuller, *supra* note 8. After the lecture, I discovered more recent works with similar approaches. See Hutchinson, *supra* note 8 (also using the term “minimalist,” although not in the same sense as it is used here); Radin, *supra* note 8.

[FN33]. See generally ELIZABETH COLSON, *TRADITION AND CONTRACT, THE PROBLEM OF ORDER* (1974); Bronislaw Malinowski, *Introduction*, in H. IAN HOGGIN, *LAW AND ORDER IN POLYNESIA, A STUDY OF PRIMITIVE LEGAL INSTITUTIONS* (1934). For a recent anthropological approach to law, see LAURA NADER, *THE LIFE OF THE LAW, ANTHROPOLOGICAL PROJECTS* (2002).

[FN34]. See David Kairys, *Introduction*, in *THE POLITICS OF LAW* (David Kairys ed., 1998).

[FN35]. [5 U.S. \(1 Cranch\) 137, 163 \(1803\)](#).

[FN36]. The wish to get away from electoral politics may be stronger, in part, because our electoral system is so corrupted by money and by the lack of choice that most of our people do not find it worth participating in.

[FN37]. [Griswold v. Connecticut](#), 381 U.S. 479 (1965).

[FN38]. This is not limited to constitutional law but applies as well to statutory construction, common law, and the whole range of legal decision-making. See generally Kairys, *supra* note 34.

[FN39]. There was an interplay of law with the forces for change, and some legal decisions played a role in the changes that occurred. Sometimes law also plays a role in codifying changes and acts as a measure of temporary equilibrium between competing forces and perspectives.

[FN40]. Protection of the rights of the majority, or those who express or represent the mainstream, is easy and characteristic of oppressive as well as nonoppressive societies and legal systems.

[FN41]. Counter-majoritarian is not used here in the same sense as it is in Alexander Bickel's argument that courts are counter-majoritarian. See generally Kairys, *supra* note 34.

[FN42]. See Kairys, *supra* note 11.

[FN43]. [347 U.S. 483 \(1954\)](#). There is a question about how counter-majoritarian this was at that point in our

history; nevertheless, *Brown* is a major example of judicial protection of human rights in the face of prior contrary law and strident opposition.

[FN44]. [323 U.S. 214 \(1944\)](#) (approving imprisonment in camps during World War II of all persons of Japanese ancestry on west coast, without proof or charges of individual guilt).

[FN45]. [319 U.S. 624 \(1943\)](#). This was probably the most libertarian decision in the Court's history. It has fallen on hard times in the more conservative era of the last few decades. See [Employment Div. v. Smith, 494 U.S. 872 \(1990\)](#). See generally DAVID KAIRYS, WITH LIBERTY AND JUSTICE FOR SOME ch. 4 (1993).

[FN46]. [478 U.S. 186 \(1986\)](#). The majority opinion also interpreted a general sodomy statute as if it were limited to and aimed at gays, and used the history of prejudice against gays as a justification for its continuation and legal sanction. *Id.*

[FN47]. [Dred Scott v. Sanford, 60 U.S. \(19 How.\) 393 \(1857\)](#) (concluding African-Americans have "no rights which the white man is bound to respect" and are not fully citizens or human); [Plessy v. Ferguson, 163 U.S. 537 \(1896\)](#); [Civil Rights Cases, 109 U.S. 3 \(1883\)](#); [Slaughterhouse Cases, 83 U.S. \(16 Wall.\) 36 \(1873\)](#); David Kairys, *Freedom of Speech, in THE POLITICS OF LAW* (David Kairys ed., 1982).

[FN48]. [Lochner v. New York, 198 U.S. 45 \(1905\)](#).

[FN49]. There are other instances, including suspension of the already meager protections of privacy.

[FN50]. Nor did it or has it historically come from the states.

[FN51]. See Civil Rights Acts of 1960, 1964, 1965, and 1968, [42 U.S.C. §§ 1971, 1973, 1975, 1985](#), 2000, [3601](#); see also Kairys, *supra* note 34, at 19 n.13 (providing examples, including prohibitions of disability and age discrimination).

[FN52]. I am not suggesting that there is a direct or easy relationship. There are periods of strong, sustained progressive movements in which the courts have gone in the other direction. See generally Kairys, *supra* note 34. For an account of the history of adoption of the rules of free speech as we know it that focuses on such matters, including the central role of organized labor, rather than viewing legal reasoning as causative or explanatory, see Kairys, *supra* note 47.

[FN53]. Among such values can be those related to law or the rule of law, but these as well as other values are not required by or the result of legal analysis.

[FN54]. See KAIRYS, *supra* note 45.

[FN55]. See [Spring Garden United Neighbors v. City of Philadelphia, 614 F. Supp. 1350 \(E.D. Pa. 1985\)](#). After the court's decision on the preliminary injunction, the city settled the plaintiffs' claims for damages. With me as counsel for plaintiffs was Stefan Presser, legal director of the Pennsylvania ACLU.

[FN56]. Compare [Buckley v. Valeo, 424 U.S. 1 \(1976\)](#), and [Nat'l Conservative Political Action Comm. v. FEC, 470 U.S. 480 \(1985\)](#), with [Int'l Soc. for Krishna Consciousness v. Lee, 505 U.S. 672, 830 \(1992\)](#). See generally David Kairys, *Freedom of Speech, in THE POLITICS OF LAW* (David Kairys ed., 1998).

[FN57]. See David Kairys, *Unexplainable on Grounds Other Than Race*, 45 AMER. L. REV. 729 (1996); David

Kairys, *Race Trilogy*, 67 *TEMPLE L. REV.* 1 (1994); KAIRYS, *supra* note 45.

[FN58]. While Ronald Reagan is the president most associated with judicial restraint, Franklin Roosevelt was our most strenuous and successful advocate of it. Roosevelt sought restraint, and threatened to pack the Supreme Court, because his New Deal measures were being invalidated by a Court majority applying an extreme free market version of justice. *See generally* Kairys, *supra* note 34. While I am here questioning the role, power, and legitimacy of courts and expansive judicial intervention, my argument is not another version of the familiar judicial restraint argument.

[FN59]. Some new measures after September 11th seem entirely appropriate, but there are many other examples of unnecessary and unjustifiable infringements on a range of rights, including privacy and freedom of speech, association, and religion.

[FN60]. *See Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002); *Padilla v. Bush*, 2002 U.S. Dist. LEXIS 23086 (S.D.N.Y. Dec. 4, 2002).

[FN61]. Anti-government rhetoric from the left and right (the right-wing version has won out so far) has proved of limited use in this regard, because most of us want our government to do something to make things better.

[FN62]. After all of the tax breaks and deregulation, it appeared, at the risk of over-simplification, our highest purpose as a society was to facilitate the richest among us to get richer.

[FN63]. The pundits and politicians from both major parties talk about mandates following each election, but I do not think any of our national leaders over the past thirty or forty years has had much of a mandate. Our winner-take-all, plurality system is outmoded and unfair as well as dominated by money. The House has been so gerrymandered to favor incumbents that less than 10% of its seats are seriously in doubt (the Supreme Court has allowed this to occur for any reason other than to achieve some racial balance, although race is also regularly considered in the ordinary gerrymanders). The Senate is way out of balance in favor of small states, with two seats per state regardless of population. The electoral college scheme was so skewed to favor small and slave states (two seats for each state's senators added to the proportional numbers of representatives, and an initial apportionment that included three-fifths of the slaves) that almost all of the presidents for the first quarter century were southern slaveholders; and that, as we saw in 2000, a candidate who wins a lot of small states, mainly in the middle and south, can succeed without a popular majority. The people appear to have given up on this system, as evidenced by their lack of voting. *See* Kairys, *supra* note 34; Kairys, *supra* note 12; STEVEN HILL, *FIXING ELECTIONS: THE FAILURE OF AMERICA'S WINNER-TAKE-ALL POLITICS* (2002); DOUGLAS AMY, *REAL CHOICES/NEW VOICES* (1993); CENTER FOR VOTING AND DEMOCRACY, *at* <http://www.fairvote.org> (last visited Feb. 11, 2003) (providing electoral system developments).

[FN64]. Minimal cultural and political respect seem lacking in the use of the rule of law as an international ostracization. For instance, in China, they have a system, culturally imbedded and without our form of codes and legal apparatus, of the working out of some local disputes by local officials. We could consider this a form of alternative dispute resolution (ADR)-alternative meaning alternative to our own expensive, cumbersome courts-and praise it (along with specific criticisms of it), instead of condemning the lack of the rule of law. We are trying to adopt forms of ADR here because we think ourselves too litigious.

This is not to say, again, that China or any other country should not be criticized. I think China's problems have more to do with too little openness, accountability, democracy, and human rights. Posing as the exclusive or primary solution institutions-courts-that have no current legitimacy and suffer from the same problems-lack of openness, accountability, and democracy-seems inadequate and inappropriate.

[FN65]. There is deep-seated fear of democracy in our culture that is felt by Democrats and liberals as well as

Republicans and conservatives and goes back to the framers, who were very interested in protecting property and promoting commerce, but had to have the Bill of Rights shoved down their throats. They were worried about the effects of mass-based popular movements and power on issues like property rights. Many of our structures of government were designed to avoid that possibility. *See generally* Kairys, *supra* note 34.

[\[FN66\]](#). *See generally* Kairys, *supra* note 34.

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