



2014

Foreword

Sandra Day O'Connor

Supreme Court of the United States, lneary@supremecourt.gov

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Recommended Citation

Sandra Day O'Connor, *Foreword*, 67 SMU L. Rev. 693 (2014)

<https://scholar.smu.edu/smulr/vol67/iss4/2>

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THE RULE OF LAW AND CIVIC EDUCATION

FOREWORD

*Sandra Day O'Connor**

LIKE any good symposium topic, the “Rule of Law” is frequently invoked—and frequently debated. Judges, policymakers, and academics often allude to the “rule of law,” but the concept means different things to different people. Some suggest that the rule of law encompasses ideals such as popular sovereignty, equal protection, or substantive justice. On this account, “it is impossible to achieve consistency with the Rule of Law unless the law that is enforced . . . satisfies a substantive test of moral correctness.”¹

Others hold the opposite view. Professor Joseph Raz, for example, asserts that the rule of law requires nothing more than the consistent, predictable application of laws. The rule of law, Professor Raz contends, is conceptually distinct from “democracy, justice, [and] equality,” and ought “not to be confused with” those ideals.² Thus, Professor Raz asserts that even “[a] non-democratic legal system, based on . . . racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law.”³

The United States Supreme Court has stated that “the rule of law implies equality and justice in its application.”⁴ “Central both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection,” Justice Kennedy wrote for the Court in *Romer v. Evans*, “is the principle that government and each of its parts remain open on impartial terms to *all* who seek its assistance.”⁵ I joined Justice Kennedy’s opinion in *Romer*, and I agree that the rule of law requires that laws be evenhandedly applied. As I wrote in my own dissenting opinion in *TXO Production Corp. v. Alliance Resources Corp.* “Influences such as caprice,

* Associate Justice, Retired, Supreme Court of the United States.

1. Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 22 (1997). See also, e.g., PAUL W. KAHN, THE REIGN OF LAW 23 (1997) (contending that in a constitutional democracy, “the rule of law must appear to represent the people: law is authoritative because it is representative”).

2. JOSEPH RAZ, THE AUTHORITY OF LAW 211 (1979).

3. *Id.*

4. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972).

5. 517 U.S. 620, 633 (1996) (emphasis added).

passion, bias, and prejudice are antithetical to the rule of law.”⁶

The purpose of this Foreword, however, is not to wade further into these debates, or to flesh out my own theory on the rule of law. I leave such tasks to the able contributors to this Symposium.

Instead, this Foreword focuses on an aspect of the rule of law that is *not* controversial: the principle that ordinary citizens must know—and be able to understand—the law of the land. In the United States, this bedrock feature of the rule of law is seriously threatened by Americans’ alarming lack of civic knowledge. Too many Americans lack even rudimentary knowledge of their constitutional rights, or of the basic structure of government. This civic illiteracy leaves many Americans without any real capacity to know and understand the law.

The good news is that America’s civic deficit can be remedied because civic illiteracy is a self-inflicted wound. For decades, America’s schools have neglected civic education; today, many young people receive virtually no instruction about America’s system of government. Predictably, these young people grow into adults who know little about the law of the land. The path towards restoring our national civic literacy thus starts in our schools. If policymakers and educators commit to prioritizing a robust, engaging civics curriculum, future citizens will once again have the capacity to understand our law and government—strengthening the rule of the law in our Nation.

All “leading accounts” of the rule of law provide that laws enacted by the government must “provide directives clear and stable enough to be understood in advance.”⁷ This feature of the rule of law is crucial. In a society where citizens do not know the law—or are unable to understand it—the law becomes an instrument that may be wielded arbitrarily by authorities. Individuals can be prosecuted for acts they had no reason to believe were criminal. Businesses can be subjected to indiscriminate, capricious regulations. Litigants can be subjected to unpredictable deadlines and procedural requirements. Such fears of government caprice led John Locke to advocate, as the first feature of an organized government, “an established, settled, *known* law.”⁸

The principle that citizens must know and understand the law is firmly embedded in our Constitution. The Supreme Court has explained that “[l]iving under a rule of law entails various suppositions, one of which is that ‘all persons are entitled to be informed as to what the State commands or forbids.’”⁹ To that end, the Court has repeatedly struck down, under the Due Process Clauses of the Fifth and Fourteenth Amendments, laws and regulations that are too vague.

6. 509 U.S. 443, 475 (1993).

7. Steven J. Horowitz, *Copyright’s Asymmetric Uncertainty*, 79 U. CHI. L. REV. 331, 371 (2012).

8. JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION* 62 (J.W. Gough ed. 1947) (emphasis added).

9. *Papachristou*, 405 U.S. at 162 (quoting *Lanzetta v. New Jersey*, 306 U. S. 451, 453 (1939)) (alterations omitted).

The void-for-vagueness doctrine is often applied to criminal statutes,¹⁰ but the doctrine applies to all laws, including civil enforcement schemes. Most recently, in *FCC v. Fox Television Stations*, the Supreme Court unanimously held that the Federal Communications Commission's indecency policy was unconstitutionally vague.¹¹ The case arose after the Commission determined that Fox Television and ABC—each of whom aired “fleeting expletives and momentary nudity” on network television¹²—had violated the Commission's bar on indecent broadcasting. The problem was that the Commission's *ad hoc* interpretation of its “indecency” policy had little basis in the Commission's written regulations. Compounding matters, the Commission had previously issued policy statements suggesting that “isolated . . . broadcasts of indecent material” would *not* run afoul of its indecency policy.¹³ The Court thus invalidated the Commission's orders against Fox and ABC, chastising the Commission for “fail[ing] to give Fox or ABC fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent.”¹⁴ “A fundamental principle in our legal system,” the Court explained, “is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”¹⁵ Because the broadcasters could not have guessed that the law would bar their conduct, the Court held that “the Commission's standards as applied. . . were vague, and . . . must be set aside.”¹⁶

Fox reflects the principle that legislators and regulators must provide citizens with fair notice of the laws they are expected to follow. If lawmakers fail to do so, judges must invalidate these laws and regulations as unconstitutionally vague. This “fair notice” doctrine—embodied in our Constitutional conception of due process—is also a bedrock feature of the rule of law. Without it, citizens would never know what the law requires, rendering the rule of law a nullity.

Nevertheless, in a country governed by the rule of law, the promulgation of clear rules is not enough. If the appearance of an arbitrary government is to be avoided, citizens must also be able to *understand* the law and its operation. In the United States, understanding the law requires, at minimum, knowledge of the Constitution, the Bill of Rights, and the branches of government.

Take, for example, the need for citizens to understand the judiciary. As Chief Justice John Marshall explained in *Marbury v. Madison*, “It is emphatically the province and duty of the judicial department to say what the law is.”¹⁷ Before Americans can truly comprehend the law, they must

10. *See, e.g.*, *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Papachristou*, 405 U.S. 156.

11. 132 S. Ct. 2307 (2012).

12. *Id.* at 2320.

13. *Id.* at 2313-14.

14. *Id.* at 2320.

15. *Id.* at 2317.

16. *Id.* at 2320.

17. 5 U.S. 137, 17 (1803).

first understand this fundamental responsibility of the judicial system. If they do not, they will have difficulty understanding why the Supreme Court has final say on the constitutionality of high-profile federal statutes. They will have difficulty understanding why courts must invalidate certain regulations under the First Amendment. And they will have difficulty understanding why courts must sometimes vacate criminal convictions—even for defendants convicted of unspeakable crimes—because a defendant’s trial rights were violated. In short, if citizens do not grasp how the judicial system works, a great many court decisions will seem arbitrary, opaque, and unfair. Worse, citizens will be unable to comprehend why courts are empowered to decide certain cases in the first place.

It is therefore troubling that many Americans lack even basic knowledge about the judiciary’s Constitutional authority. In one survey, 40% of Americans stated that the President may simply ignore certain Supreme Court rulings.¹⁸ An additional 27% stated they do not know whether the President can ignore the Court.¹⁹ Thus, over *two-thirds* of Americans fail to comprehend that the judiciary, not the President, maintains final authority “to say what the law is.”²⁰ In response to a different question, Americans demonstrated profound confusion over the legal effect of divided Supreme Court opinions. Fewer than half of Americans understood that a 5-4 decision by the Supreme Court carries the same legal weight as a 9-0 ruling.²¹ Twenty-three percent of Americans thought that a closely divided Supreme Court opinion is referred to Congress.²² An additional 16%—overlooking the obvious clue in the *Supreme* Court’s name—thought a 5-4 decision must be sent back to the lower courts.²³

Such misconceptions are antithetical to the rule of law. Citizens who think the President can unilaterally trump the Supreme Court do not comprehend the law of the land. Equally oblivious are citizens who think that a divided Supreme Court opinion carries less legal weight than a unanimous one. And those who think that a 5-4 Supreme Court opinion must be ratified by Congress or the lower courts do not understand “what the law is.”²⁴

To make matters worse, Americans’ civic illiteracy is not limited to the judiciary. Only one-third of Americans can name all three branches of the federal government—let alone explain how those branches operate.²⁵

18. KATHERINE HALL JAMIESON, ANNEBERG PUB. POLICY CTR., PUBLIC UNDERSTANDING OF AND SUPPORT FOR THE COURTS: 2007 ANNEBERG PUBLIC POLICY CENTER JUDICIAL SURVEY RESULTS (2007), available at http://www.annenbergpublicpolicycenter.org/Downloads/20071017_JudicialSurvey/Judicial_Findings_10-17-2007.pdf.

19. *Id.*

20. *Marbury*, 5 U.S. at 177.

21. CAMPAIGN FOR THE CIVIC MISSION OF SCHOOLS, GUARDIAN OF DEMOCRACY: THE CIVIC MISSION OF SCHOOLS 4 (Jonathan Gould ed., 2011), available at <http://civicmission.s3.amazonaws.com/118/f0/5/171/1/Guardian-of-Democracy-report.pdf>.

22. *Id.*

23. *Id.*

24. *Marbury*, 5 U.S. at 177.

25. Kathleen Hall Jamieson & Michael Hennessy, *Public Understanding of and Support for the Courts: Survey Results*, 95 GEO. L.J. 899, 899 (2007).

Americans also struggle to understand the structure of state government. In one recent survey, over 80% of Americans could not distinguish the role of state judges from the role of state legislators.²⁶ These are grave shortcomings in a society that aspires to the rule of law. Just as citizens must understand that the judiciary is empowered to “say what the law is,” they must also understand how state and federal lawmakers enact laws in the first place. Americans’ failure to grasp the structure of state and federal government torpedoes their ability to understand the law. Because citizens’ ability to “know the law” is a key feature of the rule of law, our collective civic ignorance undermines the rule of law itself.

As unsettling as Americans’ civic deficit may be, it is also unsurprising. For decades, we have failed to teach our young people the basic functions of American government. Indeed, civic education in America is near its nadir. As late as the 1960s, students in American high schools were commonly required to take as many as three courses in civics, democracy, and government.²⁷ Since then, however, the amount of instructional time dedicated to civic education has steadily decreased.²⁸ By the turn of the millennium, thirty states did not require high school students to take *any* course in civics or government.²⁹ Civic education has fared no better in elementary and middle schools. Indeed, 36% of American elementary schools reported reducing or eliminating social studies instruction between the years 2001 and 2007 alone.³⁰ And many middle schools in the United States do not offer courses in history, civics, or government at all.³¹

Predictably, this lapse in civic instruction has coincided with stunningly low student achievement on civics achievement tests. Since 1994, no more than 27% of American fourth, eighth, or twelfth graders have scored at a “proficient” level on national history or civics assessments.³² These tests also reveal gaping holes in students’ civic knowledge. On the most recent

26. JAMIESON, *supra* note 18. This particular confusion, as I have noted in the past, is almost certainly exacerbated by politicization of state judicial elections. See, e.g., Sandra Day O’Connor, *Foreword: Ninth Annual Judicature Society Symposium: Lawyers, Judges, and Money: Evolving Legal Issues Surrounding Spending on Judicial Elections*, 60 *DRAKE L. REV.* 677 (2012).

27. CARNEGIE CORP. OF N.Y. & CTR. FOR INFO. & RESEARCH ON CIVIC LEARNING & ENGAGEMENT, *THE CIVIC MISSION OF SCHOOLS 14* (2003), available at <http://civicyouth.org/PopUps/CivicMissionofSchools.pdf>.

28. *Id.* at 14-20.

29. Charles N. Quigley, *Civic Education: Recent History, Current Status, and the Future*, 62 *ALB. L. REV.* 1425, 1431 (1999).

30. CTR. ON EDUC. POLICY, *CHOICES, CHANGES, AND CHALLENGES: CURRICULUM AND INSTRUCTION IN THE NCLB ERA 7* (rev. 2007), available at <http://www.cep-dc.org/displayDocument.cfm?DocumentID=312>.

31. See, e.g., Sam Dillon, *Schools Cut Back Subjects to Push Reading and Math*, *N.Y. TIMES*, Mar. 26, 2006, at A1.

32. See NAT’L CTR. FOR EDUC. STAT., *THE NATION’S REPORT CARD: U.S. HISTORY 2010, NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS AT GRADES 4, 8, AND 12 2*, available at <http://nces.ed.gov/nationsreportcard/pdf/main2010/2011468.pdf> (history); NAT’L CTR. FOR EDUC. STAT., *THE NATION’S REPORT CARD: CIVICS 2010, NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS AT GRADES 4, 8, AND 12 8, 21, 35* available at <http://nces.ed.gov/nationsreportcard/pdf/main2010/2011466.pdf> (civics).

national assessments, just 9% of fourth graders could provide two reasons Abraham Lincoln was important.³³ Just 7% of eighth graders could name the three branches of government.³⁴ And just 21% of twelfth graders— young adults on the cusp of voting age—could think of even two privileges held by U. S. citizens.³⁵

Given all of this, it is no surprise that America as a whole suffers from profound civic illiteracy. Knowledge of law and government, after all, is not passed down through the gene pool. Such subjects must be taught. Yet schools are failing to impart even basic civic knowledge to our students. Young people who graduate from high school without even a rudimentary understanding of our law and government become the ill-informed voters and citizens of today and tomorrow.

All of this seems rather bleak, but there are glimmers of hope. Even as civic education has been de-emphasized in the United States, most Americans continue to believe in the civic mission of schools. In 1996, a poll asked people's opinions about the most important purpose of schools (besides "providing a basic education.") More than any other goal, respondents listed "prepar[ing] students to be responsible citizens" as "very important."³⁶ In a follow-up poll, 84% of America's teachers agreed that "prepar[ing] students for responsible citizenship was very important," while another 15% called it "quite important."³⁷

Reflecting this consensus, several states and organizations have taken steps to ensure that all students will receive at least a basic civic education. In 2010, Florida enacted a law that requires all students to complete at least one civics education course in the middle grades.³⁸ I am honored that this sensible legislation bears my name: the "Justice Sandra Day O'Connor Civics Education Act."³⁹ Moreover, just this past year, the College Board announced that the reading portion of the SAT exam will now include at least one "text from [America's] Founding Documents or the Great Global Conversation they inspire."⁴⁰ The inclusion of these documents will likely encourage high schools (and test preparation companies) to provide at least minimal instruction regarding the Founding and American government.

33. See Joy Resmovits, *U.S. History Test Scores Stagnate As Education Secretary Arne Duncan Seeks 'Plan B,'* HUFFINGTON POST, July 14, 2011.

34. See Joy Resmovits, *Federal Civics Test Shows Little Progress,* THE HUFFINGTON POST, May 4, 2011.

35. See NAT'L CTR. FOR EDUC. STAT., NAEP QUESTIONS TOOL, TWELFTH GRADE, Box C4, Question 13, available at <http://nces.ed.gov/nationsreportcard/itmrlsx/search.aspx?subject=civics>.

36. Stanley Elam et. al, *The 28th Annual Phi Delta Kappa/Gallup Poll of the Public's Attitudes Toward the Public Schools*, 78 PHI DELTA KAPPAN 41 (1996).

37. Quigley, *supra* note 29, at 1446.

38. H.B. 105, 112th Leg. Sess. (Fla. 2010).

39. *Id.*

40. The College Board, Letter from David Coleman and Cyndie Schmeiser, Apr. 16, 2014, available at <http://www.collegeboard.org/delivering-opportunity/sat/redesign/letter-from-david-coleman>.

Finally, new media solutions are emerging to ensure that civics—when it is taught—is taught effectively. I have personally worked with experts in law, technology, and education to create iCivics.org, a free, online civics curriculum that actively engages students via role-playing games, videos, and social networking. By presenting information in an engaging, interactive manner, iCivics not only teaches children about foundational principles of democracy, but also shows them how to apply that knowledge to real societal challenges. And it is working. Indeed, Baylor University researchers recently found that iCivics significantly improved students' civics test scores in the fourth, fifth and eighth grades.⁴¹ Moreover, during the 2013-14 school year, more than 24 million iCivics games were played, and more than 65,000 teachers across the country created iCivics accounts.

Despite these promising developments, we have a long way to go before we fully revitalize America's commitment to civic education. But I believe that we can get there. My hope for the future springs (fittingly enough) from our Founders. Many Founders—including Jefferson, Madison, and Adams—were early advocates of public schools because they believed that education was the best way of building a cohesive, well-informed citizenry.⁴² The first American public schools were founded with this civic mission in mind, and throughout most of our Nation's history, civic education was prioritized. In fact, forty state constitutions expressly mention the importance of civic education, with thirteen stating that civic literacy is the *primary* purpose of schools.⁴³ Civic education is thus deeply rooted in the history and culture of America. I am confident we are in the early stages of rediscovering these roots.

But we must not be too sanguine. If we fail to revitalize civic education in America, we risk undermining our most cherished values, including the rule of law. To protect against government caprice, we must understand our Constitution, our government, and our laws. As Thomas Jefferson warned, "If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be."⁴⁴ It is imperative that educators and policymakers heed Jefferson's words and restore civic education to its rightful place in American schools. Only then can we be assured that our citizens truly understand our laws and our government. And only then can we be assured that the rule of law will prosper in our Nation.

41. BAYLOR UNIV., CITIZENSHIP GOES DIGITAL: BAYLOR UNIVERSITY RESEARCHERS FIND ONLINE GAMING EFFECTIVE IN TEACHING CIVICS EDUCATION, Jan. 30, 2014, *available at* <http://www.baylor.edu/mediacommunications/news.php?action=story&story=137598>.

42. See Sandra Day O'Connor, *The Rise and Fall of Civic Education in American Schools*, in *FRONTIERS IN SOCIOLOGY OF EDUCATION* 257-58 (Maureen T. Hamilton ed., 2011).

43. John Doyle & Stephen C. Shenkman, *Revitalizing Civic Education: A Case Study*, 80 FLA. BAR J. 31, 31 (2006).

44. Letter from Thomas Jefferson to Charles Yancey (1816), in 11 *WORKS OF THOMAS JEFFERSON* 278-79 (1905).