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## Contemplating the Meaning of "The Rule of Law"

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# FOREWORD

## CONTEMPLATING THE MEANING OF “THE RULE OF LAW” \*

*Rodney A. Smolla* \*\*

This historic issue of the *University of Richmond Law Review* memorializes one of the greatest events in the history of the University of Richmond School of Law: the Law School’s hosting of an international conference exploring the meaning of “The Rule of Law.” The conference included the following participants: Chief Justice John G. Roberts, Jr., of the United States Supreme Court; The Right Honorable Lord Phillips of Worth Matravers, Lord Chief Justice of England and Wales; United States Supreme Court Justice Stephen G. Breyer; Retired United States Supreme Court Justice Sandra Day O’Connor; Judge J. Harvie Wilkinson, III, former Chief Judge of the United States Court of Appeals for the Fourth Circuit; Judge Carl E. Stewart of the United States Court of Appeals for the Fifth Circuit; Chief Judge Deanell Tacha of the United States Court of Appeals for the Tenth Circuit; The Right Honorable Lady Justice Mary Arden of the Court of Appeal of England and Wales; The Right Honorable Lord Jonathan Mance of the House of Lords Appellate Committee; The Right Honorable Bernard Rix of the Court of Appeal of England and

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Wales; Justice Randy Holland of the Supreme Court of Delaware; Chief Justice Ruth McGregor of the Supreme Court of Arizona; Judge James R. Spencer of the United States District Court for the Eastern District of Virginia; Professor Grant Ackerman of the Columbia University Graduate School of Business; The Honorable Rory Brady, SC, Attorney General of Ireland; Professor Erwin Chemerinsky of the Duke University School of Law; Elaine Jones, former President of the NAACP Legal Defense Fund; Richard Naimark, Senior Vice President of the American Arbitration Association; Jan Paulsson of the Freshfields Bruckhaus Deringer firm in Paris; Andrew Prozes, Chief Executive Officer of LexisNexis Group; Ambassador Robert Seiple, President of the Council for America's First Freedom; The Honorable Joe Shirley, Jr., President of the Navajo Nation; William Slate, II, President of the American Arbitration Association; Dean Kenneth Starr of the Pepperdine University School of Law; Barry Tempelton, a prominent Canadian attorney and internationalist; Dean Robert K. Walsh of the Wake Forest University School of Law; and Xu Wenli, a founder of the Chinese Democracy Party.

The phrase "The Rule of Law," which was the title and organizing theme of the extraordinary conference, means many different things to different people throughout the world. Throughout the conference, we asked the many distinguished panelists and participants, again and again, what the phrase does and should mean. As one might expect, there were identified areas of common ground, and identified tensions and contradictions.

In the year 1946, President Harry Truman introduced Sir Winston Churchill, to deliver an address at Westminster—not Westminster in London, but tiny Westminster College in Fulton, Missouri. Churchill delivered a speech that came to be known as the Sinews of Peace address. Please let me share with you a few of Churchill's words:

[W]e must never cease to proclaim in fearless tones the great principles of freedom and the rights of man which are the joint inheritance of the English-speaking world and which through Magna Carta, the Bill of Rights, the Habeas Corpus, trial by jury, and the English common law find their most famous expression in the American Declaration of Independence.

All this means that the people of any country have the right, and should have the power by constitutional action, by free unfettered elections, with secret ballot, to choose or change the character or

form of government under which they dwell; that freedom of speech and thought should reign; that courts of justice, independent of the executive, unbiased by any party, should administer laws which have received the broad assent of large majorities or are consecrated by time and custom. Here are the title deeds of freedom which should lie in every cottage home. Here is the message of the British and American peoples to mankind. Let us preach what we practice—let us practice—what we preach.<sup>1</sup>

During the course of the conference, many questions were deeply probed. The following are some of the questions I found the most intriguing:

- Are there any important differences between American and British conceptions of the rule of law? If so, what are they?
- Of what significance, if any, to our understanding of the rule of law are such factors as our differences regarding separation of powers and shared powers; our differences regarding judicial review and the role of constitutional courts; or, our differences regarding written and unwritten constitutions?
- To what extent are our understandings of the rule of law likely to be influenced by our conceptions of the appropriate role of judges in society, and our conceptions of how one engages in constitutional or statutory interpretation of national and international documents?
- In the United States, for example, how are conceptions of the rule of law linked or not linked to debates over different approaches to constitutional interpretation, such as "textualism," or "original understanding," or a commitment to "active liberty?"
- When we think of the rule of law, should we think primarily in terms of "structure" and "process," such as whether there are independent courts, transparent public institutions, and democratic participation? Or should we think primarily in terms of substantive legal content, such as individual rights of freedom of speech or religion, criminal and civil due process, or enforcement of contract and property rights?

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1. Sir Winston Churchill, Address at Westminster College: The Sinews of Peace (Mar. 5, 1946).

- To what extent should the notion of the rule of law embody notions of “substantive” entitlements, such as food, shelter, education, health care, or employment?
- How closely linked are conceptions of the rule of law to traditions of national sovereignty?
- How is the rule of law impacted by national participation in international economic, legal, political, or military alliances? How, for example, have the European Union or the United Nations influenced our understanding of the rule of law?
- To what extent is it important or legitimate for constitutional courts in one nation to take into account precedents and developments in other nations when engaging in constitutional interpretation?
- To what extent should we think of conceptions of the rule of law as universal, applying with essentially the same force and content in all societies?
- Alternatively, to what extent should we instead think of the rule of law as almost entirely nation-specific, with different content and levels of importance for different societies?
- If we shift our focus to the world stage, and look at such issues as the struggles of emergent nations to evolve into stable societies with a measure of democratic participation and respect for human rights; the fight against terrorism; the phenomenon of governments dominated by sectarian religious traditions intolerant of religious pluralism; and the many seemingly intractable economic, environmental, health, and security issues that confront the world—how do those of us that are part of the legal communities in nations such as the United Kingdom and the United States, nations blessed with strong traditions of respect for the rule of law, assist those in other nations in instilling respect for the rule of law, while at the same time remaining respectful of the many cultural, historical, and political differences that inevitably influence the shape of legal systems in any society?
- How should our conceptions of the rule of law incorporate questions regarding the role of religion in society? One of the most daunting and intractable challenges facing societies throughout the world is the enterprise of nation-building in

nations comprised of diverse religious populations. In the United States this problem has been addressed through constitutional norms that emphasize religious freedom—through the Free Exercise Clause, and separation of church and state, through the Establishment Clause. Similarly, the United States has adopted a policy that does not permit the creation of political sub-entities drawn on religious or ethnic grounds. Thus, Utah, while consisting of an overwhelmingly Mormon population, is not permitted to be, in any official sense, a "Mormon State." Nor do we normally permit the reservation of seats in American legislative bodies for representatives of particular religious or ethnic groups. These American constitutional traditions stand in contrast to constitutional traditions in many other democracies. England, of course, has an established church. Many emerging democracies seek to achieve stability and peace through federal arrangements creating constituent states defined in religious or ethnic terms.

- How do we square our understandings of the notion of the rule of law with actual historic treatment of indigenous peoples, such as the first Americans, the American Indians? Any exploration of the rule of law that is part of the commemoration of the settlement of Jamestown would be hollow and incomplete without a thoughtful and candid examination of conceptions of the rule of law as it impacts indigenous peoples. The history of American law and policy regarding American Indians has been in many respects tragic, often plagued by hypocrisy and inconsistency, in which the rule of law had little, if any genuine meaning.
- What role should alternative dispute resolution, such as arbitration and mediation, play in our modern conceptions of the rule of law world-wide? International commercial arbitration and international commercial mediation are growing as mechanisms for fostering stable economic and property relationships in the global marketplace. What role do cultural values and traditions play in shaping these arbitral and mediation mechanisms?

For my own part, on the weekend before the conference I was asked to provide my own reflections, for the *Richmond Times-Dispatch*, about the meaning of the rule of law.<sup>2</sup> As I stated in that essay, it is a heavy phrase—one that tends to conjure notions of authority, crime and punishment, or wars against terror and anarchy. Yet we might do better to think of the rule of law in a manner both lighter and more enlightened—not as the great enforcer, but the great emancipator. Consider this possible surrogate for the famous scriptural injunction: “Ye shall know the law, and the law shall make you free.”

Life is a constant struggle between two natural but opposing instincts: the impulse of the free spirit and the yearning for order. Our free spirit beckons us to creativity, invention, enterprise, and movement. Our yearning for order calms us to seek predictability, stability, and security. Striking the right balance is a key to the good life, for individuals and for societies.

The most successful societies in the New World and the Old World have been those that have managed to achieve a healthy balance between freedom and order in the three great marketplaces of human endeavor: the political marketplace, the economic marketplace, and the marketplace of ideas. Our efforts to find this “healthy balance” are best guided by one overarching goal—to achieve the maximum freedom possible, consistent with our basic needs for stability and security.

Stability and order are necessary; without law there is no security for life, liberty, or property. Yet too much concern for stability and order tempts us to over-regulate, smothering the spirit with too much law. Over-regulation of economic markets acts as a drag on investment and entrepreneurial enterprise; over-regulation of political systems interferes with democracy and discourages civic participation; over-regulation of the marketplace of ideas stifles creativity and discovery in the arts and sciences. Societies that are able to approach an optimal balance in all three marketplaces will fare better, in the long haul of history, than societies that achieve such balance in only two, one, or none.

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2. Rod Smolla, *Cornerstone Principles: Rule of Law Helps Maximize Freedom, Stability*, RICH. TIMES-DISPATCH, Apr. 8, 2007, at E3.

Applying this matrix, how might we grade ourselves for the last 400 years? It is first helpful to contemplate who comprises this "we." "We" begins with the first Americans, the Indians. The Indians, particularly those descendants of the Virginia Indians that first encountered Europeans at Jamestown, may be excused if they find our commitment to the rule of law less than perfect. By the time our Indian law policies reached some measure of rationality and fairness in recent years, the Virginia tribes had been decimated. Four hundred years after Jamestown, the Virginia tribes now seek a fair measure of recompense in their ongoing and righteous struggle for federal tribal recognition.

The "we" next includes all of the many waves of migrations from peoples and cultures to this nation worldwide—migrations that continue apace. The first of those migrations, of course, was that which we mark in commemorating the settlement of Jamestown. That migration, from England, occupies a special place not only because it was first in time, but because of the unique imprint of England on the history of the United States. For all of our linkages and differences, America and England are indeed specially joined, and it is this shared heritage in law that joins us most profoundly.

This linkage has been marked with both travesties and triumphs. The rule of law failed to stop the Civil War, and after the war, failed to achieve genuine equality for African Americans during the regime of "separate but equal." Yet the rule of law provided a framework for the freedom of speech that gave shelter to the civil rights movement, and a constitutional structure that allowed segregation to be ultimately repudiated.

And so it is that in our shared Anglo-American legal tradition, we have much of which to be proud. Our political, economic, and expressive marketplaces remain robustly free. We are blessed with the shared heritage of Magna Carta. We are bound by the 'blood, toil, tears, and sweat' of a great generation's shared struggle against titanic tyranny. We are united in our common hope for a future in which the rule of law reigns throughout the globe.

The 400th anniversary of the settlement of Jamestown invites us to take pause and take stock—not so much in celebration as in contemplation. The rule of law must mean independent courts, transparent public institutions, respect for elementary human



rights, and protection of democratic participation. Yet as we embrace the cornerstone principles of due process, equality, religious liberty, freedom of conscience and expression, protection of property, and democracy, we must also reject arrogance, and remain respectful of the many cultural, historical, and political differences that inevitably influence the shape of legal systems in any just society.

Let me end this essay by thanking the hundreds of participants and many co-sponsors of The Rule of Law Conference. The co-sponsors included LexisNexis, the American Inns of Court, the English Inns of Court, the American Arbitration Association, the Commercial Bar Association, the John Marshall Foundation, the John Marshall American Inn of Court, the Lewis F. Powell, Jr. American Inn of Court, the National Center for State Courts, and the Virginia Bar Association Foundation.

Three people who were instrumental in organizing the conference deserve special recognition: Justice Donald Lemons of the Supreme Court of Virginia, was the person who originally conceived the conference, and his tireless leadership and energy were vital to every aspect of the conference's success; and two of Richmond School of Law's Associate Deans, Associate Dean Kristine Henderson and Associate Dean Roberta Sachs, worked for over a year with exceptional dedication and creativity to produce the conference, and all involved owe them a deep debt of gratitude. The conference was, for me, one of the most fulfilling experiences of my professional life, and I am proud of everyone associated with the University of Richmond who helped make it possible. I hope that the questions we asked, and the many thoughtful and engaging answers and reflections upon them, are not the end, but the beginning of an ongoing conversation and commitment to enshrining the rule of law, in all of its manifold possibility and potential, for our future posterity.