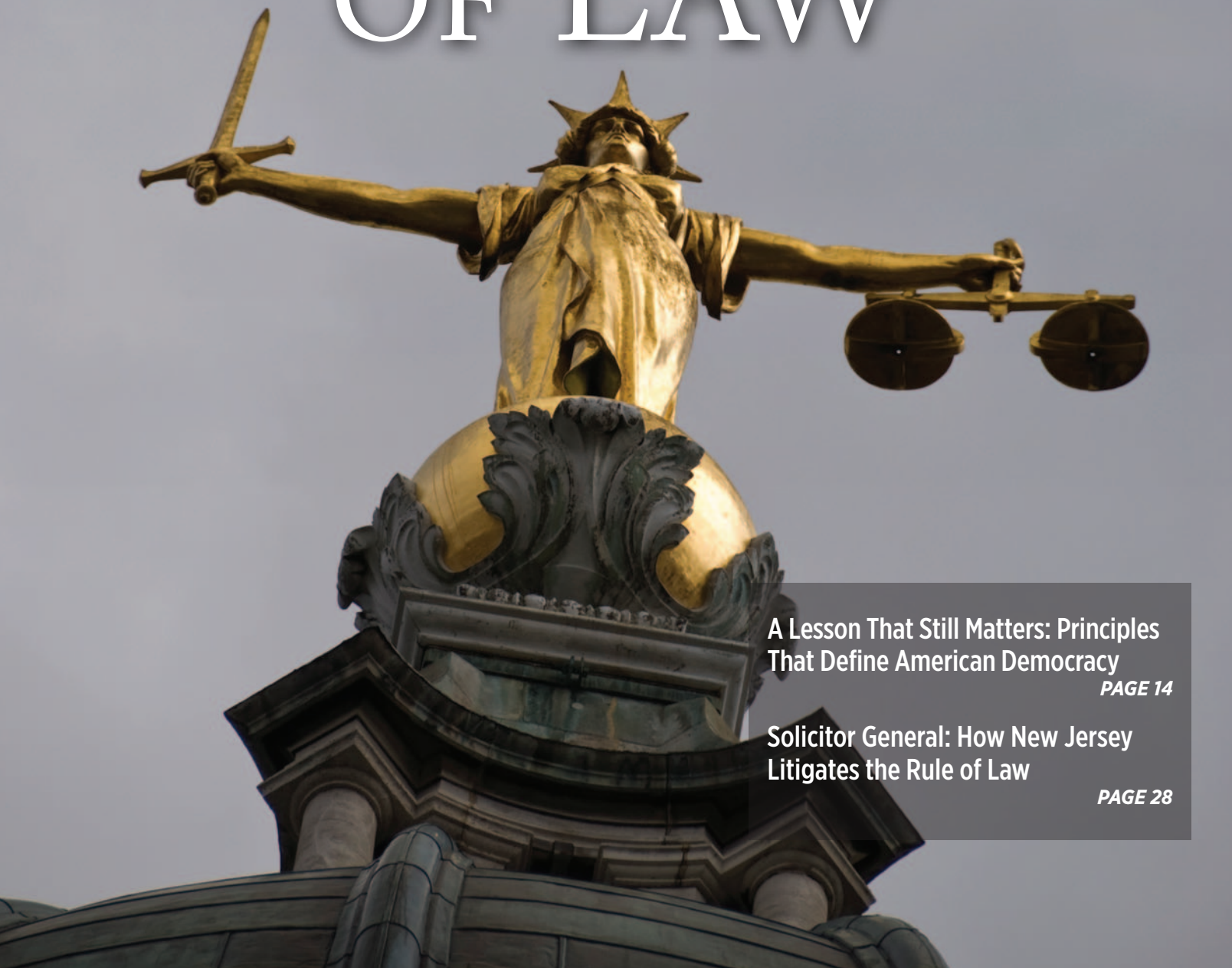
NEW JERSEY LAWYER

April 2026

No. 359

THE RULE OF LAW



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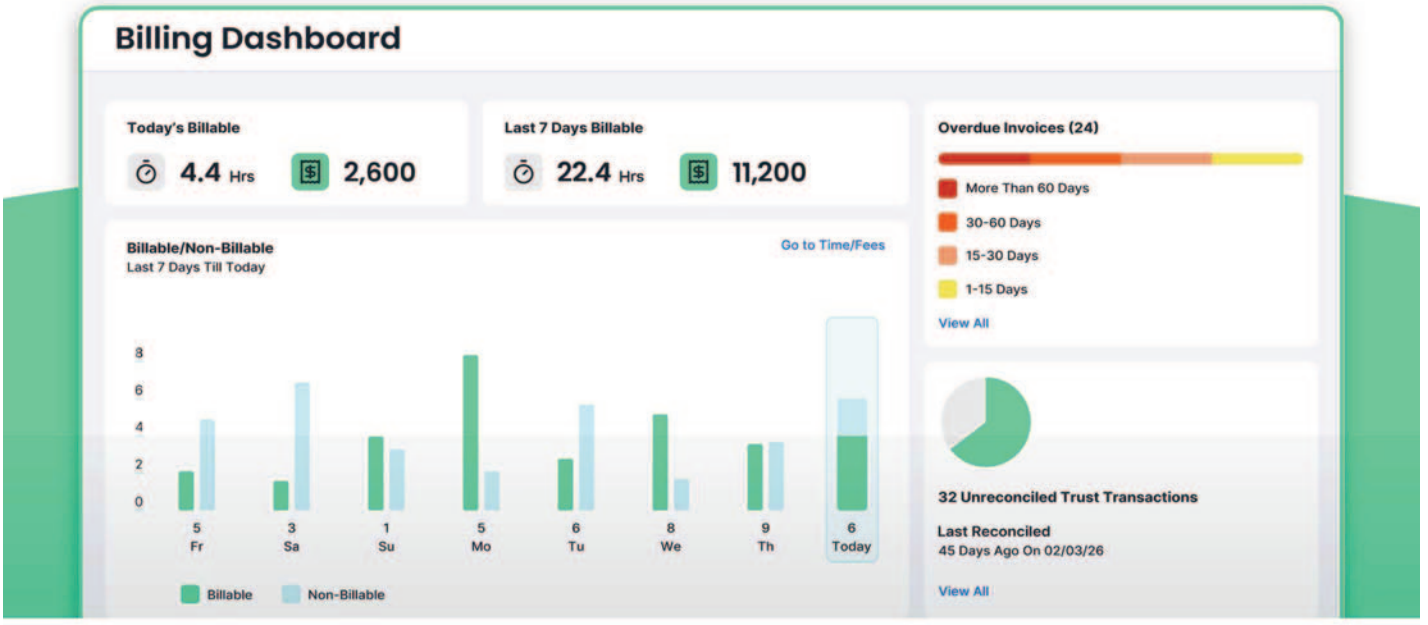

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CHRISTINE A. AMALFE

One Year, One Mission

Time seems to accelerate the longer you practice law. The days can be long, sometimes stressful and often rewarding, but the years tend to pass effortlessly. Every day brings another opportunity to land a client, win a motion, stand before a jury and help give a client their day in court. Amid life's chaos, it's never a bad time to reflect on what you have achieved. If we don't look backward, we can never truly look forward.

Lawyers and bar associations play a vital role in society. We possess the skills to advocate for what is right, engage in civil discourse and defend our Constitution and the rule of law.

I spoke those words nearly a year ago when I accepted the honor and privilege of serving as the New Jersey State Bar Association's 127th president. Like many things in life, the year passed in a blink. As I reflect on my time as president, and my travels throughout this great state, nothing has shaken my conviction in the importance of the words I spoke almost a year ago. Civil discourse is alive and well in our state. Our members wake up every day and remember their oath to the Constitution and the rule of law. This bar association is serving the needs of the profession with education, thought leadership and resources.

From Salem to Sussex counties, I listened to the issues facing our profession and the challenges of our members. From Hudson to Hunterdon, I learned what solo and small firms face on a day-to-day basis. I listened to managing partners of the state's largest law firms and I engaged with many, many young lawyers to hear their unique perspectives. I spent time with sections and committees and took the bar association on the road to law firms and law schools. I learned a lot. But most importantly, the bar association learned too. Internally, we engaged in a full-year strategic planning initiative to reaffirm our commitment to members, focusing on the five strategic pillars which sustain our organization: advocacy, continuing legal education, finance, membership and sections and committees. Our bar association is now better able to set priorities that truly matter to all of our members. In short, the NJSBA has never been better positioned to address those most pressing issues facing lawyers in this state and our profession in general.

Each day, I was inspired by the volunteers who dedicate their time outside of work to strengthen the profession. They devote countless hours drafting Supreme Court briefs, advocating in consequential cases, contributing to legislation that enhances our legal system and sharing their expertise through educational panels. They mentor the next generation of lawyers, hoping to leave the profession stronger than they found it. They represent the best of us, and I am proud to have stood alongside them. Leading this exceptional community has been one of the greatest honors of my professional life. We have much to celebrate.

We have made meaningful progress this year on a number of issues. First, our persistent advocacy in reducing statewide judicial vacancies, now at 11—the lowest level in several years—was a meaningful step toward restoring stability to New Jersey's courts and access to justice for our clients. Our Judicial and Prosecutorial Appointments Committee vetted several candidates last year, one of the busiest years for that hard-working committee in a very long time. In addition, I am pleased to report that in the spirit of collaboration with the governor's office, the Association renewed the Judicial Compact with Gov. Mikie Sherrill, continuing our longstanding, nonpartisan role in reviewing candidates for judgeships and county prosecutor positions. The compact ensures that prospective nominees undergo a comprehensive, inclusive vetting process drawing on diverse perspectives from across New Jersey's legal community. We are proud to have provided governors of both parties with informed, nonpartisan recommendations for nearly 60 years. This continued partnership will help sustain New Jersey's national reputation for judicial excellence, a standard the NJSBA is proud to uphold.

The NJSBA also remained committed to protecting the financial interests of attorneys, particularly as law firms face

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New Jersey Lawyer (ISSN-0195-0983) is published six times per year. Permit number 380-680. • Subscription is included in dues to members of the New Jersey State Bar Association ($10.50); those ineligible for NJSBA membership may subscribe at $60 per year. There is a charge of $2.50 per copy for providing copies of individual articles • Published by the New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520. • Periodicals postage paid at New Brunswick, New Jersey 08901 and at additional mailing offices. POSTMASTER: Send address changes to New Jersey Lawyer, New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520. • Printed in U.S.A. • Official Headquarters: New Jersey Lawyer, New Jersey State Bar Association, New Jersey Law Center, One Constitution Square, New Brunswick, New Jersey 08901-1520. 732-249-5000 • Advertising Display 732-565-7560.

FROM THE SPECIAL EDITORS

The Rule of Law
Principle, Practice, and Preservation

By Susan Nardone and Christina Silva

In this issue of *New Jersey Lawyer*, we explore a concept so foundational that it can seem almost self-evident: the rule of law. Yet as the distinguished contributors to this edition demonstrate, the rule of law is neither abstract nor automatic. It is a living principle—defined by constitutional structure, sustained by institutional discipline, and dependent upon the daily choices of lawyers, judges, legislators, and public officials.

In *A Lesson That Still Matters: Principles That Define American Democracy*, Judge John D'Amico (Ret.) situates the rule of law within the philosophical and historical foundations of our constitutional system. Beginning with the basic principles of American democracy—equality, natural rights, due process, representative government, and the people's authority to amend their constitution—he traces their roots in the Declaration of Independence, the Constitution, and centuries of political thought. Judge D'Amico explores how justice serves as the harmonizing principle between liberty and equality, and reminds us that the rule of law is inseparable from the moral commitments that support our democracy: fairness,

CHRISTINA SILVA *is a principal in the Berkeley Heights office of Jackson Lewis, P.C., where she concentrates her practice on conducting workplace investigations, workplace training, and providing advice and counsel on employment and employee relations matters, including managerial best practices, organizational compliance, and risk management strategies. Christina provides interactive training programs for managers, employees, and human resource professionals on various topics, including best practices for conducting internal investigations, performance management, leave of absence and reasonable accommodations, and prevention of discrimination, harassment, and retaliation. She is a member of the Executive Committee of the Academy of New Jersey Management Attorneys, a member of the editorial boards of* New Jersey Lawyer *and the* New Jersey Labor and Employment Law Quarterly, *and a member of the Association of Workplace Investigators.*

SUSAN L. NARDONE *is a partner at FBT Gibbons in Newark. She offers guidance to regional and national employers on how to proactively ensure compliance with applicable employment laws and obligations. She provides strategic and preventive advice and counseling for employers, including employee hiring, discipline and termination, and accommodation and leave. Susan conducts employee training and workplace investigations, as well as cultural assessments to help companies gain an understanding of the qualities that define their workplace cultures.*

accountability, and an independent judiciary capable of safeguarding rights.

Justice Helen E. Hoens (Ret.) delves into the philosophical and institutional dimensions of the subject in *Charting Your Course: Searching for Justice Within the Rule of Law*. She asks foundational questions: What is justice? What is the rule of law? A jurist's obligation, she explains, is to search for fairness within the constraints of law and precedent. By identifying four institutional constraints—legal framework, precedent, justiciability, and collegial decision-making—Justice Hoens illustrates how the rule of law disciplines even the most well-intentioned decision-maker. At the same time, she calls on lawyers to pursue justice not only in their professional roles but in their civic lives, reminding us that the arc toward justice bends through deliberate action.

Debra Tuberion and Christina Vassiliou Harvey address an essential dimension of the rule of law in *New Jersey Legislature Obligated to Abide by its Own Statutes, Rules When Enacting Law.* Their article focuses on procedural integrity in the legislative process. Constitutional requirements—such as multiple readings of bills—and statutory mandates, like public notice under the Open Public Meetings Act, are not technical formalities. They exist to promote transparency, deliberation, and public participation. The authors also examine the statutory mechanism that permits citizens to challenge legislation that was not enacted in accordance with constitutional or procedural requirements. Their analysis reinforces that the Legislature must adhere to the legal framework it has established consistent with the rule of law.

Jeremy Feigenbaum, New Jersey's Solicitor General, addresses these themes in *How New Jersey Litigates the Law*. Writing from the perspective of representing the state in complex constitutional litigation, he reminds us that the rule of law rests on two essential points: no one is above the law, and everyone is entitled to its protection. He describes the Solicitor General's role in defending duly enacted statutes and executive actions, while also challenging federal action when it exceeds constitutional bounds. His central insight underscores that all exercises of power—state or federal—remain subject to constitutional limits and judicial review. The rule of law, he observes, endures because lawyers and public servants choose, repeatedly, to uphold it.

Elizabeth Matto's article, *Keeping the Republic: Teaching Citizenship Starts in the Classroom*, explores the vital role of civic education in sustaining American democracy. Drawing on research and best practices, the article emphasizes that civic education equips future citizens to uphold democratic norms and the rule of law, teaching not only civic knowledge but also the skills and dispositions necessary for meaningful participation. Matto highlights experiential learning and calls on legal practitioners to play an active role in preparing the next generation to engage in and preserve the nation's constitutional system.

Robert Cloutier's article, *Equal Access and the Rule of Law: Individual Rights and Institutional Authority in Public Schools*, examines how the Equal Access Act and recent Supreme Court decisions shape the balance between student expression and school authority. Emphasizing neutrality, voluntary participation, and freedom from coercion, the article explores how public schools must balance student expression with institutional neutrality and constitutional limits while accommodating diverse viewpoints and preserving the rule of law.

In *NJ Offers New Model for International Dispute Resolution,* Laura Kaster and Robert Margulies examine how rules-based dispute resolution supports global commerce by promoting fairness, predictability, and enforceability across borders. They trace the evolution of international arbitration and highlight New Jersey's innovative law creating a hybrid arbitration–mediation framework for resolving cross-border commercial disputes, expanding access to justice while preserving the enforceability essential to the rule of law.

Laura Kaster and Robert Bartkus' article, *Why Arbitration Depends on Legal Independence*, explores the interdependent relationship between arbitration and the rule of law. Tracing arbitration's historical development and its role in modern dispute resolution, the authors examine how its effectiveness depends on neutrality, independence, and decision-makers who are free from political pressure or retaliation. They also consider how pressures on lawyers, arbitrators, and the legal system may affect arbitration's integrity, emphasizing the need to preserve the conditions that allow both arbitration and the rule of law to function effectively.

Alan N. Walter's article, *Justice in the Shadow of Power*, examines the dangers posed when prosecutorial authority is perceived as a political tool rather than an impartial mechanism of law enforcement. He argues that politicized prosecution threatens impartial justice and erodes public trust in legal institutions. Drawing on historical and contemporary examples, he explores how selective or retaliatory prosecutions can influence perceptions of fairness. He emphasizes that the rule of law depends not only on formal structures, but on adherence to professional norms, institutional independence, and the courage of those entrusted with enforcing the law.

Lawrence Lustberg and Michael Noveck's article, *The Shadow Docket and the Rule of Law*, examines the Supreme Court's increasing reliance on emergency orders to decide significant legal issues without full briefing or explanation. The authors explore how this practice raises concerns about transparency, consistency, and the development of

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PRACTICE TIPS

ETHICS & PROFESSIONAL RESPONSIBILITY

Inappropriate Behavior in Your Law Firm Can Result in Discipline

By Bonnie Frost
Einhorn, Barbarito, Frost, Botwinick, Nunn & Musmanno, PC

Most times when one thinks about whether a lawyer has committed an ethical lapse, one thinks about their relationship with clients. But a lawyer can be disciplined by the Supreme Court because of their relationship with their law firm.

Several recent cases demonstrate that there are two kinds of behavior relating to a lawyer's relationship with a law firm which can result in sanctions—misappropriating law firm funds and performing outside work without the law firm's knowledge.

Misappropriating Law Firm Funds

In re Steven Seigel stands for the proposition that if one steals from one's partners, they will be disbarred.[1] Siegel was a partner in a large law firm who, over a period of three years, improperly charged $25,000 in false expense requests for his personal use on 34 separate occasions. He paid his personal tennis club fees, purchased theater tickets and sports memorabilia, paid for his home's landscaping and for his mother-in-law's mortgage. He also disbursed to himself $53,450 that belonged to the law firm claiming it was a gift from a client without seeking approval to accept the gift. In a 6–3 decision, the Disciplinary Review Board recommended a three-year suspension with the dissent recommending disbarment. The Supreme Court ruled that Siegel's repeated deception compelled disbarment because a lawyer who "for personal gain willfully defrauds a client and one who for the same untoward purpose defrauds his or her partners"[2] must be disbarred. In the Board's decision, it stated that a partnership relationship requires "reliance, confidence and trust," qualities Siegel did not demonstrate.[3] The inescapable conclusion is that the misappropriation of funds from one's law firm' s partners is as wrong as misappropriating a client's money.

Misappropriating law firm funds can result in disbarment for associates as well as members of a law partnership.

In the Matter of Daniel A. Frischberg, Frischberg was an associate who had been permitted to use the law firm's credit card for legitimate law firm expenses.[4] Frischberg charged $43,691 in total

on the law firm's credit card in Amazon purchases which he represented to the bookkeeper were for law firm related expenses. Contrary to that representation, he purchased "game coin packs" with Amazon using the firm's credit card. During the ethics proceedings, Frischberg stipulated that $16,755 of the $43,691 was not for law firm purchases. Although he was not charged, he admitted he committed a third-degree crime of fraudulent use of a credit card in violation of N.J.S.A. 2C-21-6(h). Frischberg promised to repay the law firm the $16,775 he admitted he took, but he failed to do so.

Frischberg was charged with violating *RPC* 8.4 (b) (committing a criminal act which reflects adversely on a lawyer's honesty, truthfulness or fitness as a lawyer) and (c) (engaging in conduct involving dishonesty, fraud deceit or misrepresentation). It bears noting that he was also charged with failing to cooperate with disciplinary authorities under *RPC* 8.1(b) because he refused to provide the Office of Attorney Ethics (OAE) with his Amazon credentials without which the OAE could not corroborate his self-created spread sheet which he asserted represented his impermissible charges of $43,691.

Of note, Frischberg mounted defenses which did not persuade the Disciplinary Review Board to reduce its recommended sanction. He argued that he suffered from a mental illness including a gambling habit for which for he had sought treatment both of which excused his ability to act ethically. The Board stated that even though "compulsive behavior may lead to misconduct, [we] will not allow the public to go unprotected," citing *In re Bock*, 128 N.J. 270, 273 (1992).[5]

In the final analysis, Frischberg's misappropriation of law firm funds for his personal use warranted disbarment.

Outside Work

Taking on outside work for oneself might seem, on the surface, like a benign thing to do but cases demonstrate that lawyers who do so without the knowledge of their firm can be treated by the ethics system as if they misappropriated law firm funds.

William Kelly[6] was a non-equity partner in a large firm who performed legal services "outside" the firm without the firm's knowledge. He did not open his "outside work" files at the firm, bypassed the firm's conflict procedures, and generated invoices on the firm's letterhead. He misrepresented to the court in a verified answer to a complaint that the law firm represented the client and that he was acting under its auspices. He issued several discovery demands under the law firm's name and wrote to government entities on the firm's letterhead. When clients made out checks to the law firm, he returned them and asked clients to pay him directly. He communicated with his "outside" clients by phone or via his personal email to hide his "outside" work and kept $11,415 from his "outside work" for his personal use.

To mitigate his behavior, Kelly argued that he was compelled to pursue "outside work" to meet his support obligations from his divorce because the law firm had reduced his salary in 2019 and 2020. Kelly did not have a written employment agreement with the firm, nor did the firm have a policy about "outside work" without firm authorization. The firm did not seek to recover the money, and he had an unblemished record since his admission in 2005. Kelly had a lapse in sobriety in 2021 and since that time had been living in a sober house, regularly attending AA meetings. The Office of Attorney Ethics asked for disbarment. The Disciplinary Review Board recommended a three-year suspension based on compelling mitigation, but the Supreme Court disagreed and imposed a two-year suspension.

In the Matter of Stephen Lankenau,[7] the lawyer's behavior was different than that of Kelly. Lankenau was an associate who had a fee sharing agreement with Lundy Law. The law firm only took personal injury cases and turned away cases which were nearing the statute of limitations. Those cases which the law firm turned away were the ones which Lankenau worked on as "outside work" as Lundy Law "would not have accepted them."[8] He filed litigation under his own name using his Delaware Attorney ID number and kept fees of $6,444.45 from those cases for himself without the knowledge of the law firm. The Disciplinary Review Board did not minimize the seriousness of Lankenau's misuse of firm funds as an ethics violation but determined his behavior did not rise to the level of disbarment within the meaning of *In re Wilson.*[9] It stated that a "New Jersey lawyer is subject to mandatory disbarment in a 'knowing misappropriation' case where the misappropriations violated a fiduciary duty to a client, to an escrow beneficiary or to a fellow law partner."[10] Here, Lankenau did not take the money of a client nor did he have a fiduciary duty to any partners. His behavior in mitigation was significant, however. He admitted his misconduct to the senior partner of Lundy Law. He reimbursed the law firm $900 for filing fees he charged to the law firm's court account, and he repaid the law firm, in full, the sum of $6,444.45 without the law firm asking to be repaid. In analyzing the discipline to be imposed, the Disciplinary Review Board stated that while his behavior was a serious infraction of the Rules of Professional Conduct, his behavior did not rise to the level which warranted disbarment for life as recommended by the dissent. The Supreme Court imposed a two-year suspension.

Endnotes

1. *In the Matter of Steven G. Siegel*, 133 N.J. 162, 168 (1993)
2. *Attorney Grievance Commission of Maryland v. Nothstein*, 300 Md. 667 (1984)
3. *Siegel*, 133 N.J. at 167
4. *In the Matter of Daniel A. Frischberg*, DRB 24-064 (January 6,2025).
5. *In re Bock*, 128 N.J. 270, 273 (1992)
6. *In re William Kelly*, DRB 24-140 (February 11. 2025).
7. *In the Matter of Steven Lankenau*, DRB 16-442 (June 19, 2008)
8. *Id.*
9. *In re Wilson*, 81 N.J. 451 161 (1979)
10. *Lankenau* at DRB 16-442 p.27

WRITER'S CORNER

The Art of the Pivot: Transitions That Work

By Veronica J. Finkelstein
Litigative Consultant, U.S. Attorney's Office, Eastern District of Pennsylvania

Legal writing is often criticized for its formulaic nature and its tendency toward terseness. In many law school classrooms, students are taught to favor the active voice, to strip away archaic legalese, and to organize their arguments with mechanical precision. These are valuable lessons. After all, clarity, conciseness, and logical structure are essential tools for any legal communicator. Yet, in the pursuit of technical correctness, legal writing can begin to resemble a construction project: a series of rigidly stacked argument blocks, each carefully aligned but devoid of connection.

Enter one of the unsung heroes of legal writing—transitions. Transitional words and phrases are the connective tissue of legal argument. They guide the reader from one idea to the next, signaling shifts in tone, emphasis, or logic. When used poorly, they create confusion. When used well, they create momentum. Yet they are rarely discussed and even less often given sufficient attention. Legal writers rely on a handful of tired transitions which are repeated ad nauseum. Words and phrases like "however," "moreover," "in addition" are used over and over again until they lose efficacy. This is a missed opportunity. A good transition does more than mark a change; it prepares the reader for what's coming and reinforces what came before.

Transitions as Rhetorical Signals

Think of transitions as road signs. A stop sign doesn't just tell you to stop; it tells you more than that. It is a warning of change to come, a sign that something important is about to happen. A yield sign doesn't just suggest caution. A yield sign signals that someone else has the right of way. Transitional phrases serve the same function in legal writing. They tell the reader how to interpret the next sentence, paragraph, or section.

Consider the difference between these two transitions used in a hypothetical brief:

"However, the defendant's argument fails."
"But the defendant's argument collapses under scrutiny."

The first transition, using "however," is serviceable. It signals an argument to the contrary. In this sense, it gets the job done. What it doesn't do is persuade. The second transition has persuasive heft. It doesn't just mark contrast. This transition adds tone, judgment, and rhetorical force. The best transitions do all three. So how do you craft transitions as effective as the latter example? By avoiding the firehose and building a transition toolbox.

Avoiding the Firehose

One common mistake in legal writing is the "firehose" approach to transitions. Writers dump a series of arguments on the page without guiding the reader through them. The result is disorientation. The reader may understand each individual point but struggle to see how they connect.

To avoid this, think of transitions as bridges. Each bridge should be sturdy enough to carry the reader from one idea to the next. If you're arguing that a statute doesn't apply, then pivoting to why the legislative history supports your interpretation, you need a transition that does more than say "next." You need a phrase that explains the relationship between the two ideas. A better transition would be the following: "Although the statutory text initially appears ambiguous, the legislative history provides

clarity." This transition doesn't just move the reader forward; it also reframes the ambiguity as an invitation to explore context.

Building a Transitional Toolbox

Developing attorneys should build a toolbox of good transitions in common categories. Then, in the writing and editing process, those transitions can be employed where a specific tool is required.

Here are a few categories of transition that are frequently used in legal writing:

- To show contrast, consider "Yet," "Still," "Despite this," and "Nevertheless."
- To show cause and effect, consider "As a result," "Therefore," and "Consequently."
- To clarify, consider "In other words," "Put differently," "and To clarify."
- To emphasize, consider "Indeed," "Notably," and "Importantly."
- To sequence, consider "First," "Next," "Finally," and "Subsequently."

But don't stop at the word level. Transitional sentences and even transitional paragraphs can be powerful. A well-crafted paragraph that summarizes the previous section and previews the next can orient the reader and reinforce your argument.

One effective strategy for developing better use of transitions is to rewrite a paragraph or section of your writing using three different transitional strategies. This forces you to think about structure, emphasis, and rhetorical flow. It also helps you develop a sense of voice and a comfort level with less common transitions.

The Final Turn

Transitions are not filler. They are strategy. They shape how the reader experiences your argument. They signal confidence, con-

trol, and clarity. In a profession where persuasion is paramount, the ability to pivot well is not optional; it's essential. So the next time you write a brief, don't just move from point A to point B. Build the bridge. Guide the reader. Make the pivot count.

WORKING WELL

A Conversation on Attorney Wellness with Acting AOC Director Judge Blee

By Jeralyn L. Lawrence
NJSBA Past President

EDITOR'S NOTE: The following article is adapted from a discussion hosted by the New Jersey State Bar Association's Lawyer Well-being Committee, where Acting Administrative Director of the Courts Judge Michael J. Blee joined Maritza Rodriguez, Linda Mainenti Walsh and the author to talk about the state of attorney wellness and the judiciary's role in creating a healthier profession.

The legal profession is confronting an uncomfortable truth: it is in crisis. Long hours, unrelenting pressure, and a culture that rewards exhaustion have left many lawyers emotionally drained—and New Jersey is leading a growing movement to change that.

The message from a recent NJSBA Lawyer Well-being Committee panel with Acting Administrative Director of the Courts Judge Michael J. Blee was clear—the status quo is unsustainable.

A Profession on the Brink

Among the alarming numbers from the 2023 NJSBA Putting Lawyers First Task Force Report shared during the program: Nearly half of the 1,637 New Jersey attorneys surveyed reported burnout, more than two-thirds said they experience anxiety, and over half reported alcohol misuse. Ten percent (164 lawyers) admitted to having suicidal thoughts.

The report identified the roots of the problem: an "always on" culture that demands 24/7 availability, economic pressures, adversarial work environments, and the stigma that prevents lawyers from seeking help. The profession continues to glorify busyness instead of balance and exhaustion instead of sustainability. That mindset is making lawyers sick. The question is no longer whether a wellness problem exists. The question is what the profession is willing to do about it.

The Judiciary Steps In

For Judge Blee, who began his career as a solo practitioner before joining the bench, the issue is both professional and personal.

"At every stop, I talk about wellness because the survey also showed that not only are our lawyers suffering but we as judges, who are lawyers, are also suffering," Judge Blee said.

Since his appointment as Acting Administrative Director in April 2025, Judge Blee has made wellness a focal point of his leadership. "We can't care for others if we can't care for ourselves first. So we need to be right to make other people right. We need to come together to try to help each other, to see if somebody's struggling, try to get them help."

Judge Blee outlined a series of initiatives that reflect a more collaborative approach between the bench and the bar.

Real Reforms, Measurable Progress

1. Anonymous Referrals to NJLAP

The judiciary now authorizes court personnel, attorneys, and judges to make confidential referrals to the New Jersey Lawyers Assistance Program (NJLAP). Colleagues who notice troubling behavior can refer someone for support without breaching privacy.

"The third-party referral—you make the call, you can keep it anonymous. You provide the individual's name, a little bit of background, and away it goes. Understand, though, that's the last contact you'll have, because what we've heard from our committees and the surveys is that the lawyers are really concerned about confidentiality, again, because of the stigma," Judge Blee said.

2. Mental Health and Bar Admission Reform

One of the most celebrated changes is the reform of Question 12B on the Character and Fitness application, which is part of the bar application, that formerly asked applicants about mental health conditions.

The Task Force noted that question had a chilling effect, with

law students reporting they were afraid to seek therapy because they knew they'd have to disclose it later. With input from the bar, the judiciary rewrote the question to focus on conduct rather than diagnosis—a small but significant step toward ending stigma.

3. Succession Planning for Solos

As a former solo practitioner, Judge Blee knows firsthand how important planning can be. "Starting September 25th, attorneys in private practice will respond to questions about succession planning status and annual registration."

The judiciary's collaborative approach drew praise during the discussion. Succession planning emerged as a recommendation of the Supreme Court Wellbeing Committee, following significant discussion about whether such planning should be mandatory. Ultimately, the court was receptive to concerns raised by the bar and chose not to make the requirement mandatory.

4. Normalizing the Wellness Conversation

For the first time, every assignment judge in New Jersey now addresses wellness during annual State of the Judiciary meetings—a simple but powerful change Judge Blee initiated.

During the discussion it was highlighted from a lawyer's perspective, hearing an assignment judge openly discuss attorney wellness represented a feeling of arrival and a powerful moment—one that signaled a meaningful cultural shift within the profession.

Courthouses have also begun hosting wellness-focused activities—from CLEs and mindfulness sessions to acupuncture pop-ups—and providing information about confidential support programs.

5. Reducing Barriers to Getting Help

The Supreme Court's Wellness Committee, which includes Judge Blee, is reviewing the $2,000 inactive status fee for attorneys who take leave due to disability or mental health needs.

"You wonder why an attorney who is struggling, who has to make a difficult decision that could affect his or her family, by going on disability inactive status, needs to pay $2,000. So we're working on that," Judge Blee said.

A Healthier Future for the Profession

As the discussion came to a close, Judge Blee reflected on the shared responsibility to prioritize well-being.

"I just want to say how grateful I am, one, for everybody on the screen, two, for some of us that are on the tail ends of our career to be open to these concepts—to want to help our brothers and sisters in this profession," Judge Blee said.

The message was unmistakable: **wellness is no longer optional**. It is a professional duty—one that requires empathy, awareness, and systemic reform. Wellness isn't a trend. It's the foundation of a sustainable profession. By putting lawyers first, the entire justice system is strengthened.

New Jersey's judiciary and bar are modeling what that change looks like: collaboration over criticism, progress over perfection, and a collective commitment to ensuring that those who serve justice can do so without losing themselves in the process.

Visit njcourts.gov/attorneys/registration-compliance/supreme-court-committee-wellness-law for more information and resources. ■

Jeralyn L. Lawrence *of Lawrence Law is the founder of the Putting Lawyers First Task Force. She serves on the New Jersey Supreme Court's Committee on Wellness in the Law. Jeralyn offers her deepest gratitude to Judge Blee for his unwavering commitment to wellness and for his exceptional efforts for addressing these critical issues.*

A Lesson That Still Matters

The Principles That Define American Democracy

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By Hon. John D'Amico (Ret.)

On my first day in her class at Red Bank High School, my eleventh-grade Social Studies teacher Elisabeth Kelley asked us to describe the basic principles of democracy. Of course, we could not, so a large part of the curriculum for the year involved discussing, analyzing, and learning them. At the end of the year, Kelley told us that our final exam would include the question, "What are the basic principles of American Democracy?" I am proud to say that I aced the exam, and the principles have stuck with me ever since. Unfortunately, most Americans cannot recite them.

Here is Kelley's list:

1. All people are created equal.
2. All people are endowed with natural rights, including life, liberty, the pursuit of happiness, and the ownership of property.
3. The people are guaranteed freedom of religion, speech, assembly, the press, and the right to petition the government for redress of grievances.
4. No person can be deprived of life, liberty, or property without due process of law, including trial by jury.
5. Government is by consent of the governed by democratically elected representatives.
6. The people may change their government by amending the constitution from which it derives its powers.

Legal foundations for these principles can be found in the Constitution, the First, Fourth, Sixth, Seventh, 14th, 15th, 19th, and 26th Amendments, and in Article 1 (Rights and Privileges) of the New Jersey Constitution. They established a rules-based system of self-government "of laws and not men."[1] To ensure that justice and the rule of law would prevail, they created a strong, accessible, independent, and impartial judicial system.

Lawyers and judges should be familiar with these precepts. They should also be aware of the philosophical underpinnings and the ethical dynamics of our republic. Influenced by ancient Greek philosophers and by English and French thinkers of the Age of Enlightenment, Thomas Jefferson placed this illustrious sentence in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal."[2] With the end of slavery in 1865, the enfranchisement of women in 1920, and civil and voting rights legislation in the 1960s, Jefferson's words came to mean that all human beings are by nature equal as persons.

The declaration states that all human beings "are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness."[3] The Founding Fathers considered the pursuit of happiness to be the primary right guaranteed by the declaration. John Adams believed that "the happiness of society is the end of government."[4] Jefferson agreed, declaring that "the care of human life and happiness, and not their destruction, is the first and only legitimate object of good government."[5] These Presidents derived their concept of happiness from Aristotle, who believed that "happiness is the meaning and purpose of life, the whole aim and end of human existence." It encompasses a whole life well-lived and enriched by the cumulative possession of all the goods—health, sufficient wealth, knowledge, friendship, and virtue—that a moral and ethical human being ought to desire.[6]

To advance the nation's well-being, the preamble of the Constitution declares that, "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."[7] The first clause of Article 1, Section 8 of the Constitution gives Congress the power to lay and collect taxes and acquire other revenues. It can use these to pay the nation's debts and to provide for the "common defense and general welfare of the United States."[8]

The founders were very concerned about the values by which the new government they created would exercise these powers. Although they were Deists (believers in God as creator of, but having no control over, the universe) rather than Christians, they advocated governance in conformity with Christian values. In the Virginia Declaration of Rights, Patrick Henry wrote, "It is the mutual duty of all to practice Christian forbearance, love, and charity towards each other."[9]

Jefferson regarded himself as "a real Christian—that is to say, a disciple of the doctrines of Jesus Christ."[10] His version of the Bible only contained the words of Jesus, including the passage in Matthew 25:34–40 where Jesus (as the king) explains that acts of compassion toward those in need—like feeding the hungry, sheltering strangers, or caring for the sick—are considered acts of service to Him.[11] The core message is to recognize and serve Jesus by showing love and mercy to everyone, especially the most vulnerable.

Regrettably, Jefferson's livelihood was based on the ownership of slaves and thus inconsistent with the modern meaning of Christianity. President Abraham Lincoln ended slavery, saying that opposition to it is in man's "love of justice."[12] Before he was elected, he said this about the wisdom of the Founding Fathers and the compatibility of the Declaration of Independence with Christianity:

> Wise statesmen as they were, they knew the tendency of prosperity to breed tyrants, and so they established these great self-evident truths, that when in the distant future some man, some faction, some interest, should set up the doctrine that none but rich men, or none but white men, were entitled to life, liberty, and pursuit of happiness, their posterity might look up again to the Declaration of Independence and take courage to renew the battle which their fathers began—so that truth, justice, mercy, and all the humane and Christian virtues might not be extinguished from the land; so that no man would hereafter dare to limit and circumscribe the great principles on which the temple of liberty was being built.[13]

Our elected representatives should…make sure that we have as much liberty as justice allows and as much equality of conditions as justice requires.

Over the last two centuries the temperament of the government of the United States has swung between the seemingly incompatible extremes of equality and liberty. "Libertarian" presidents and congresses have placed primary emphasis on liberty as their guiding principle. For them, that government which governs least governs best. They favored individual liberty in personal and economic affairs without interference from government. Therefore, they asserted that government should not exercise power over the marketplace and the economic decisions and interests of individuals and corporations

"Egalitarian" presidents and congresses, on the other hand, have held that all people should have the same rights and opportunities in life. They have relied on government action to provide economic security, ease human suffering, and create conditions under which individuals, regardless of race, national origin, color or creed, could realize their potential as human beings.

The Founding Fathers believed that there should be a balance between liberty and equality. Jefferson expressed it this way: "Rightful liberty is unobstructed action according to our will within limits drawn around us by the equal rights of others."[14] Conservative 20th century philosopher and educator Mortimer Adler wrote that neither liberty nor equality is an unlimited good. He argued that both can be maximized harmoniously only when regulated by justice, which is "a greater good than either liberty or equality" and is the "supreme value."[15] Jefferson believed that "justice is instinct and innate, that the moral sense is as much a part of our constitution as that of feeling, seeing, or hearing; as a wise Creator must have seen to be necessary in an animal destined to live in society."[16] Daniel Webster, a lawyer who argued cases before the Supreme Court and served his country in the U.S. House of Representatives, the Senate, and as Secretary of State, amplified Jefferson's concept:

> Justice is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever her temple stands, and so long as it is duly honored, there is a foundation for social security, general happiness, and the improvement and progress of our race.[17]

Adler asserted that by virtue of common humanity, all human beings "have an equal right to life, liberty, and whatever else anyone naturally needs for success in the pursuit of happiness. Should individuals be unable to secure for themselves whatever is thus needed, then a just government is called upon to secure for them their right to these goods."[18] Our elected representatives should therefore make sure that we have as much liberty as justice allows and as much equality of conditions as justice requires. The economic inequality that justice allows "consists in some having more wealth than anyone needs...but since the amount of wealth available for distribution is limited, no one should be in a position to earn by his productive contribution—to earn, not to steal or seize—so much wealth that not enough remains for distribution, in one way or another, to put all individuals on the baseline of economic sufficiency."[19] Justice requires that no individual or family be "seriously deprived, by destitution or dire poverty, of that minimal supply of economic goods that everyone needs.... To this much everyone has a natural right."[20]

An ancient Biblical definition of the just and proper balance between the imperatives of liberty and equality can be found in the Torah and the New Testament:

> Of course, I don't mean your giving should make life easy for others and hard for yourselves. I only mean that there should be some equality. Right now, you have plenty and can help those who are in need. Later, they will have plenty and can share with you when you need it. In this way, things will be equal.[21] As it is written, the one who gathered much did not have too much, and the one who gathered little did not have too little.[22]

President Franklin D. Roosevelt anticipated Adler's formulation and articulated the practical implications of these scriptures in his 1944 State of the Union message. He urged Congress to implement for all Americans an economic Bill of Rights—to a useful and remunerative job; to earn enough to provide adequate food, clothing, and recreation; to conduct business free from unfair competition; to a decent home; to adequate medical care; to a good education; and to protection from the economic fears of old age, sickness, accident, and unemployment.[23]

Every day people are aggrieved by government action or inaction. It is the duty of attorneys to assert—and of judges,

juries, and government officials to adjudicate—their constitutional and economic rights in accordance with the rule of law, the requirements of justice, and the moral commitment to compassion and human dignity reflected in the nation's founding ideals. ■

Endnotes

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Charting Your Course

Searching for Justice Within the Rule of Law

By Hon. Helen E. Hoens (Ret.)

What is Justice?
What is the Rule of Law?

Philosophers would tell us that we cannot even begin to discuss justice or the rule of law without first defining what those terms mean. But one could fill an entire library exploring those overarching concepts and likely fall short of finding anything approaching even the most general agreement about them in our increasingly multi-cultural society.

And yet, those of us who have been honored and privileged to serve as lawyers, Superior Court judges or Justices of our Supreme Court, always have been, and still are, tasked with searching for justice within the rule of law.

Exploring Concepts of Justice and the Rule of Law

Perhaps most of us would agree that justice includes concepts of fairness and equity, the idea that we treat people equally, impartially, without bias or preconceived notions of guilt, liability or responsibility for the happening of an event. For many of us, justice also includes elements that spring from a sense of morality, ethics or an understanding about right and wrong.

But layered within those fundamental considerations are multiple versions of justice. The most familiar ones, at least within our court system, are procedural justice—the duty to ensure that our decision-making rules and processes are fair to everyone—and retributive justice—the notion that wrongs are punished, or are otherwise met with consequences, that are commensurate with the crime or, in the civil context, with the tort.

Beyond those basic concepts of justice, however, there are two additional kinds of justice that may operate within or as a complement to our court system, such as restorative justice, that focuses on repairing harms and relationships, and distributive justice, that aims to create a more fair distribution of resources and opportunities in society. The former might be found in court-annexed mediation or through diversionary programs that seek to remedy underlying causes of wrongdoing like drug addiction. The latter, in contrast, is largely left to the other branches of government where political influences may be brought to bear.

Are there then no unifying definitions of justice that express all-encompassing principles with which everyone might agree? Perhaps there is one, found in the work of John Rawls, the pre-eminent American philosopher of the 20th century. In his masterwork, *A Theory of Justice,*[1] Rawls described not a utopian vision of a better or more just nation, but instead posited a way of thinking through which one might work toward recognizing and perhaps achieving such a nation. Starting from a premise of justice as fairness, he challenged us to engage in a thought exercise, one in which we consider ourselves as participating in a group of people who know nothing about what their individual circumstances in society might be. Those people, operating behind a Veil of Ignorance[2] and acting in what Rawls called the Original Position,[3] therefore essentially define justice as what they would agree in advance is fair. In particular, therefore, his theory favored a broad view of fairness as opposed to utilitarianism in which an individual or their rights or interests are sacrificed in order to advance the greater good.[4]

Beyond [the] basic concepts of justice, however, there are two additional kinds of justice that may operate within or as a complement to our court system, such as restorative justice, that focuses on repairing harms and relationships, and distributive justice, that aims to create a more fair distribution of resources and opportunities in society.

Encountering the work of Rawls and his then-revolutionary theory shortly after it was published raised for me the question of whether one could individually make decisions by attempting to engage in that thought experiment. It further presented the tantalizing possibility that one could recognize the existence and impact of the lens through which one sees the world, a lens created by one's own upbringing, experience, education and other circumstances, and at least try to see what, viewed more broadly, would be fair. That of course is not to suggest that one can ever actually know or even completely appreciate the lived experience of others, which might be one of the worst forms of hubris, but it at least helps one to approach the situation of others from humility and, more to the point, to search for justice tempered with compassion.

But how do these concepts of justice square with the rule of law? Again, the philosophers would suggest that we try to define what we mean when we refer to the rule of law. In its simplest iteration, it refers to the overarching concepts on which our nation was founded and the essential documents in which those concepts are set forth. That would include basic principles that no one is above the law, that laws are applied equally to

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everyone, and that those who serve in our court system are independent and impartial in their enforcement of laws and in their protection of our rights.

Institutional Constraints on Searching for Justice Within the Rule of Law

All of those are lofty, and oft-repeated principles, but embedded within them are significant challenges to us as jurists and, therefore, to all lawyers as well.

Indeed, the concept of the rule of law imposes at least four institutional constraints that prevent all jurists from advancing any personally held view of justice.

First, courts do not have the authority to create justice. Courts operate, as they must, within an existing legal framework that includes our state and federal constitutions, statutes and agency regulations. That means that judges and justices simply do not have the ability to decide whether they believe that there is a wiser constitutional provision, a better law or a fairer regulation than the one adopted or enacted by the other co-equal branches and impose it on the people. Instead, for the most part, the role of the courts is to apply or in some cases to interpret those existing provisions, laws and regulations. Moreover, in carrying out those judicial functions, courts also must be guided by well-established canons of construction in their analysis.

Second, courts almost never write on a clean slate. That is, in addition to operating within the existing body of law just identified, judges and justices are also constrained by judicial precedents. The recent United States Supreme Court decision in *Dobbs*[5] notwithstanding, even at the highest levels, courts rarely overturn an existing precedent, preferring to move incrementally and analyzing those precedents to determine whether the particular issue before the court presents a question that merely calls for a new or nuanced approach.

Third, courts can only speak to an issue when a controversy is presented to them. No matter how important a matter may be to the public or to society, and no matter how pressing a particular justice might think a specific issue is, unless there is a dispute brought before the courts, determined by the trial and appellate courts, and presented through a petition for certification or certiorari, even the highest courts cannot act.

Courts operate, as they must, within an existing legal framework that includes our state and federal constitutions, statutes and agency regulations.

Finally, within every court of last resort, any individual justice has only one vote, a vote that by itself is neither enough to bring a matter onto the court's docket nor sufficient to decide a case, let alone one that creates a result in accordance with a particular justice's view of the matter. Instead, each jurist is constrained by the political reality of not having had any input into the identities or viewpoints of the others seated around the conference room table, and therefore each is required to engage in a process of respectful presentation, careful analysis, and persuasive exchange of views, all in order to reach a consensus among a majority, with or without possible dissents, some of which might be focused on justices of the future or those in the other branches who might eventually appoint them.

Charting Your Course: Practical Implications and Personal Priorities

All of this has significant practical implications for lawyers. First, recognize your own professional strengths and weaknesses. That means appreciating whether you have the means, the wherewithal, the ability, and the expertise to handle the matters that might most appeal to your sense of justice. Believing that an injustice has occurred—a guilty man is in prison, for example, might not mean that you are the lawyer best able or best suited to tackle righting that wrong. Be discerning, because the course you choose will be different if you are a sole practitioner than if you are a senior partner at a large law firm with a track record of handling like matters.

Second, even if you are blessed with the means, the ability and the expertise to take on any particular matter, recognize that your most cherished outcome might not be in the cards for the judges or justices charged with adjudicating your case. If, for example, your goal is overturning a precedent that is offensive to your or your client's sense of fairness, or having a statute that you or your client find to be abhorrent declared unconstitutional, keep in mind that those on the bench before whom you are arguing might not agree with that outcome. Always be prepared with a fallback argument so that you don't risk achieving some form of relief by insisting on a wished-for result that does not fit within the ordinary constraints on judicial decision-making.

Third, recognize that the person who comes into your office demanding justice might be seeking a result that is not attainable through the courts. They might be seeking a remedy now foreclosed, such as the death penalty, or a result better achieved through a change in the law or a change in how social

programs are funded. Be prepared to listen with care and to offer your wise counsel about potential avenues for relief that would advance the cause of justice, but that might be found outside of the courts.

Concluding Thoughts

Dr. Martin Luther King, Jr., famously said, "the arc of the moral universe is long, but it bends toward justice."[6] Bear in mind that his admonition is not a suggestion that we sit around wishing and hoping that justice will be achieved of its own accord, but rather a call to all of us to step up and play our part in bringing justice about.

As lawyers, it matters not whether you work for the cause of justice in your professional calling; it matters more that you find ways to do so even if they aren't part of your everyday practice of law. Take time to consider broadly where you see injustice around you and then focus on how you might take action to make justice a reality. Worried about food insecurity? Volunteer at the food bank. Concerned about unequal access to medical care? Help out at a fundraiser for a disease or a local hospital. Troubled by the plight of older adults or our veterans? Organize a collection of toiletries for patients at the Veterans Hospital or the residents at a nearby senior center. Think that things would be better if a law were changed? Sign up to assist with a political campaign or run for office. Fearful about the next generation? Start by getting involved in the Bar Association or by becoming a mentor to younger lawyers.

In short, never lose sight of the fact that the power to help bend the arc of the universe toward justice is in our own hands. In the end, that is how we best serve the ends of justice. ■

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NJ Legislature Obligated to Abide by its Own Statutes, Rules When Enacting Law

By Debra Tuberion and Christina Vassiliou Harvey

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Among the balance of power of the three co-equal branches, each branch must follow the Constitution and the authority generated within the powers granted to that branch by the Constitution. The Legislature is obligated to not only act within the scope of power granted to it by the people through Constitution, but also to abide by the statutes it enacts. These statutes cannot exist in a vacuum where only the other branches of government and the people are bound to follow them. This article addresses the power of the people to enforce the principle that the Legislature must follow the rule of law.

How the Legislature's Violation of Its Own Statutes Impacts the Rule of Law

Through the Constitution, the people granted the Legislature the authority to enact laws. In recognition of this authority, in the 19th century, the New Jersey Legislature granted the people the right to challenge the Legislature when it failed to follow either the Constitution or its own statutes.[1] Although New Jersey's Constitution has changed since that time, a statute giving the people this power remains valid and in force.[2]

When the Legislature ignores laws and procedures it previously enacted when attempting to create new laws, it suggests arbitrariness and undermines legal certainty and public trust—values the rule of law is meant to protect. The statutory scheme that the Legislature created in 1873 was intended as a remedy to this problem. Under that statute, the attorney general or at least two citizens may bring an action against the Legislature challenging the enactment of a law. The statute's purpose is to hold the Legislature accountable for not following its constitutional authority or its own statutory procedures.[3]

Proof of Procedure: What the Legislature Must Do When Enacting Laws

The fundamental premise of the rule of law is that the law applies equally to everyone, including the government. This means the Legislature must be bound by the laws and procedures it has already enacted when it makes new laws. Specifically, the New Jersey Constitution provides, in pertinent part:

> All bills and joint resolutions shall be read three times in each house before final passage. No bill or joint resolution shall be read a third time in either house until after the intervention of one full calendar day following the second reading.[4]

The public policy behind adding an intervening calendar day between the reading of a bill was to ensure the Legislature and members of the public had adequate time to review what could potentially be enacted into law.[5] Providing notice to the public is one of the most important procedural requirements the Legislature must take before enacting a law, which is evidenced by its requirement in both the state Constitution and state statutes. For example, the Open Public Meetings Act (OPMA) requires the Legislature to give "adequate notice," "to the extent known," that it will consider a bill.[6]

Citizens have a constitutional and statutory right to know what the Legislature plans to enact into law. As members of a society directly affected by the law, citizens are entitled to understand the proposed legislation, its language, and its potential consequences. The public notice requirement goes hand in hand with the rule of law itself—by giving the public the opportunity to ensure the government is doing what it is legally required to do.

OPMA is often referred to as the "sunshine law" as it provides the public with the right to attend all public meetings and to witness lawmakers' deliberation and policy decisions.[7] The best way to provide transparency is by providing public notice and the opportunity for full participation.[8] The Legislature falls within the scope of OPMA.[9]

The New Jersey Supreme Court likewise explained the purpose behind N.J.S.A. 1:7–3 is to provide the public with adequate time to study proposed bills.[10] The purpose of adequate study is not just for notice, but also, to encourage public participation in the legislative process. Through this process, citizens can contact legislators about potential changes to the legislation.

The Legislature enacted additional protections to ensure the public is aware of pending legislation. Not only does the OPMA apply to the legislative process, but the Legislature has also created additional mechanisms to provide notice to the public, including a website that provides bill text, bill tracking information, a calendar of legislative events, including when public hearings regarding proposed bills will be held, and text of all chapter laws enacted since 1996.[11]

The goal of these protections is to encourage public participation through the legislative process. However, when the process fails, the procedure under N.J.S.A. 1:7-3 provides citizens with a remedy.

How Citizens Can Enforce Their Rights to Adequate Notice

If the notice requirement is meant to protect citizens, what happens if that procedure is not followed? For the rule of law to have meaning, there must be a way to hold the Legislature accountable for taking the necessary steps in enacting law. Citizens have the option to file suit in court challenging the passage of a law if they believe the law "was not duly passed by both houses of the Legislature…or otherwise made effective as law in the manner required by the Constitution."[12]

When a citizen brings an action challenging the procedural enactment of a law, the citizen is entitled to a full hearing, including witnesses and discovery.[13]

However, the challenge and its related discovery can only relate to the mechanics of the enactment of the law—not the constitutional validity of the law itself.[14] Therefore, citizens' rights are based purely on procedure—emphasizing the importance of the requirement of providing public notice of proposed bill text.

The Court Has Voided Statutes that were Enacted Without Abiding by Constitutional and Statutory Requirements

Citizens have successfully challenged statutes enacted in contravention of the Constitution. For instance, in one case the version of the bill signed by the governor had been amended by the Senate.[15] Because the version of the bill passed by the Assembly differed from the version passed by the Senate, the court adjudged the statute void. In order to pass constitutional muster, the same bill was required to be read three times, with one calendar day intervening between the second and third readings.

The New Jersey Supreme Court similarly adjudged another statute void when the version of the bill signed by the governor was only approved by the Senate, and the version passed by the Assembly did not reach the governor's desk.[16] These two cases show the power of citizens to ensure that the Legislature does its job in following the procedure of a bill becoming a law.

In addition to a constitutional challenge, citizens may also seek to have a law adjudged void due to a failure to abide by the statutory requirements for enactment. Prior to the ratification of New Jersey's current Constitution, the state Supreme Court declared a statute void after two citizens challenged that the Legislature had not published the bill as required by another statute.[17] The act at issue repealed an act creating the New Jersey Detective Association. Because the act was a "special" law under the then-existing New Jersey Constitution, its repeal required publication of a notice of intent to repeal six days prior to the introduction of the bill, and service of a copy of the bill upon the registered agent for the association. Because the notice of intention and publication were not completed, two citizens challenged the repealing act.

The Supreme Court held a hearing on whether the required notice was provided. Due to testimony from the chief clerk of the Office of the Secretary of State that the notice of intention was not filed, the Supreme Court declared the repealing statute null and void.

This decision is important to the rule of law in two respects. First, it shows that the Legislature cannot enact a statute requiring it to take certain actions before repealing a law and then disregard those requirements. In other words, the Supreme Court held that the Legislature was not above the law. Second, the case is important because it shows that a citizen has a right to a hearing and the opportunity to present proofs that the Legislature violated its statutes. Both components are essential to the rule of law.

If the judicial branch cannot hold the Legislature accountable for violating its own statutes, the rule of law is diminished. If the court cannot hold the Legislature accountable when it violates statutory requirements in enacting law, then the Legislature acts above the law and the legislation is ultra vires.

Since the 19th century, the Legislature established a process for citizens to ensure that the Legislature follows its "statutory provisions relating to the enactment and approval of laws."[18] To protect the rule of law, this process should be interpreted so that the Legislature is bound by its enactments.

Conclusion

The rule of law encompasses the principle that the law applies equally to all people and that no one is above the law—not even the government. With those principles at the core of our legal system, the court must hold the Legislature accountable if it is violating its own statutes and not following proper procedure when enacting law. Without this accountability, the values behind the rule of law, including legal certainty and public trust, are diminished. ■

Endnotes

1. *See In re Jaegle*, 83 N.J.L. 313, 314 (Sup. Ct. 1912) (quoting act of March 3, 1873 (Comp. Stat. p. 4978)).
2. N.J.S.A. 1:7-1 to -7 provides a mechanism for the attorney general or two citizens to seek a declaration that a statute is void when "any such law or joint resolution was not duly passed by both houses of Legislature, or approved by the governor or otherwise made effective as law in the manner required by the Constitution." N.J.S.A. 1:7-1.
3. The Appellate Division recently held *In re Eames*, 481 N.J. Super. 601 (App. Div. 2025), *certif. den.,* No. 090806, _ N.J. _ (Jan. 16, 2025) that a citizen cannot challenge a statute when deficiency is limited to the Legislature failing to follow its own statutes.
4. N.J. Const. art. IV, § 4, ¶ 6.
5. *In re Forsythe*, 91 N.J. 141, 148 (1982).
6. N.J.S.A. 10:4-8.
7. *See Burnett v. Gloucester Cnty. Bd. of Chosen Freeholders*, 409 N.J. Super. 219, 232 (App. Div. 2009) (quoting N.J.S.A. 10:4-7).
8. N.J.S.A. 10:4-7.
9. N.J.S.A. 10:4-8(a).
10. *In re Forsythe*, 91 N.J. at 148.
11. N.J.S.A. 52:11-78.
12. N.J.S.A. 1:7-1 and -4.
13. *In re McCabe*, 81 N.J. 462, 467 (1980).
14. *In re McGlynn*, 58 N.J. Super. 1, 7 (App. Div. 1959).
15. *In re Jaegle*, 83 N.J.L. 313, 317 (Sup. Ct. 1912).

16. *In re Kornbluh*, 134 N.J.L. 529, 530 (Sup. Ct. 1946).
17. *In re Miller's Petition*, 122 N.J.L. 176, 177 (Sup. Ct. 1939). The Appellate Division in *Eames* found the defect was because the repealing statute "lacked 'certain constitutional requirements;'" however, the notice requirement for special legislation appeared in R.S. 1:6-6. *See Eames*, *supra*, 481 N.J. Super. at 615 (quoting *McCabe*, *supra*, 81 N.J. at 468-69)(quoting *Miller's Pet.*, 122 N.J.L. at 177)).
18. N.J.S.A. 1:7-3.

President's Perspective

Continued from page 5

rising operational costs. After raising concerns about a proposed $27 increase in the annual attorney registration fee, the Judiciary reconsidered, sparing attorneys an additional financial burden. Without this outcome, assessments would have risen nearly 40% in just over three years.

Throughout the year, the Association hosted meetings and retreats to gather perspectives from managing partners, county and affinity bar leaders and young lawyers. These discussions fostered dialogue across generations, uniting participants around the shared goal of strengthening the profession and improving service to clients. Internally, we are undertaking a strategic planning initiative to reaffirm our commitment to members, focusing on five pillars: advocacy, continuing legal education, finance, membership and sections and committees.

In a nation as strong as the United States, it is easy to take our Constitution and democratic principles for granted. To highlight the ongoing responsibility of citizens, the Association launched the Defending Democracy Series. This three-part educational program featured stellar panels of leaders in law, politics, academia and journalism, exploring the history of the Constitution, attorneys' roles in defending free speech and strategies to uphold democratic values. The strong attendance among both legal professionals and the public was a heartening reminder that these principles remain deeply held and provide hope for the resilience of our democracy. And of course, the NJSBA will continue its outreach with programs like Law Day, co-sponsored by the New Jersey State Bar Foundation and local bar associations. This annual program, held around Law Day USA on May 1, opens the courts to the public, educates attendees about the judicial system and celebrates the rule of law in an accessible, engaging way.

Finally, we provided our members with many programs and meetings from Atlantic City to Sorrento, Italy, to Aruba where they could network, develop relationships, learn and have some fun. In a time of virtual meetings and isolation for many, these meetings provided our members with the opportunity to spend time with their colleagues within this incredible community of NJSBA members. As we continue to focus on attorney wellness, these in-person meetings could not be more important.

Unfortunately, this year has also been a difficult one in many respects. The legal profession faced unprecedented attacks on the judiciary and law firms, including threats against judges for their rulings, campaigns targeting law firms for the clients they represent and retaliation against citizens for protected speech. As I write this column these threats continue.

The NJSBA is unwavering in its commitment to the rule of law, individual rights and a diverse, inclusive legal community. Attacks on judges, attorneys and law firms undermine public confidence in the independence of the judiciary, a cornerstone of our Constitution. They put our judges in danger, something no democratic society should allow. Together with the bar leaders who follow, I am committed to ensuring the Association continues to protect the rule of law, defend individual rights and preserve judicial independence. That is our mission, one we will uphold so long as we remain the voice of New Jersey attorneys, judges and legal professionals.

To the members of this Association: you are in the capable hands of passionate volunteers and dedicated staff, prepared to advance our mission and confront any challenge. I look forward to the future, and I thank you for the privilege of a lifetime. ■

Special Editors

Continued from page 7

precedent, and consider its implications for public confidence in the judiciary and the broader principles that underpin the rule of law.

Finally, the New Jersey State Bar Foundation article, *The Rule of Law as a Living Principle* addresses how the rule of law shapes everyday interactions, rights, and expectations in American society.

Taken together, these articles approach the rule of law from complementary perspectives—executive, judicial, legislative, historical, and philosophical, illustrating not only its foundational importance, but the ongoing responsibility required to sustain it in practice. ■

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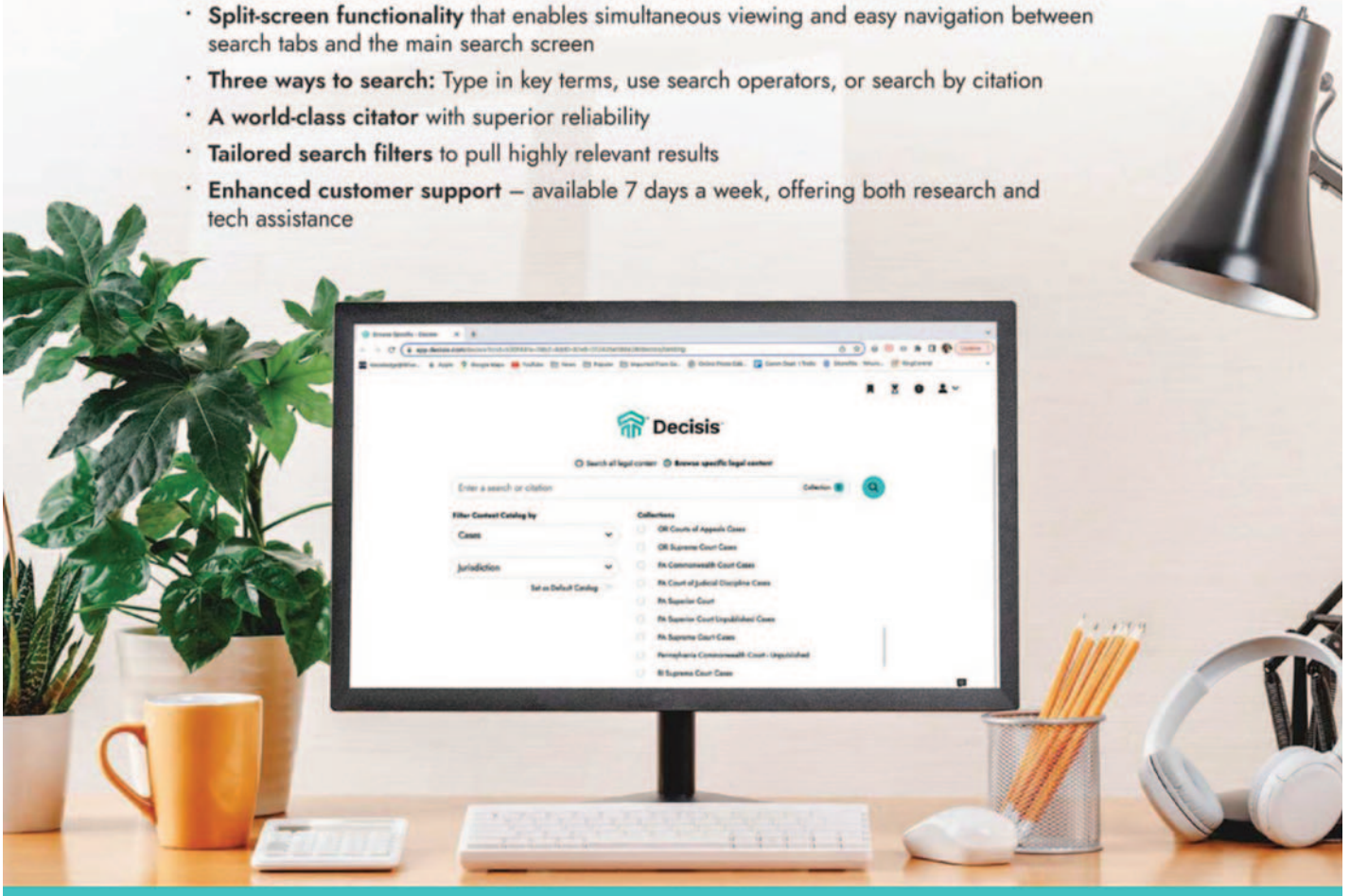

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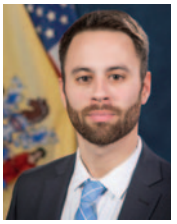
How New Jersey Litigates the Rule of Law

By Jeremy Feigenbaum



JEREMY FEIGENBAUM *is the Solicitor General for New Jersey.*

Little matters more to lawyers than the rule of law. Lawyers invoke the rule of law in moments of crisis—when institutions are strained, public confidence in government feels fragile, or orders are disobeyed. But the rule of law is not a catchphrase reserved for extraordinary times. At its core, the rule of law rests on twin promises: no one is above the law, and everyone is entitled to its protection. That must be a daily reality for lawyers, judges, and public servants across the state—to ensure these principles are there when we need them in those crises.

The work of the New Jersey's solicitor general has given me a front-row seat to litigating the rule of law. Much of the solicitor general's work involves standing up for New Jersey in court—whether defending the statutes the Legislature enacts, the executive orders the governor issues, or policies agencies adopt. And in litigation involving the federal government, the state solicitor general works hand in hand with the attorney general and other state officials to defend the state's sovereignty, its residents, and the rule of law itself.

That final point is critical. When New Jersey stands up in court to challenge federal action, it should never be based on policy disputes or on political fights—but on whether the federal action harms the state's residents, interferes with state sovereignty and violates the law. And so when New Jersey files suit, the state seeks to affirm the rule of law itself—the principle that federal authority, no less than state power, must be subject to constitutional limits and subject to judicial review.

Our litigation defending birthright citizenship from a presidential executive order illustrates this point. The question in that case is whether the Constitution and federal statutes ensure that children born in this country, with almost no exception, are United States citizens. But the broader principle is whether constitutional norms—a tradition predating our Constitution and existing at every time in our nation's history except the Civil War—can be undone by the stroke of the President's pen. And so the birthright citizenship litigation is about the rule of law as much as about the individual citizens: whether constitutional protections limit the actions of the federal executive branch.

But the rule of law cannot merely be defined in opposition to something—it also requires that we take affirmative steps in New Jersey. It requires us to ensure that everyone in New Jersey is bound to our law, no matter how powerful, and that all are entitled to protection, no matter how powerless. That includes advocates who pursue relief in our states' courts, arguing our Constitution ensures protections even if federal constitutional law does not. It includes state officials who enforce, and defend, protections our law affords. And it includes those who hold the powerful to account.

Ultimately, the rule of law survives not because it is written in constitutions and statutes—though it is—but because we choose, again and again, to respect it. That respect requires taking proactive steps, including here in the Garden State, to live up to its ideals. ■

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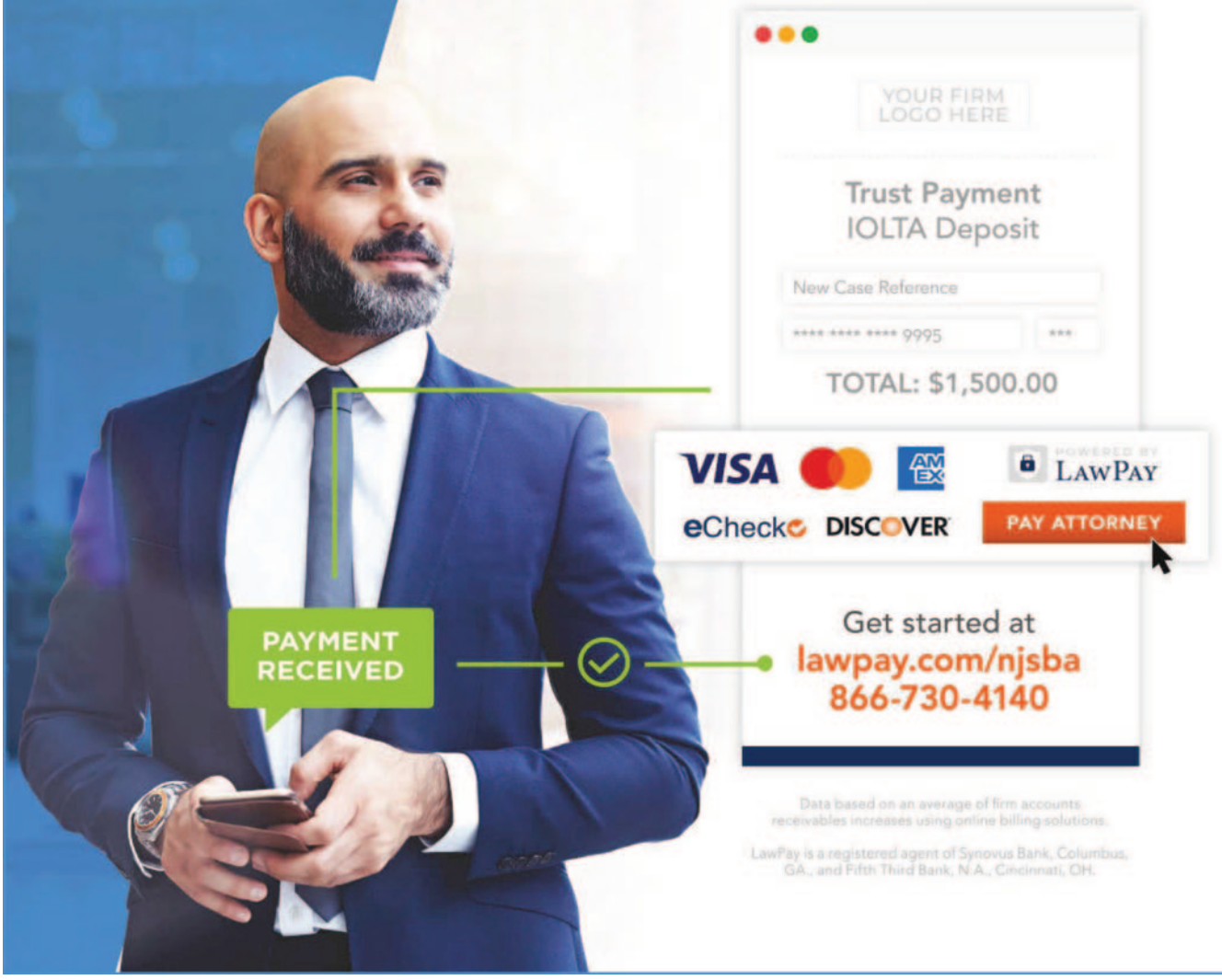

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Keeping the Republic

Teaching Citizenship Starts in the Classroom

By Elizabeth C. Matto

ELIZABETH C. MATTO *is a research professor and teacher-scholar-practitioner of democratic education and serves as the Director of the Eagleton Institute of Politics at Rutgers University. Elizabeth earned her Ph.D. in American politics from George Washington University and is a recipient of the Harry S. Truman Award (Nevada, 1990). She has held leadership roles both within the American Political Science Association and at Rutgers University in furthering civic learning and democratic engagement and in creating a campus culture for active citizenship.*

As the nation marks the 250th anniversary of the Declaration of Independence in 2026, survey research indicates that Americans are concerned about the health of democracy. A Times/Siena poll in October 2024 reported that less than half of the respondents (49%) believed that American democracy does a good job representing the people with 76% stating that American democracy is currently under threat (with each party offering very different versions of how or why it is under threat). An Eagleton Center for Public Interest poll from November 2024 found that 47% were "very worried" and 39% "somewhat worried" about the future of America's democracy. These concerns remind us that the United States' unique system of representative government, "a republic if you can keep it" as Benjamin Franklin reportedly observed, is fragile and not necessarily guaranteed. Efforts to safeguard its core ideals, its structure, and its processes range from constitutional amendments to legislative action to transforming the makeup of elected bodies. A powerful approach to "keeping the republic" though is teaching democratic citizenship.

Over the years, a vast body of scholarship and set of best practices regarding high quality civic education has emerged that emphasizes not just imparting civic knowledge but also teaching civic skills and dispositions. An important facet of such civic preparedness is an understanding of what it means to think like a democratic citizen

with an understanding of such principles as liberty, equality, and respect for the rule of law. This article reviews this scholarship with particular attention to active learning approaches and the important role practitioners of law might play to help students link the study of American democracy with the practice.

The Theory and Practice of Civic Education

Understanding what it means to be a democratic citizen is not genetic—we are not born understanding how to navigate America's complex system of representative government. Citizenship needs to be taught. As John Dewey asserted, "democracy needs to be born anew every generation, and education is the midwife."[1]

In the last 25 years in particular, a good deal of scholarship has been conducted that considers the multifaceted nature of civic competency and how best to foster such competency in the next generation of citizens. Integral to these efforts has been to conceptualize such learning as more than the acquisition of historical facts or information about the functioning of government. In her groundbreaking civic education study of adolescents around the globe in 2012, Judith Torney-Purta posited the idea that civic competency consists not only of knowledge of civic and political life but also the skills to engage in civic and political life as well as a disposition to do so.[2] This conclusion has served as the foundation to subsequent civic education research at all stages of education—primary, secondary, and higher education.

In studying how best to equip young people with the knowledge, skills, and disposition to be informed and engaged citizens, a consistent thread has addressed the powerful benefits of using "active" or "experiential" learning. It is when given opportunities to practice being a democratic citizen in the classroom that students acquire the knowledge, skills, and attitudes of democratic citizenship. What does active civic learning look like in practice? One of the best ways to practice citizenship is by engaging in political discussion in the classroom. Diana Hess in her book *Controversy in the Classroom* argues that discussion reflects the political equality intrinsic in democracy, "The ideal of discussion supports the validity of intrinsic equality by implying, at least symbolically, that all members of a community are political equals and are therefore equally qualified to participate in discussion and decision-making."[3] Cross-cutting political talk also builds political tolerance and can allows for consideration of the causes and solutions to public problems.

Other forms of active learning also have been shown to be highly effective including service-learning, project-based learning, and simulations that allow students to be part of the learning process and practice all facets of democratic participation. These best practices are gaining more prominence in classrooms around the country with more organizations and national efforts emerging to support these civic education efforts including iCivics, the Democratic Knowledge Project, and the National Constitution Center.

What It Means to Think Like a Democratic Citizen—Appreciating the Rule of Law

The fragility of America's system of government is implicit in Benjamin Franklin's characterization of America's system of government as "a republic, if you can keep it." The multifaceted nature of civic competency requires then not just a shared understanding of how the system works but why it works the way it does. Understanding democracy is fundamental to democracy's health including a keen appreciation for its core values and tenets—chief among them is the rule of law. Although the notion of the "power of the people" is central in American democratic thought, popular sovereignty is meant to exist with the rule of law and the principles codified in a written constitution.

As the nation celebrates the 250th anniversary of the Declaration of the Independence, it is worth considering another important milestone marked in 2026—the 250th anniversary of the publication of Thomas Paine's *Common Sense*. Wildly popular at its publication in January 1776, the essay outlined the key values and ideals intrinsic to American democratic thought and in many ways catalyzed the creation of the Declaration of Independence. Chief among the ideals enunciated was the power of the law. As Paine wrote, "in America the law is king. For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other."

Echoes of Paine can be found in the thinking of the nation's Founders and the form of government they crafted—one in which the passions of the populace were filtered through a federal system of government, separation of powers, and checks and balances. The aim was to ensure that the populace would not be subject to the whims of a ruler or the majority. As James Madison wrote in *Federalist #51*, "If men were angels, no government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."

The challenge of respecting the will of the people without violating the rights of the individual is meant to be met then by a shared commitment to the rule of law and the supremacy of the principles embedded in the Constitution. This is a commitment meant to be shared by those serving in office and positions of public authority and by the people they serve. It is to the U.S. Constitution that public officials take an oath—not to a

political party, or an individual, or even to "we the people." To be sure, fidelity to constitutional principles and the rule of law has been practiced imperfectly throughout America's history and certainly up to the present day. The theory and practice of civic education demonstrates though that it is a critical norm in the health of a democracy and a value that can be taught.

Teaching Democratic Citizenship and the Rule of Law—A Call to Action to Legal Practitioners

In the fall of 2025, the American Bar Association published the "ABA Task Force Report for American Democracy." In her introduction, the former President of the ABA Mary L. Smith underscored the collective vigilance necessary to protect and defend democracy, "For 237 years, America's Constitution has guided our country and defined us as a Nation of laws. When our democracy is tested, we draw strength from the Constitution as the bedrock, making our country more equal and more just for all our citizens. American democracy requires our constant care, vigilance, and full participation to determine the very future of our Nation."[4]

Of the 12 recommendations offered by the ABA Task Force, "Reinvigorating American Civics Education" topped the list. Proposed solutions offered by the Task Force include supporting nonpartisan evidence-based legislative and policy solutions to support funding, curriculum development, and pedagogy related to civic education and the federal, state, and local levels with the assertion that investing in civic education today "would yield long-term results as the next generations inherit the responsibility to safeguard our democracy and the rule of law."[5]

Given the body of scholarship on civic education and the support the legal profession has shown for its important role in safeguarding American democracy, how can legal practitioners engage in the important work of "keeping the republic"?

As recommended in the ABA Task Force, one meaningful way to support civic education is by identifying and advocating for civic education reform at the local, state, and federal levels. A project of iCivics, CivxNow is an excellence resource for identifying high-quality and evidence-based legislative proposals and even includes an interactive state map tracking the status of state-level reform.[6] For those unfamiliar or even uncomfortable with advocating for policy reform, CivxNow offers a toolkit for how to advocate for policy either in-person or virtually.

As indicated earlier, there are several excellent nonpartisan national organizations that create civics curriculum, provide professional development for teachers, and offer pedagogical support for educators seeking to provide their students a high-quality civic education. Such organizations include iCivics, the National Constitution Center, the Bill of Rights Institute, and the Democratic Knowledge Project. Learn more about these organizations and support them with a donation.

Also referenced earlier, active civic learning is a powerfully effective way to learn what it means to be a democratic citizen and to support the rule of law. There are several national and regional and school-based efforts that allow students to link the theory of democracy and law with the practice including the Center for Civic Education's "We the People" program, Model United Nations and Model Congress programs, and such legally-focused civic engagement efforts as the organization Street Law and even mock trial teams. Identify these efforts in your community and volunteer your time and expertise by serving as an advisor, a sponsor, or a judge at a competition.

Demystifying the practice of law and connecting students to the reality of what upholding the rule of law looks like by everyday legal practitioners is another powerful way of teaching this valuable norm. Share your expertise by visiting a classroom and discussing your work or by inviting student groups on a field trip to your law firm or courthouse. Again, students learn best when proximate to the practice of democracy—when they can see others engaging in citizenship and then envisioning themselves doing the same.

As the expression goes, democracy is not a spectator sport—there is a role for all of us to play. Moreover, it is fragile and not guaranteed, but democracy begins and ends with "we the people." What better way to celebrate the nation's 250th anniversary than by actively engaging to protect and advance it? ■

Endnotes

1. John Dewey, *The Need of an Industrial Education in an Industrial Society* (1916).
2. Judith Torney-Purta, "The School's Role in Developing Civic Engagement: A Study of Adolescents in Twenty-Eight Countries." *Applied Developmental Science* 6, no. 4 (2012): 203.
3. Diana Hess, *Controversy in the Classroom* (2009), 15.
4. Report of the ABA Task Force on Democracy (2025), iii: americanbar.org/content/dam/aba/administrative/office_president/democracy-task-force/2025-report-american-democracy.pdf.
5. Report of the ABA Task Force on Democracy (2025), 18.
6. CivxNow: civxnow.org/.

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Equal Access and the Rule of Law

Individual Rights and Institutional Authority in Public Schools

By Robert S. Cloutier

High school students gather after school at grouped desks in a classroom, immersed in The Game of Life. Nearby, other students negotiate real estate trades for Monopoly dominance. What appears informal is, in fact, structured: an after-school, student-initiated board game club, supervised only in a custodial capacity by a teacher who remains present to ensure order and safety.

Beneath the play, something more consequential is taking place. Students choose whether to participate, agree on shared rules, negotiate outcomes, resolve disputes, and accept both success and loss. Authority is decentralized. Participation is voluntary and open to all without exclusion. In small but meaningful ways, students are engaging in the habits of democratic participation through individual choice and collective action rather than institutional direction.

From a legal perspective, these details matter. The club is not designed by the school, directed by staff, or connected to curriculum. Students select the activity, organize participation, and govern the interaction themselves. As a result, the activity falls squarely within a category the United States Supreme Court has long treated as private student expression, rather than government speech.

That distinction lies at the heart of the Equal Access Act and has taken on renewed importance in light of the Court's recent jurisprudence concerning individual liberty, religious freedom, and the limits of institutional authority in public schools.

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The Equal Access Act and the Rule of Law

The Equal Access Act was upheld by the United States Supreme Court in *Board of Education of Westside Community Schools v. Mergens*[1] because of its carefully designed structural features. The statute requires that covered student organizations be student-

initiated, voluntary, non-curricular, and supervised by school staff only in a non-participatory, custodial role. These requirements were not incidental. They were constitutionally determinative.

By separating student initiative from school sponsorship, the act preserved governmental neutrality while protecting individual rights. The Court rejected the notion that exposure to student expression—religious or otherwise—creates constitutional risk. Instead, the inquiry focused on whether the school had endorsed the message or coerced participation. Absent those elements, Equal Access did not convert student speech into government speech.

From Endorsement to Compulsion

In *Kennedy v. Bremerton School District,*[2] the Supreme Court moved away from Establishment Clause frameworks that emphasized perceived endorsement or symbolic entanglement. The Court reframed the analysis around historical practices and, critically, the presence or absence of actual coercion.

Under this approach, constitutional violations arise not from the mere presence of private expression in public settings, but from government action that compels participation, suppresses individual expression, or penalizes dissent. Neutrality does not require institutional silence; it requires even-handed administration and respect for individual choice.

Mahmoud v. Taylor and the Constitutional Significance of Choice

The Court's emphasis on coercion was further sharpened in *Mahmoud v. Taylor,*[3] decided on June 27, 2025. There, the Supreme Court granted preliminary injunctive relief to parents who alleged that a public school system substantially burdened their religious exercise by compelling student participation in certain instructional content without notice or an opportunity to opt out.

Notably, the Court did not frame the dispute as one involving disagreement with ideas or mere exposure to differing viewpoints. Instead, the analysis turned on the absence of meaningful choice and the role of institutional compulsion.

Liberty, Inclusion and Institutional Restraint

Read together, *Mergens*, *Kennedy*, and *Mahmoud* reflect more than a chronological progression. They reveal a coherent constitutional principle grounded in the rule of law: lawful inclusion in public schools depends on individual liberty, voluntary participation, and freedom from coercion

Exposure to differing viewpoints does not, by itself, raise constitutional concern. Compulsion—particularly where meaningful choice is absent—does.

In this respect, *Mergens* was prescient. Long before the Court explicitly rejected endorsement-based frameworks, the Equal Access Act embodied a liberty-protective model of pluralism. Schools establish neutral forums. Students decide whether and how to participate. The institution neither directs the message nor compels engagement. The Court's more recent decisions do not depart from this framework; they confirm it.

This approach does not deny the real concerns raised by power imbalances in school communities. Rather, it responds to those concerns by emphasizing procedural fairness and student agency as the most constitutionally durable means of sustaining inclusion in a diverse democracy.

Implications for New Jersey Public Schools

For New Jersey school districts, Equal Access policies—such as Policy 5842,[4] Equal Access of Pupil Organizations—translate constitutional doctrine into daily practice. When implemented consistently, these policies preserve voluntary association while maintaining clear boundaries between student expression and institutional authority.

Recent state initiatives addressing student cell phone use reflect similar concerns. The New Jersey Department of Education's 2025–2026 Phone-Free Schools Grant encourages districts to limit device use to address distraction and social isolation. Limiting phone use, however, addresses only part of the problem. Students also require opportunities for voluntary, in-person interaction—opportunities that student-initiated clubs provide without compulsion.

Viewed through the lens of modern Supreme Court jurisprudence, the Equal Access Act is not merely a statutory accommodation from another era. It represents a constitutionally durable framework that supports pluralism, student expression, and civic association while respecting the limits of institutional authority imposed by the rule of law. ■

Endnotes

1. *Board of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226 (1990)
2. *Kennedy v. Bremerton Sch. Dist.,* 597 U.S. 507 (2022)
3. *Mahmoud v. Taylor*, 606 U.S. 522 (2025)
4. Policy numbering referenced herein is consistent with model policies published by Strauss Esmay Associates LLP, which are widely used by New Jersey school districts.

NJ Offers New Model for International Dispute Resolution

By Laura A. Kaster and Robert E. Margulies

Rule of law in the United States is often viewed through the lens of the Constitution and its guarantees of separated powers, due process, and judicial review.[1] Yet the concept is broader and more universal, encompassing the expectation that relationships will be governed by fair rules and orderly, predictable procedures.[2] In the commercial sphere, this universal dimension of the rule of law is expressed in rules-based regimes that allow parties to express their expectations at the outset, so they can structure transactions, allocate risk, and plan for inevitable disagreements with confidence that any dispute will be decided according to agreed norms rather than raw power or local favoritism.[3]

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One assurance of predictable outcomes in commercial transactions has been arbitration by independent neutrals.[4] Early 20th-century jurists like Roscoe Pound and William Howard Taft saw international arbitration as a civilizing mechanism that could channel conflict away from force and toward law.[5] Pound's sociological jurisprudence insisted that law in action must secure social interests, promote cooperation, and provide reliable channels for resolving disputes in a way that parties experience as legitimate.[6] Taft advocated general arbitration treaties and international adjudicatory mechanisms as part of a broader project to replace power politics with adjudication by impartial tribunals, believing that peaceful, rules-based dispute resolution would stabilize international affairs and create an environment in which commerce and individual enterprise could flourish.[7] That vision animates the modern system of international commercial arbitration, in which neutral arbitrators apply a party-chosen law, follow agreed-upon procedures, and issue awards that states commit to recognize and enforce.[8]

The business consequences of this development have been profound.[9] Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), arbitral awards are enforceable in national courts of more than 170 contracting states, subject only to limited defenses.[10] This regime mitigates the problem of "home court advantage," reduces fears of local bias or dysfunction, and allows companies to enter cross-border contracts confident that disputes will be decided in a neutral forum and that any award can be converted into real relief.[11] Empirical and doctrinal work shows that party autonomy, limited court interference, and broad enforceability have made international arbitration the default method for resolving cross-border commercial disputes, supporting the growth of global trade, foreign direct investment, and complex supply chains.[12] In the digital era, this infrastructure increasingly underpins cross-border online transactions for goods and services—business-to-business platforms, SaaS agreements, cloud services, and other internet-based contracts that require predictable enforcement far beyond national borders.[13]

However, success has produced new challenges that threaten access to justice, especially for small and medium-sized enterprises.[14] Many international arbitrations now resemble full-blown litigation, with extensive disclosure, multiple experts, and elaborate jurisdictional and procedural battles that drive up costs and prolong proceedings.[15] For smaller businesses or individual transactions that nevertheless may be commercially significant, claims arising from cross-border sales of goods or services, tribunal fees, institutional charges, and international counsel can easily exceed the amount in dispute or simply be unjustified, effectively closing the door to meaningful redress.[16] The adversarial intensity of such proceedings can also erode ongoing commercial relationships, contrary to the original promise that arbitration would both resolve disputes and preserve cooperation.[17] These realities have generated a widespread desire in the international commercial community for processes that integrate mediation into the dispute resolution framework rather than forcing parties into siloed choices among litigation, arbitration, or mediation.[18]

That preference has been documented in both institutional innovation and academic work.[19] The Global Pound Conference series held in 26 cities around the world, for example, found that corporate users tend to prioritize efficient, relationship-preserving resolution and enforceable outcomes over the label attached to the process, whereas lawyers often focus on whether a matter is "in arbitration" or "in mediation."[20] In a parallel development, UNCITRAL responded to the multinational corporate desires by drafting the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention on Mediation).[21] The Singapore Convention reflects this shift by seeking to provide mediated settlement agreements with a cross-border enforcement regime analogous to that of the New York Convention.[22] Cost effectiveness, speed, preservation of relationships and, importantly, enforceability are central to users' concerns.[23] However, the Singapore Convention has so far been ratified by a relatively limited number of states, and its enforcement machinery is not yet globally available.[24] In practice, parties continue to look for mechanisms that incorporate mediation while still delivering the robust, widely accepted enforceability associated with arbitral awards.[25]

Many international arbitrations now resemble full-blown litigation, with extensive disclosure, multiple experts, and elaborate jurisdictional and procedural battles that drive up costs and prolong proceedings.

Viewed through a rule-of-law lens, this "New Jersey solution" advances several core values at once. It promotes fairness and party autonomy by allowing businesses to use a process that includes both consensual problem-solving and binding adjudication, rather than forcing an all-or-nothing choice.

The New Jersey International Arbitration, Mediation, and Conciliation Act offers a uniquely structured, rule-of-law–oriented solution.[26] Codified at N.J. Stat. Ann. §§ 2A:23E-1–18, the statute creates an international framework that allows disputes to be commenced as arbitrations, then shifted into mediation or conciliation—potentially before the same neutral—without losing the protective envelope of the arbitration.[27] If mediation succeeds, the settlement can be embodied in an arbitral consent award, which is treated as an arbitral award for purposes of recognition and enforcement and thus falls within the well-developed New York Convention regime adopted by more than 170 states.[28]

Importantly, the act is not parochial: it applies to international disputes so long as there is at least one U.S. party, without requiring any party to be a New Jersey resident or to maintain a place of business in the state, and it was expressly designed to reduce the cost and duration of international proceedings, promote mediation, and attract cross-border business by making sophisticated dispute resolution accessible beyond the largest multinational corporations.[29] The New Jersey act is administered online and with video-conferenced mediations by GMXC Resolutions.[30]

The GMXC enforcement of mediated settlements solution is a "mixed mode" procedure. The parties either include a clause in their contract designating it or the parties with a legal disagreement chose it as a first step to resolution. Once a claim is made to GMXC and a response is submitted, an arbitration is convened by video-conference. The neutral is chosen from a panel of experienced arbitrators/mediator neutrals. The arbitration immediately converts the proceeding to a mediation, which, if successful, results in the neutral changing their hat back to arbitrator who enters a consent arbitral award, enforceable under the New York Convention.

Viewed through a rule-of-law lens, this "New Jersey solution" advances several core values at once.[31] It promotes fairness and party autonomy by allowing businesses to use a process that includes both consensual problem-solving and binding adjudication, rather than forcing an all-or-nothing choice.[32] It enhances predictability and enforceability by anchoring mediated outcomes in arbitral consent awards that are recognizable and enforceable under a mature, globally accepted treaty regime rather than a still-nascent one.[33] It improves access to justice for small and medium-sized enterprises, and for the vast universe of cross-border internet-based sales and service transactions, by lowering procedural costs and providing a structured pathway from negotiation to enforceable outcome.[34] And it carries forward the insight of Pound and Taft that peaceful, rules-based dispute mechanisms are not peripheral to the rule of law but central to it: they are the practical means by which law becomes a credible alternative to power, enabling commerce to flourish on a foundation of fairness, order, and respect for binding commitments.[35] ■

Endnotes

1. See generally Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* 114–18 (Cambridge Univ. Press 2004) (discussing rule-of-law concepts beyond constitutional structure).
2. See Lon L. Fuller, *The Morality of Law* 39–41 (rev. ed. 1969).
3. See Thomas H. Moran, *The Rule of Law in Commercial Arbitration*, 32 Arb. Int'l 1, 5–7 (2016).
4. See Gary B. Born, *International Commercial Arbitration* 90–96 (3d ed. 2021).
5. See Roscoe Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12, 18–20 (1910); William Howard Taft, *The United States and Peace*, 6 Am. J. Int'l L. 789, 790–93 (1912) (linking arbitration to peaceful settlement of international disputes).
6. See Roscoe Pound, *An Introduction to the Philosophy of Law* 98–105 (1922)
7. See John J. Noyes, *William Howard Taft and the Taft Arbitration Treaties*, 56 Vill. L. Rev. 535, 540–47 (2011).
8. See Born, *supra* note 4, at 365–70 (explaining modern practice of party-chosen law, consensual procedures, and state recognition of awards under international instruments).
9. See *id.* at 75–79 (describing economic significance of

international commercial arbitration).

10. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. I, June 10, 1958, 330 U.N.T.S. 3 (New York Convention).
11. See New York Convention, *supra* note 10, arts. III–V; Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding Local Standard Annulment*, 9 ICSID Rev. 1, 1–4 (1994) (discussing mitigation of "home-court advantage").
12. See Born, *supra* note 4, at 75–79, 212–14
13. See Daniel Kalderimis, *Arbitration and Online Commerce*, 36 J. Int'l Arb. 1, 2–6 (2019).
14. See Catherine A. Rogers, *The Politics of International Investment Arbitration* 7–10 (2014) (noting concerns about cost and access to justice).
15. See Susan D. Franck, *Rationalizing Costs in Investment Treaty Arbitration*, 88 Wash. U. L. Rev. 769, 773–79 (2011).
16. See Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* 11–15 (2010) (observing that cost can deter smaller claims and parties).
17. See Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. Ill. L. Rev. 1, 10–14 (discussing effects of adversarial procedures on relationships).
18. See Thomas J. Stipanowich & Zachary P. Ulrich, *Arbitration and Mediation in the Age of "Integration,"* 2014 J. Disp. Resol. 1, 4–9 (reporting corporate preference for mixed-mode processes).
19. See *id.* at 6–9; S.I. Strong, *Realizing Rationality: Cost–Benefit Analysis in International Arbitration*, 16 Cardozo J. Conflict Resol. 547, 551–54 (2015).
20. See Deborah Masucci & Ethan Katsh, *The Global Pound Conference Series: What We Learned, What We Still Need to Learn, and Why It Matters for Dispute Resolution*, Fed. Law., Mar./Apr. 2018, at 32, 33–35 (summarizing GPC user data).
21. United Nations Convention on International Settlement Agreements Resulting from Mediation, Dec. 20, 2018, 58 I.L.M. 701 (2019) (Singapore Convention on Mediation).
22. See *id.* arts. 3–5; U.N. Comm'n on Int'l Trade Law, *UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation*, U.N. Doc. A/73/17 (2018).
23. See Nadja Alexander, *The Singapore Convention on Mediation: A Framework for the Cross-Border Enforcement of Mediated Settlement Agreements*, 22 Cardozo J. Conflict Resol. 1, 5–9 (2020) (highlighting users' focus on cost, speed, relationships, and enforceability).
24. See Status of United Nations Convention on International Settlement Agreements Resulting from Mediation, U.N. Treaty Collection (listing ratifications and accessions).
25. See Stipanowich & Ulrich, *supra* note 18, at 10–13 .
26. New Jersey International Arbitration, Mediation, and Conciliation Act, N.J. Stat. Ann. §§ 2A:23E-1 to -18 (West 2025).
27. See *id.* §§ 2A:23E-2, -3.
28. See *id.* § 2A:23E-3(f) (treating settlement recorded as an arbitral award); New York Convention, *supra* note 10, arts. I, III.
29. See N.J. Stat. Ann. §§ 2A:23E-2(a), -3(a), -4; Lauren E. Koster, The New Jersey International Arbitration, Mediation, and Conciliation Act: A New Model for International Mixed-Mode Dispute Resolution, Seton Hall L. Rev. (student note, forthcoming) (manuscript at 4–8) (on file with author)
30. See GMXC Resolutions, *GMXC Rules*, gmxcresolutions.com/gmxc-rules (last visited Dec. 11, 2025).
31. See Tamanaha, *supra* note 1, at 114–18 (connecting institutional design to rule-of-law values).
32. See Stipanowich & Ulrich, *supra* note 18, at 4–9 (describing integrated processes combining mediation and arbitration).
33. See New York Convention, *supra* note 10, arts. III–V; Singapore Convention on Mediation, *supra* note 21, arts. 3–5 (contrasting maturity and breadth of enforcement regimes).
34. See Koster, *supra* note 29, at 8–13 (arguing that the New Jersey Act expands access to international dispute resolution for smaller enterprises and lower-value transactions).
35. See Pound, *Law in Books and Law in Action*, *supra* note 5, at 18–20; Noyes, *supra* note 7, at 540–47 (linking peaceful, rules-based dispute mechanisms to a robust conception of the rule of law).

Why Arbitration Depends on Legal Independence

By Laura A. Kaster and Robert E. Bartkus

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Arbitration and the rule of law are interdependent. Arbitration is a private, contract-based mechanism for resolving disputes. From the merchant guilds of medieval Europe to the arbitration clauses embedded in modern domestic and international contracts, and state-to-state disputes, the practice has thrived because it is perceived as efficient, trustworthy, rule-based, and neutral.

Today, executive orders aimed at law firms, law schools, and legal organizations raise serious concerns within the arbitration community and should concern anyone who seeks to resolve legal disputes. In its opinion enjoining Executive Order 14230 aimed at law firms, *Perkins Coie LLP v. United States DOJ*,[1] the court found that the executive order violates the Constitution because it constitutes retaliation, viewpoint discrimination, and compelled disclosure in violation of the First Amendment; denies equal protection in violation of the Fifth Amendment; violates the right to counsel guaranteed by the Fifth and Sixth Amendments; and denies due process of law in violation of the Fifth Amendment. In essence, the court ruled that there can be no rule of law without lawyering. "Congress may legislate, the President may implement, and

courts may adjudicate, 'but only the lawyers can prepare and submit the great issues of human justice under law in such manner and form that courts, in the ultimate, may be effective.'"[2]

Arbitration and arbitrators are not immune from the same kinds of attacks against law firms, lawyers and judges. The ability to advocate for clients with energy and fortitude is undermined when the lawyers who serve as advocates or the neutrals who serve as arbitrators are attacked because they have disagreed with government officials. The same concerns apply equally to arbitration. Both advocates in arbitration and arbitrators must remain free from pressure to tow any viewpoint line without fear of being targeted by the administration.

Given the unique relationship between arbitration and the rule of law, challenges are of equal concern to the arbitration community and to the entire country. Sadly, history contains examples directly affecting arbitration. They must not be repeated. Protecting the independence of judges, arbitrators, lawyers, firms, public servants, and legal organizations is therefore essential to the functioning of the rule of law. Their ability to perform their respective functions, whether in advocacy or adjudication, should remain free from undue interference in both public courts and private arbitration forums.

The adversary system necessarily requires advocacy for every side of an issue. The rule of law demands respect for the role of lawyers in examining, debating, and arguing for the rights, positions, and needs of all entitled to seek legal redress. Arbitrators, as neutrals, must be able to remain neutral and guided by the rule of law.

Historical Evolution of Arbitration and the Rule of Law

Historically, arbitration emerged where governmental systems were absent or where existing courts were considered unreliable, arbitrary, or overly intrusive. Arbitration dates from ancient times well before formal legal systems and courts were established. Arbitration began as an informal means for resolving disputes without violence, often through the decisions of a neutral third party perceived to be fair. The Bible talks about judges as wise people. Ancient Egypt, Greece, and Rome incorporated arbitration into their legal structures, with documented cases such as disputes in Greece around 600 B.C.E., including interstate controversies settled by selected arbitrators, such as the Spartan judges allocating the island of Salamis. Religious authorities, including those in Jewish, Christian, and Islamic traditions, often encouraged their adherents to settle disputes internally rather than rely on secular courts. Jewish law developed intricate systems of Beth Din (rabbinical courts) long before the rise of modern arbitration. Paul's letters in the Christian New Testament advised believers to resolve disputes amongst themselves. As referenced in the Quran, the Prophet Muhammad served as an arbitrator in disputes between non-Muslim as well as Muslim parties.[3]

Protecting the independence of judges, arbitrators, lawyers, firms, public servants, and legal organizations is… essential to the functioning of the rule of law.

During medieval times, merchant guilds played a crucial role in shaping commercial arbitration rules by providing private systems of dispute resolution that prioritized efficiency, expedience, and the interests of the mercantile community. Merchant guilds established their own process applying the "law merchant," in which disputes between members and sometimes with outsiders were resolved through arbitration by elected panels of experienced merchants or guild officials. These arbitration forums provided flexible rules that addressed real-world business needs, serving as a laboratory for modern commercial law.

Courts and legislatures adopted, codified, and harmonized widely accepted rules reflected in arbitral decisions. For example, principles of good faith and fair dealing that underly modern commercial law were prominent in arbitral decisions before being recognized in national laws. Indeed, prominent jurists such as Lord Mansfield and Benjamin Cardozo paid homage to the Law Merchant in some of their most quoted and respected opinions centuries after the guilds' arbitration courts had developed the concepts.[4]

New Jersey's colonial past includes particular respect for arbitration, in part because of its close proximity to Quaker communities (which favored arbitration) in and surrounding Philadelphia. The legal system in at least one New Jersey county was essentially supervised by Quakers and their arbitrator processes.[5] Colonial and post-Revolutionary New Jersey adopted early pro-arbitration reforms. West Jersey's 1682 arbitration statute was one of the earliest in the colonies. After the Revolution, the 1790 Arbitration Act continued until adoption of the fully modern Act in 1923, two years before the adoption of the Federal Arbitration Act.

Just as domestic disputants with commercial relationships benefited by arbitrating disputes, nations found that

disputes in international commerce and relations between and among them could be resolved by neutral arbitrators to avoid more violent means. During the Renaissance, international arbitration became even more common. Later, the Jay Treaty of 1794 between the United States and Great Britain established commissions for arbitration to resolve revolutionary war claims and marked the beginning of modern international arbitration practice.

History shows that state actors seeking to impose authoritarian rule on the population, vastly limiting the rule of law, have at times reduced or regulated arbitration in ways that shrink its independence and neutrality.

Modern arbitration was institutionalized by the Hague Conferences of 1899 and 1907 and the establishment of the Permanent Court of Arbitration. In the 20th century, the New York Convention of 1958 and UNCITRAL Model Law enhanced the global reach of arbitration. Arbitration became the preferred mechanism for cross-border dispute resolution.

There are sometimes tensions between courts and arbitration in sharing responsibility. However, in the late 20th and 21st centuries they have maintained a mutually reinforcing relationship. Over time, statutes, including the English Arbitration Act 1698 and the U.S. Federal Arbitration Act 1925, granted legal force to arbitration agreements and awards, moving arbitration into a system intertwined with formal law. Courts now enforce arbitration agreements and awards. Arbitration provides efficient, accessible dispute resolution that relieves pressure on judicial systems and often contributes rules and principles to the disputes at hand.

Thus, the relationship between courts and arbitration is best seen as a dynamic coevolution—a symbiotic development in which arbitration fosters rules of law and is embedded within the landscape of the rule of law. Therefore, an attack on law, lawyers, judges, and fundamental justice necessarily undermines arbitration. Pope Leo XIV in his recent state of the world address called the rule of law the "foundation of all peaceful civil coexistence."[6] Attacks on the rule of law undermine the very basis of ordered liberty and must be rebuffed.

Threats to Arbitration

History shows that state actors seeking to impose authoritarian rule on the population, vastly limiting the rule of law, have at times reduced or regulated arbitration in ways that shrink its independence and neutrality. As Gary Born writes, totalitarian regimes tend to domesticate arbitration and convert it into an arm of state justice.[7] In two instances, the distortions of arbitration imposed by authoritarian rulers were undone only by revolution and war.

In 17th century France, Louis XIV's "reforms" of the Ordonnance Civile of 1667 and Ordonnance de Commerce of 1673 regularized arbitration by providing national recognition and standards. Agreements had to be in writing and were offered recognition by the Royal Courts. At the same time, by centralizing the process for approving arbitrators' awards, the Acts transformed arbitration to an instrument of imperial power. Courts had to approve arbitration decisions to ensure they were "correct," that is, *la justice émane du roi* ("justice emanates from the king"), in accordance with the King's notion of the rule of law. Louis XIV saw justice as a personal prerogative and used procedural reforms, including regarding arbitration, to integrate all judicial activity into the orbits of the state. An independent, parallel arbitral system "was simply intolerable."[8] It has been said that, under the "reforms" of his reign, "[a]rbitration was all but outlawed" and "all but disappeared."[9] It took the French Revolution (1789–1799) for Louis XIV's notions of justice to be reversed. Among the reforms of the Revolution, the French Constitution of 1791 included a right to independent, neutral arbitration.

The experience of Nazi Germany was more pernicious. Before World War I, German leaders such as Otto von Bismarck had regularly praised arbitration. However, the infamous 1933 Directives disqualified Jewish judges, lawyers and arbitrators (and other non-Aryans) and sought to bring arbitration under the direct control of the state. All were required to sign loyalty oaths to the regime. The 1933 Directives "criticized arbitration for lacking transparency, providing no appellate review, and offering inadequate procedural regularity. Finally, and most fundamentally, the Directives also warned that the use of arbitration undermined confidence in the Reich's courts and, ultimately, the National Socialist state itself."[10]

As Gary Born and other scholars have noted, these measures represented a fundamental distortion of the rule of law. Arbitration, long valued for its neutrality and party autonomy, became a tool of exclusion and oppression. Private parties

were no longer free to select their own arbitrators, and the state's coercive power ensured that non-compliant individuals were silenced or removed from practice.

> The Reich Directives concerning arbitration and related legislation regarding the judiciary and legal profession were elements of the National Socialists' broader, and tragically successful, effort to assert its control over all aspects of German life. Controlling the administration of justice and adjudication of disputes was central to those totalitarian efforts.[11]

These historical episodes underscore a critical lesson: arbitration's vitality depends not only on state support but also on the state's commitment to the rule of law. When the state actively undermines neutrality and independence, arbitration ceases to function as a trusted forum.

Conclusion

Arbitration has contributed to the rule of law and to rules of law, particularly in commercial transactions, international commerce, and international relations. Many of the settled concepts governing ordered liberty require reliable rules that govern contractual arrangements and make daily interactions predictable. Conversely, the rule of law reinforces arbitration, because enforceability of arbitral awards when the parties do not voluntarily comply depends on domestic and international enforcement mechanisms. The rule of law weaves together national and international formal legal regimes with neutral and independent arbitration.

Arbitrators, lawyers, and clients must remain vigilant. ■

The authors extend their appreciation to the following New Jersey leaders of national and state arbitration organizations, who have contributed both encouragement and editorial assistance for this article: **Neal Eisenman, Felicia T. Farber, John R. Holsinger,** *and* **Richard Steen**. *Neal and John are past presidents of the College of Commercial Arbitrators; Felicia is current President of the Garibaldi Inn; and Rick is past president of the NJSBA, as well as a member of the CCA, the Garibaldi Inn, and the NJSBA DRS. The opinions in this article are their own and do not necessarily reflect the positions of the organizations mentioned.*

Endnotes

1. *Perkins Coie LLP v. United States DOJ*, 783 F. Supp. 3d 105 (D.D.C. 2025), *appeal filed*, No. 25-5241 (D.C. Cir. July 2, 2025).
2. *Perkins Coie LLP v. United States DOJ*, 783 F. Supp. 3d 105, 120-21 (D.D.C. 2025), *appeal filed*, No. 25-5241 (D.C. Cir. July 2, 2025) (citation omitted).
3. *See Rabea* Benhalim, The Case for American Muslim Arbitration, 2019 Wis. L. Rev. 531, 572 (2019).
4. *See generally* Allan Farnsworth, Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code, 30 U. Chi. L. Rev. 666 (1963); Charles A. Bane, From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law, 37 U. Mia. L. Rev. 351 (1983).
5. *See* F. Peter Phillips, Ancient and Comely Order: The Use and Disuse of Arbitration by New York Quakers Symposium, 2016 J. Disp. Resol. 1 (2016).
6. Pope Leo Confronts Trump on His Own Terms, N.Y. Times, at SR5 (Jan. 11, 2026).
7. *See* Gary Born, I International Commercial Arbitration § 10.1[B], at 50 (3d ed. 2021), *citing* E.J. Cohn, Commercial Arbitration and the Rule of Law: A Comparative Study, 4 U. Toronto L.J. 1, 27 (1941) (reportedly smuggled out of Germany).
8. Schultz, The Workings of Legal Exceptionalism, 72 Buff. L. Rev. 1585, 1591 (No. 5, 2024), *quoting* Simon Bezat, The Concept of Authority in the Arbitral Paradigm 111 (1924).
9. Thomas Schultz, The Workings of Legal Exceptionalism, 72 Buff. L. Rev. 1585, 1591 & 1595 (No. 5, 2024).
10. Gary Born, The 1933 Directives on Arbitration of the German Reich: Echoes of the Past?, 38 J. Int'l Arb. 417, 425 (No. 4, 2021).
11. Gary Born, The 1933 Directives on Arbitration of the German Reich: Echoes of the Past?, 38 J. Int'l Arb. 417, 420 (No. 4, 2021). *See also* E.J. Cohn, Commercial Arbitration and the Rule of Law: A Comparative Study, 4 U. Toronto L.J. 1, 27-28 (1941).

Justice in the Shadow of Power

By Alan N. Walter

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Justice must operate in daylight, not in the shadow of political retribution. When the Department of Justice becomes an instrument for targeting political adversaries rather than enforcing the law impartially, the foundations of democratic governance begin to crack. This article examines what happens when prosecutorial power is wielded as a weapon and what safeguards might prevent such abuse.

For half a century, American constitutional governance has rested on an unwritten but essential proposition. The White House and the Department of Justice must remain institutionally distinct. Department policies instruct that case-specific contacts with the White House be "limited and appropriate" and routed through senior officials, not through direct presidential pressure on line attorneys.[1] This architecture reflects a hard-won insight: prosecutorial power, once captured by partisan interests, corrodes everything it touches.

The warning signs of politicized prosecution are recognizable across eras and administrations. For example, Presidents publicly demanding prosecution of named critics, career prosecutors forced out when they resist particular charges and replaced by loyalists lacking federal prosecutorial experience, and targets who share one common trait: they investigated, sued or loudly criticized the president. When enforcement priorities resemble a catalog of adversaries, what emerges is not law enforcement but political hygiene dressed in the robes of justice.

When adversaries of the President are singled out for investigation, confidence in neutral enforcement shatters. High-profile defendants face staggering legal fees, reputational destruction and career-ending publicity long before any jury is empaneled. The process itself becomes the punishment.

The Chilling Effect

Political prosecutions strike at the foundations of democratic legitimacy, impartiality, fairness and equal treatment under law. When adversaries of the President are singled out for investigation, confidence in neutral enforcement shatters. High-profile defendants face staggering legal fees, reputational destruction and career-ending publicity long before any jury is empaneled. The process itself becomes the punishment.[2]

A chilling effect need not be announced to be effective; it operates through demonstration. The critic who might have spoken falls silent. The investigator who might have dug deeper closes the file. The donor who might have contributed thinks better of it. Political contributions are protected speech.[3] When major donors are investigated based on their giving patterns, the unspoken lesson—"This could happen to you"—requires no explicit articulation to achieve its purpose.

The ripple effects extend far beyond direct targets. Law firms grow cautious about representing disfavored clients, calculating that visibility in a politically charged case may invite scrutiny of the firm itself or its other clients. Media organizations hedge their coverage, lawyers in newsrooms advising against stories that might provoke official retaliation. Civil servants across agencies learn to keep their heads down, recognizing that diligent enforcement against the wrong party can end a career. The chilling effect is not a single frost but a climate change, altering the entire ecosystem of accountability.

Comparative Warnings

In *How to Lose a Constitutional Democracy*, Aziz Huq and Tom Ginsburg catalogue a pattern so familiar it approaches formula.[4] Democracies rarely collapse in a single dramatic moment. More often, elected leaders consolidate power incrementally: constraining courts, disabling watchdog institutions and selectively wielding law enforcement against opponents. Hungary, Turkey and Venezuela share this commonality: the reorientation of prosecutors from neutral law enforcers into instruments of political control.

The United States possesses stronger institutional defenses: An independent judiciary with life tenure; decentralized federalism; a robust civil society; a press protected by the First Amendment. But these safeguards are not self-executing. They depend on a shared professional culture that treats certain lines as bright. Constitutional architecture provides the structure; norms provide the mortar. Once an administration learns it can survive crossing those lines, the constraint they provided is gone. The line is not a wall; it is a consensus. Broken once, it may not hold again.

When the Guardrails Bend

Judicial review provides a critical check on prosecutorial overreach. When courts enforce appointment law and vacate cases brought by unlawfully appointed prosecutors, the system demonstrates its capacity for self-correction. A judge who holds that accepting the government's theory would allow the executive to send "any private citizen off the street" into a grand jury room so long as the Attorney General blessed the result afterward correctly concludes that "cannot be the law."[5]

Yet judicial review operates only after considerable damage has been done. By the time a court dismisses an indictment, defendants have endured months of proceedings, millions in legal fees and severe reputational harm that no judicial ruling can repair. Dismissal is remedial, not restorative. It is not a time machine.

Grand juries, too, can serve as a check,

though historically a weak one. Former Chief Judge Sol Wachtler famously observed that prosecutors could persuade a grand jury to "indict a ham sandwich."[6] When grand juries repeatedly reject charges that appear politically motivated, even this traditionally compliant body is delivering an unmistakable verdict. Such refusals are not merely procedural outcomes; they are acts of institutional conscience.

The defense bar constitutes another institutional safeguard, not always acknowledged. When skilled attorneys mount vigorous defenses of politically targeted defendants, they impose costs on abusive prosecutions: exposing evidentiary weaknesses, challenging procedural irregularities and creating public records of governmental overreach. Defense counsel willing to take such cases, knowing they may themselves attract official disfavor, perform a vital democratic function. Their willingness to stand between the individual and the state, even when the state is most determined, tests whether the adversarial system retains meaning. A healthy legal profession treats representation of the unpopular not as a liability but as a duty. The principle is foundational. The ABA Model Rules provide that representation "does not constitute an endorsement of the client's political, economic, social or moral views or activities."[7] When John Adams defended British soldiers after the Boston Massacre, he did not betray his country; he defined what loyalty to the rule of law actually requires. A lawyer's role is not to ratify popular sentiment but to stand between the individual and the state, ensuring that power answers to law regardless of political pressure. Adams later called it "one of the best Pieces of Service I ever rendered my Country."[8]

Lessons from History

Troubling precedents in American history reveal how politicized enforcement erodes democratic norms.

The Early Republic

The Sedition Act of 1798 represents the nation's first experiment with using federal prosecutorial power against political opponents. The Act made it a crime to publish "false, scandalous and malicious writing" against the government or the president; notably, it did not protect Vice President Thomas Jefferson, who led the opposition. Federal prosecutors indicted at least 26 individuals, all opponents of the Adams administration. Jefferson described the prosecutions as "the reign of witches."[9] The widespread outrage helped sweep the Federalists from power in 1800; they would never again win a national election. The lesson is instructive. Politicized prosecution may produce short-term victories but often generates lasting backlash that damages the perpetrators more than their targets.

The 20th Century

The Palmer Raids of 1919 to 1920 remain among the darkest chapters in federal law enforcement history. Following bombings attributed to anarchists, Attorney General A. Mitchell Palmer orchestrated mass arrests of suspected radicals. On a single January 1920 night, federal agents arrested over 4,000 people in dozens of cities, many held without charges and denied lawyers; targets selected based on political beliefs rather than evidence.[10]

The FBI's COINTELPRO operations from 1956 to 1971 represent a sustained campaign to surveil, infiltrate and disrupt American political organizations. Tactics included illegal wiretapping, planting false evidence and engineering arrests "on any excuse" until targets "could no longer make bail." Martin Luther King Jr. was subjected to intense surveillance; the FBI sent him an anonymous letter encouraging suicide.[11] The Church Committee concluded that "too many people have been spied upon by too many Government agencies" based on "their political beliefs, even when those beliefs posed no threat of violence or illegal acts."[12]

Politicized prosecution may produce short-term victories but often generates lasting backlash that damages the perpetrators more than their targets.

Richard Nixon's "enemies list" identified journalists, activists and politicians for investigation and harassment. The resulting abuse formed part of Article II of the impeachment articles.[13] The post-Watergate reforms that followed, including ethics laws, inspector general statutes and revised Department of Justice guidelines, reflected a bipartisan consensus. Once the prosecutorial apparatus becomes an extension of presidential will, the rule of law collapses into the rule of power.

The 21st Century

Modern controversies across administrations confirm that concerns about prosecutorial overreach transcend party lines. The 2008 prosecution of Sen. Ted Stevens provides a bipartisan cautionary tale. Stevens was convicted on corruption charges days before his re-election, likely costing him his Senate seat.

Months later, revelations of extensive Brady violations led the Department of Justice to seek dismissal.[14] The Stevens case reminds us that prosecution decisions can alter electoral outcomes and that justice system integrity depends on whether officials should bring a charge, not just whether they can.

In 2012, revelations emerged that the Obama-era Department of Justice had secretly subpoenaed phone records and emails of Associated Press reporters and labeled Fox News journalist James Rosen a criminal "co-conspirator" for receiving leaked information.[15] Such actions demonstrate how prosecutorial overreach can chill press freedom regardless of which party holds power.

The Biden administration was not immune from similar activities. Oversight reviews revealed significant compliance problems with the FBI's use of Section 702 surveillance authorities. Separately, the 2021 FBI search of Project Veritas founder James O'Keefe's home, part of an investigation involving a diary belonging to President Biden's daughter, drew sharp criticism from press-freedom organizations, which warned that investigative actions targeting journalists threatened First Amendment values.[16]

Following President Trump's return to office in January 2025, the Department of Justice brought charges against several prominent Trump critics, including former FBI Director James Comey,[17] former National Security Advisor John Bolton,[18] and New York Attorney General Letitia James. A federal judge dismissed both the Comey and James indictments in November 2025, ruling that the prosecutor who obtained them had been unlawfully appointed.[19] When prosecutors twice attempted to reindict James in December 2025, grand juries in both Norfolk and Alexandria refused to approve the charges.[20]

These episodes share common threads: Using federal prosecutorial power to punish political opposition; willingness to bend or break rules in pursuit of convictions; and long-term damage to democratic institutions that reverberates for generations. Once the precedent is set that prosecution can be wielded as a political tool, future administrations inherit both the capacity and the temptation.

Once the precedent is set that prosecution can be wielded as a political tool, future administrations inherit both the capacity and the temptation.

Drawing the Line

How should we distinguish legitimate prosecution from political weaponization? Several factors are telling: Presidential demands for named prosecutions of critics; forcing out career prosecutors and replacing them with inexperienced loyalists; patterns of targets resembling a catalog of adversaries rather than a coherent enforcement philosophy; and timing aligned with political calendars rather than investigative progress. Selectivity—who gets charged, when and at whose urging—can itself constitute abuse even when underlying conduct might otherwise warrant scrutiny. The presence of any single factor may be explicable. The presence of multiple factors, repeated across cases, suggests something other than law enforcement is at work.

Conclusion

Democratic institutions are not without resources when leaders overreach. Courts, legislatures, proecutors, inspectors general, a free press and an engaged citizenry all serve as counterweights to the concentration of power. But structural safeguards alone are insufficient. What they require to function is institutional courage, the willingness of individual officials to prioritize long-term integrity over short-term political advantage, even when the personal cost is high.

Career prosecutors must be willing to decline cases that lack merit or appear retaliatory, understanding that refusal may carry professional consequences. The Department of Justice is not merely a chain of command; it is a repository of professional norms that constrain what any superior—of any administration—can legitimately demand. Federal judges must scrutinize not only the sufficiency of the evidence but also the integrity of the charging decision; courts that treat potentially pretextual prosecutions as routine risk hollowing out the judiciary's role as a check on executive power. Congress must conduct rigorous oversight even when doing so is uncomfortable for the party in power. Bar authorities bear responsibility for disciplining lawyers who participate in prosecutions they know to be abusive. And the press must continue to distinguish neutral law enforcement from political weaponization, a task that grows harder as official justifications grow more sophisticated, regardless of which party controls the machinery of justice.

Structural reforms can help. Fixed terms for Attorneys General would reduce temptation to use the office for short-term political gain; statutory codification of contact policy norms would move guidelines from internal policy to

enforceable law; and strengthened whistleblower protections for career Department of Justice lawyers would create safer pathways for those who witness misconduct.[21]

When prosecutorial power becomes an accepted instrument of political advantage, the damage to democratic institutions may prove profound and enduring. History teaches that democracies rarely fail through dramatic overthrow; they erode through the accumulated normalization of conduct once considered impermissible. Prosecutorial independence is particularly vulnerable to this dynamic because it is the very mechanism by which other abuses are checked. When prosecutors operate as political agents rather than independent officers of the law, they forfeit the credibility necessary to investigate executive misconduct. When courts are asked to validate pretextual charges, they risk becoming implicated in the abuses they exist to prevent.

Whether these patterns are recognized and corrected or become embedded as the new normal will shape the character of American democracy for generations to come. The work of preservation is quieter than the work of destruction, but no less essential. Justice must operate in daylight, not in the shadow of power. ■

Endnotes

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2. The phrase is often attributed to Attorney General Robert Jackson's 1940 address to United States Attorneys, though its precise origin is disputed. See Robert H. Jackson, *The Federal Prosecutor*, 24 J. Am. Jud. Soc'y 18 (1940). For data on the financial burdens of federal defense, see Nat'l Ass'n of Criminal Def. Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018), nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct.
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12. S. Rep. No. 94-755, Book II, *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities* (1976); Ward Churchill & Jim Vander Wall, *The COINTELPRO Papers* (2d ed. 2002).
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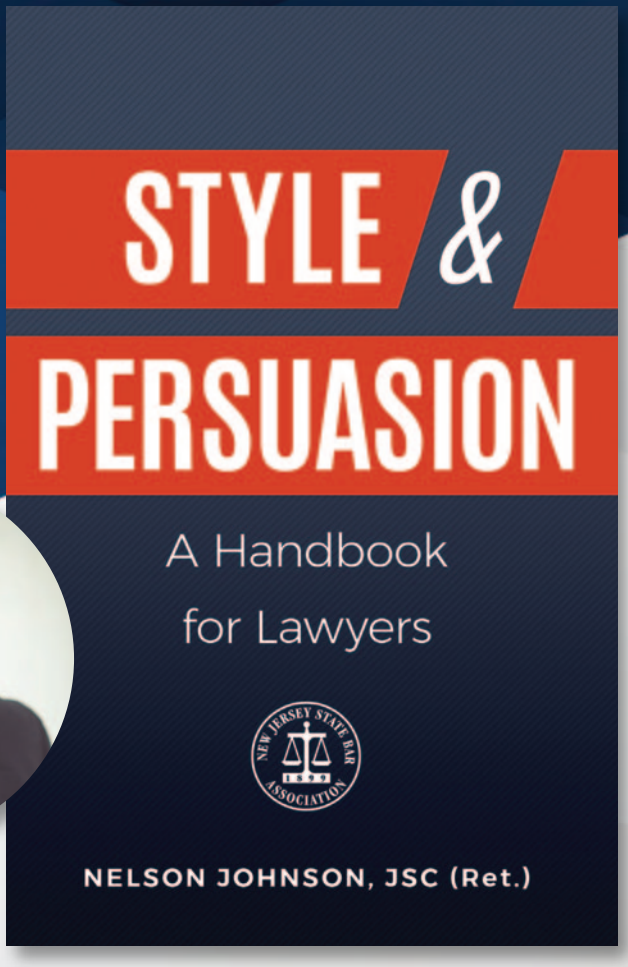

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Examining the Shadow Docket's Impact on the Rule of Law

By Lawrence S. Lustberg and Michael R. Noveck

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The increased use by the United States Supreme Court of its so-called "shadow docket"—deciding more and more important cases through the use of emergent orders[1]—has been much criticized.[2] The reasons for criticism range from its denial of a full opportunity for the parties to be heard to the manner in which it deprives the public of the basis for the Court's decision-making, and lower courts of the guidance that they typically derive from written opinions. This article discusses its implications for the rule of law.

There is, really, no dispute that the shadow docket has become the basis for a greater number of decisions than ever before in the Supreme Court's history. SCOTUSblog's "Interim Docket" tracker, which sorts by Supreme Court term (October to September), lists 18 applications for the 2022 term; 33 for the 2023 term; and 80 for the 2024 term. As of the date of this writing, five months unto the 2025 term, there

have been 43 applications filed, so the Court is on pace for even more shadow docket decisions this year.[3] This trend is even more pronounced when one looks to the most recent history. Thus, the second Trump administration filed 19 applications for emergency relief in its first 20 weeks from January to June 2025. By comparison, the Biden administration filed 19 applications total across its four-year term, and the George W. Bush and Obama administration together filed a total of eight emergency applications over their 16 years in office.[4]

Perhaps more significantly, shadow docket orders are being issued in more important cases than ever before, and in a way that has particularly profound social, political and legal impact. As Professor Kate Shaw recently pointed out at a forum on the Shadow Docket at Harvard Law School, "[s]hadow docket grants have included orders permitting the administration to remove individuals to third countries without complying with the Convention Against Torture, to expel transgender service members from the military, to permit roving ICE raids to stop citizens and non-citizens alike."[5] Just last month, the Court granted an interim stay of a Ninth Circuit opinion that had put on hold a district court injunction against a series of California state laws and regulations that prohibited schools from telling parents about their children's efforts to engage in gender transitioning unless the children consented to parental notification;[6] it also issued another interim order that stayed a New York state trial court ruling requiring the state to redraw a Congressional voting district in Brooklyn and Staten Island that diluted the voting power of Black and Latino voters,[7] even after it had allowed a redrawn Texas voting map that seemed to suffer from similar defects to survive a challenge in a different interim order earlier this term.[8]

Beyond issues that have the kind of profound social and political impact that these shadow docket rulings decide, summarily reversing lower court orders addressing significant constitutional issues, the Court has also begun to use the shadow docket to change the law, and even overrule its own precedents, *stare decisis* notwithstanding. Thus, for example, numerous lower courts blocked administration removals of various heads of independent federal agencies based upon the Supreme Court's 1935 decision in *Humphrey's Executor v. United States*,[9] which unequivocally prevented such removals. But the Supreme Court has stayed these decisions on the shadow docket,[10] with minimal explanation.[11] It has even criticized courts for not following shadow docket orders,[12] even though it had long been the law that interim orders did not have a precedential effect.[13]

Beyond issues that have the kind of profound social and political impact that these shadow docket rulings decide, summarily reversing lower court orders addressing significant constitutional issues, the Court has also begun to use the shadow docket to change the law, and even overrule its own precedents, *stare decisis* notwithstanding.

In addressing whether, and how, these kinds of increasingly common shadow docket orders bear upon the question of the continued vitality of the rule of law, it bears reminding ourselves what that oft-used term—rule of law—actually means. There is a consensus among authorities and commentators: its meaning has both a substantive and a procedural component. Substantively, it means not only that, in the words of the common aphorism, "no person is above the law,"[14] *i.e.*, that laws are applied evenly and without bias. It also means that our law derives from the Constitution; from statutes that are themselves constitutional, including being sufficiently clear to be understood by those to whom they are applied; and from precedents that are respected and applied by courts to new, similar cases through the rigorous exercise of legal reasoning rather than by arbitrary *ipse dixit*.[15] Procedurally, the rule of law demands legal process that is transparent, full, and fair.[16]

The extensive use of the shadow docket betrays these principles and thus undermines the rule of law. Some of the ways in which that is true are oft-expressed: both scholars and the Justices themselves, even including those who often join in current shadow docket orders which uphold very expansive, constitutionally suspect, broad exercises of executive power, complain that the shadow docket results in rushed rulings:[17] as Justice Brett Kavanaugh very recently put it, referring to the accelerated timetable being imposed upon the Court by the emergency docket, "None of us enjoys this."[18] Reservations are often expressed about the fact that shadow docket orders do not provide appropriate guidance to lower courts,[19] and fail to explain the Court's reasoning to the public—a critical purpose of writing opinions in the first place.[20] Still others are concerned that cases are decided without the fair process that inheres in providing an opportunity to fully brief the relevant

issues and participate in the oral arguments that attend Supreme Court arguments that really are, as is the case with many shadow docket orders, determinations on the merits.[21]

But there is another aspect of the rule of law that is implicated by shadow docket orders, orders which are often just that—orders—without any opinion,[22] or are accompanied by only very brief opinions.[23] That is, in a constitutional common law system such as ours, the law develops through the reasoned application of the general language of the Constitution, the careful interpretation of statutes, and the development of precedent, all by judges who articulate their holdings in opinions that explain why those judges have reached the conclusions that they have. Those opinions follow upon the review of briefs and consideration of arguments that likewise attempt to apply rules, interpret constitutional, statutory and judicial language, and argue that result that should follow, to the benefit of the party represented.[24] As attorneys, we often craft arguments meant to persuade but after researching the law, and seeking to apply it in the way that would lead the court to the desired conclusion, we determine that, to be colloquial, "it just won't write," so we abandon those arguments.

Judicial opinions have to meet the same criteria—they have to make sense; they have to be reasoned; they have to reach conclusions that flow from the pertinent authority. And whether they do, as all good judges (and their law clerks) know, depends upon whether those opinions "will write," whether they will make sense once the Court really tries to articulate their basis.[25] If they do not, they do not pass the test of reason that is one of the features, as explained above, of the rule of law.[26] And without that, unreasoned shadow docket orders become not only unsupported (even if that are supportable) decisions, but pure exercises of power—the product of a judge's own views, rather than of legal principles: they become the judicial embodiment of being a society of "people, not laws."[27] As such, they are the very antithesis of the rule of law.

But while the other branches of government are at times criticized as falling short in fulfilling their constitutional roles, the Courts continue deciding cases on the merits in ways that sometimes accept, but often reject the executive branch's decisions.[28] The increased use of the shadow docket is, however, a source of significant concern, raising questions about the appropriate, careful, fair determination of very important cases, including cases that implicate extremely important issues of administrative law, immigration voting rights and search and seizure. And in doing so, it may affect perceptions of the legitimacy of the judiciary, and with it the authority that springs from the fact that the judicial branch of government is and has, for the past 250 years, been the guardian of the rule of law that is the foundation of our constitutional system.

This article articulates the authors' views and cannot and should not be ascribed to the firm of which they are partners.

Endnotes

1. The term "shadow docket" was first coined by Professor William Baude to describe the Supreme Court's work outside of its merits docket, including orders granting or denying certiorari, orders granting or denying stays pending appeal, and summary reversals. William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & Liberty 1 (2015). This article focuses largely on the most controversial aspect of the shadow docket: orders granting or denying requests for emergent relief.
2. *See generally* Stephen Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* 12 (2023) (arguing that "[s]ince the mid-2010s, there has been a radical shift in how (and how often) the justices use the shadow docket—not just to manage their workload, but to change the law both on the ground and on the books"); Richard J. Pierce, Jr., *The Supreme Court Should Eliminate Its Lawless Shadow Docket*, 74 Admin. L. Rev. 1 (2022); Erwin Chemerinsky, *Why the shadow docket should concern us all*, SCOTUSblog, Aug. 4, 2025, scotusblog.com/2025/08/why-the-shadow-docket-should-concern-us-all/.
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4. Steve Vladeck, *Bonus 157: Why the Supreme Court Keeps Granting Stays to President Trump*, One First, June 12, 2025, stevevladeck.com/p/bonus-157-why-the-supreme-court-keeps; *see also* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123, 161 (2019) (Appendix Table 3 listing all cases in which the federal government should emergent relief from the Supreme Court from

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6. *Mirabelli v. Bonta*, 146 S. Ct. 797 (Mar. 2, 2026).
7. *Malliotakis v. Williams*, 146 S. Ct. 809 (Mar. 2, 2026) (Mem).
8. *Abbott v. League of United Latin Am. Citizens*, 146 S. Ct. 418 (2025).
9. *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).
10. *Trump v. Slaughter*, 146 S. Ct. 18 (2025) (Mem.); *Trump v. Boyle*, 145 S. Ct. 2653 (2025); *Trump v. Wilcox*, 145 S. Ct. 1415 (2025).
11. *See Boyle*, 145 S. Ct. at 2656 (Kagan, J., dissenting) (criticizing majority for effectively overruling *Humphrey's Executor* "with the scantiest of explanations").
12. *See Nat'l Insts. of Health v. Am. Pub. Health Ass'n*, 145 S. Ct. 2658, 2663 (2025) (Gorsuch, J., concurring) (accusing district court judge of "defy[ing]" Court's shadow docket ruling in *Dep't of Ed. v. California*, 604 U.S. 650 (2025)).
13. *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring) ("The Court's stay order is not a decision on the merits."); Stephen I. Vladeck, *The Most-Favored Right: COVID, the Supreme Court, and the (New) Free Exercise Clause*, 15 N.Y.U. J.L. & Liberty 699, 731 n.113 (2022) (quoting a speech by Justice Alito in September 2021 in which he said that "a ruling on an emergency application is not a precedent with respect to the underlying issue in the case"); *see also* Vladeck, *The Shadow Docket*, *supra* n.1, at xii (explaining that the Court has been "insisting, for the first time, that at least some of these unexplained [shadow docket] rulings are precedents that lower courts and government officials are bound to follow").
14. The exact origin of the phrase "no person is above the law" or its variants is unclear, but it appears to trace back to the Magna Carta, which espoused the principle that the king and his government were subject to legal constraints. *See* Victor Mather, *A Brief History of the Phrase 'No One Is Above the Law'*, N.Y. Times, June 13, 2024, nytimes.com/2024/06/13/us/politics/trump-biden-no-one-is-above-the-law.html.
15. *See, e.g.*, American Constitution Society, *What Is the Rule of Law?*, May 27, 2025, acslaw.org/inbrief/what-is-the-rule-of-law/ (defining the Rule of Law to include "the role of an impartial court to evaluate the arguments and come to a reasoned conclusion to settle the dispute"); Sam Spital, *When Power Is Divorced From Rule of Law*, NAACP Legal Defense Fund, Apr. 9, 2020, naacpldf.org/naacp-publications/ldf-blog/wi-2020-primary-election/ (arguing that Supreme Court shadow docket order reflected "mere *ipse dixit*" and thus "failed to respect the decision-making principles that ensure judicial opinions (whether we agree with them or not) are grounded in the judges' application of law"); Harry W. Jones, *The Rule of Law and the Welfare State*, 58 Colum. L. Rev. 143, 145 (1958) (defining Rule of Law to include "a tradition . . . that day-to-day decisions shall be reasoned, rationally justified, in terms that take due account both of the demands of general principle and the demands of the particular situation").
16. *See, e.g.*, World Justice Project, *What is the Rule of Law?*, worldjusticeproject.org/about-us/overview/what-rule-law (accessed March 10, 2026) (defining the Rule of Law through principles including that "[t]he processes by which the law is adopted, administered, adjudicated, and enforced are accessible, fair, and efficient"); Jack Goldsmith, *The Rule of Law in Secret*, Apr. 2, 2015, jackgoldsmith.org/the-rule-of-law-in-secret/ ("Transparency into the processes of law making, and law-interpretation, and law-execution is usually a means—a presumptive means—to the end of ensuring conformity to law by government.").
17. *See, e.g.*, *Mirabelli*, 146 S. Ct. at 805–06 (Kagan, J., dissenting) (arguing that the "emergency docket can malfunction" when complex decisions are made without necessary "reflection and explanation"); *Vasquez Perdomo*, 146 S. Ct. at 17 (Sotomayor, J., dissenting) (criticizing shadow docket for "circumvent[ing] the ordinary appellate process"); *California*, 604 U.S. at 653 (Kagan, J., dissenting) ("The risk of error increases when this Court decides cases—as here—with barebones briefing, no argument, and scarce time for reflection."); *Does 1–3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring) (noting that the "emergency docket" requires the Court to act "on a short fuse without benefit of full briefing and oral argument").
18. Abbie VanSickle, *Two Supreme Court Justices Debate Handling of Trump Emergency Cases*, N.Y. Times, Mar. 9, 2026, nytimes.com/2026/03/09/us/politics/supreme-court-justices-

emergency-cases.html. Justice Kavanaugh laid the blame on "gridlock in Congress [that] has led presidents to do more through executive orders, which have then been challenged in court." *Id.*

19. *See Vasquez Perdomo*, 146 S. Ct. at 17 (Sotomayor, J., dissenting) (criticizing unreasoned shadow docket orders "when lower courts and litigants need guidance about the issues on which they should focus"); William Baude, Opinion, *The Supreme Court's Secret Decisions*, Feb. 3, 2015, nytimes.com/2015/02/03/opinion/the-supreme-courts-secret-decisions.html ("[B]ecause the lower-court judges don't know why the Supreme Court does what it does, they sometimes divide sharply when forced to interpret the court's nonpronouncements."); Steve Vladeck, *Justice Gorsuch's Attack on Lower Courts*, One First, Aug. 25, 2025, stevevladeck.com/p/174-justice-gorsuchs-attack-on-lower (criticizing Justice Gorsuch's claim that lower court judges were defying shadow docket rulings because "writing little to nothing and then complaining about lower courts not correctly divining the justices' intent strikes me as little more than hubris").
20. *See, e.g.*, Abbie VanSickle, *Justice Kagan Urges Supreme Court to Explain Itself in Emergency Decisions*, N.Y. Times, July 24, 2025, nytimes.com/2025/07/24/us/justice-kagan-supreme-court-emergency-decisions.html (describing Justice Kagan speech in which she expressed "concerns that the justices' failure to provide the court's reasoning in cases could make it difficult…for the public to understand the court's reasoning"); Nancy A. Wanderer, *Writing Better Opinions: Communicating With Candor, Clarity, and Style*, 54 Me. L. Rev. 47, 50 (2002) (discussing how judicial opinions should be written to explain the reasons for the court's opinion to the public).
21. *See, e.g.,* Chemerinsky, *supra* n.2 ("If one believes that briefing, arguing, and deliberating matters are essential to a system of law—and I certainly do—we should be deeply troubled by their absence when the court is issuing major rulings without them.").
22. *See, e.g.*, *Vasquez Perdomo*, 146 S. Ct. at 1 (Mem.) (no majority opinion); *Dep't of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153 (2025) (Mem.) (same).
23. *See, e.g.*, *Boyle*, 145 S. Ct. at 2654 (two paragraph majority opinion); *NIH*, 145 S. Ct. at 2659 (one paragraph majority opinion).
24. *See generally* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877 (1996) (arguing that "when people interpret the Constitution, they rely not just on the text but also on the elaborate body of law that has developed, mostly through judicial decisions, over the years").
25. *See* Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. Chi. L. Rev. 1421, 1447 (1995) ("In thinking about a case, a judge might come to a definite conclusion yet find the conclusion indefensible when he tries to write an opinion explaining and justifying it."). *See also* Judge Mel Dickstein, *Why Judges Write Opinions,* MINNPOST, Oct. 17, 2014, minnpost.com/community-voices/2014/10/why-judges-write-opinions/ ("[W]writing an opinion helps a judge think through complex issues, forcing the judge to carefully consider the reasons for the judgment rendered."). Judge Dickstein concludes; "What I think is so wonderful about our system is that we come to a clear understanding of the law when opinions are well written and clearly expressed. A reader, following the arc of the decisions in this case, knows how the ultimate decision was made—what arguments were considered and accepted or rejected. It leads to a respect for the law, whether or not you agree with it. That's how our law develops, and one way we assure respect for the process—it's the reason we write legal decisions; sometimes very long ones."
26. *See supra* at 3 and n.15; *see also* Barry Sullivan, *Discretion, Judgment, and the Supreme Court's Docket: Litigating Presidential Immunity*, 56 Loyola U. Chi. L.J. 137, 146 (2024) ("[T]he absence of any obligation to explain may sometimes serve to conceal the absence of legitimate, persuasive reasons.").
27. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men.").
28. *See, e.g.*, Chris Geidner, *The D.C. District Court strikes back*, Law Dork, Feb. 12, 2026, lawdork.com/p/the-dc-district-court-strikes-back (citing decisions showing "that lawless actions from the executive are not ultimately lawlessness if they are stopped by others who maintain respect for the law"); Kyle Cheney, *Hundreds of judges reject Trump's mandatory detention policy, with no end in sight*, Politico, Jan. 5, 2026, politico.com/news/2026/01/05/trump-administration-immigrants-mandatory-detention-00709494 (describing how "More than 300 federal judges, including appointees of every president since Ronald Reagan," have rejected the Trump administration's position on its immigration detention authority).

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New Jersey State Bar Foundation

The Rule of Law as a Living Principle

EDITOR'S NOTE: This article originally appeared in **The Informed Citizen**, *a publication of the New Jersey State Bar Foundation (NJSBF). The NJSBF is the educational and charitable arm of the New Jersey State Bar Association and is dedicated to advancing public understanding of the law, the legal system, and the role of courts in a constitutional democracy. Written for a general audience, the article is reprinted here as part of this issue's broader examination of rule of law. Learn more about the Foundation at njsbf.org*

By Jodi Miller

In many countries around the world, citizens are subject to the arbitrary rulings of dictators or those in power. In the United States, even though it is never mentioned in the U.S. Constitution, citizens are governed by the concept of the rule of law, the principle on which the American legal system was built.

Origins of Rule of Law

The rule of law is actually an ancient concept that predates America's founding by several centuries. It maintains that the government and the governed should be subject to the same laws. While never mentioning the rule of law by name, Greek philosophers such as Plato and Aristotle pushed forth their own versions of it.

Plato said, "Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state."

Aristotle went further, writing, "It is more proper that law should govern than any one of the citizens: upon the same principle, if it is advantageous to place the supreme power in some particular persons, they should be appointed to be only guardians, and the servants of the laws."

Believed to be the first document advocating the rule of law, England's Magna Carta was signed in 1215. While much of the ancient document has been **repealed** or **codified**, its 39th clause remains. It stated: "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send other to do so, except by the lawful judgment of his equals or by the law of the land."

This clause has been interpreted to mean that citizens are entitled to **due process** and trial by a jury of their peers, even though the concept of a jury trial was not in existence in 13th Century England.

"Due process is essential to the application of the rule of law as it impacts how justice is administered," says Tiffany N. Basciano, associate director of the International Law and Organizations Program at Johns Hopkins School of Advanced International Studies in Washington, DC. "If one is accused of a crime, or deprived of property, for example, there has to be protections in place to fairly decide on guilt or innocence or rights, allowing both sides to be heard and present evidence. The fairness of a process bolsters the rule of law, as it is more inclined to assess the truth of the matter and avoid random decision-making."

According to *Meeting at Runnymede—The Story of King John and Magna Carta*, published by the Constitutional Rights Foundation, "The real significance of this document lies with

the basic idea that a ruler, just like everyone else, is subject to the rule of law. When King John agreed to [what would eventually become] Magna Carta, he admitted that the law was above the king's will, a revolutionary idea in 1215."

Centuries later, the influence of the Magna Carta would transfer to the American colonies. In January 1776, Thomas Paine published his pamphlet, *Common Sense*, in which he wrote: "In America, the law is king. For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other." When drafting the Constitution of Massachusetts in 1780, John Adams advocated for "a government of laws and not of men."

Rule of Law Protections

According to Basciano, the rule of law should protect every legally tangible right.

"Without the rule of law, or when the rule of law breaks down, the effective enforcement of rights becomes an issue," says Basciano. "There is a distinction between having a law on the books and implementation. There needs to be accessible, impartial and effective accountability mechanisms in place such that when there is a complaint that the government or a private actor violated rights, there is an avenue for **redress**."

The Oxford English Dictionary defines the rule of law as: "the principle whereby all members of a society (including those in government) are considered equally subject to publicly disclosed legal codes and processes."

The World Justice Project (WJP), established by the American Bar Association in 2007, recognized that "the 'rule of law' is a frequently used term that is rarely defined" and set out to establish an accepted definition in part to measure adherence to the rule of law around the globe. WJP's definition is comprised of four universal principles:

- Accountability—The government as well as private actors are accountable under the law.
- Just Laws—The laws are clear, publicized, stable and just; are applied evenly; and protect fundamental rights, including the security of persons and property and certain core human rights.
- Open Government—The processes by which the laws are enacted, administered and enforced are accessible, fair and efficient.
- Accessible & Impartial Dispute Resolution—Justice is delivered timely by competent, ethical and independent representatives and neutrals who are accessible, have adequate resources and reflect the makeup of the communities they serve.

Everyday Rule of Law

So, how does the rule of law impact the everyday lives of Americans? Basciano points out that every time we stop at a red light, we are adhering to the rule of law.

"Is it out of a sense of moral duty, is it because it is the law, or is it because of the fear of punishment or hurting someone?" she asks.

"In the U.S., we live in a society based on the rule of law such that there are certain expectations, responsibilities, and duties. Whether we realize it or not the rule of law impacts both small and large interactions in our lives," Basciano says. "For example, from the economic perspective, the rule of law provides businesses and investors some level of certainty enabling them to create job opportunities. The predictability that comes with the rule of law helps us all to develop and thrive." ■

NJSBA Events

Recognizing Excellence, Building Community

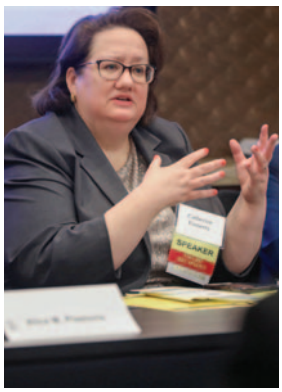
From major CLE gatherings to community service and celebrations of diversity, NJSBA members came together this winter for a wide range of programs and initiatives. These events highlight the Association's commitment to professional excellence, leadership development and service to the broader community.

Family Law Symposium Returns for Two-Day Event

New Jersey's premier family law event returned to the Hyatt in New Brunswick on Jan. 23–24. The annual gathering brought together many of the state's leading family law lawyers and judges for thought-provoking and insightful presentations on recent trends in the practice.

Solo and Small-Firm Attorneys Gather for 2026 Conference

The premier CLE event for solo and small-firm attorneys, held from Feb. 20–21, offered valuable networking, engaging programs and meaningful time with colleagues.



Distinguished Civil Practice Attorneys, Former Federal Judge Honored at McLaughlin Awards

The NJSBA's Civil Trial Bar Section presented its annual James J. McLaughlin Awards on Feb. 10 to retired U.S. Magistrate Judge for the District of New Jersey John J. Hughes, and attorneys Kathleen M. Reilly and Frank A. Viscomi. The awards recognize the highest standard of civility, legal competence and professionalism in the practice of civil law. New Jersey Appellate Division Presiding Judge Jack M. Sabatino paid tribute to the trio in a keynote address.

NJSBA Celebrates Black History Month

The NJSBA Minorities in the Profession Section celebrated Black History Month with a dynamic event featuring live musical performances, a showcase of local artists and a keynote by retired Judge Glenn A. Grant, former director of the state Administrative Office of the Courts. Finalists in the MIPS annual Black History Month Essay Contest read excerpts from their winning essays on the future of equity in New Jersey. This year's contest finalists were Hania Hashmi of An-Noor Academy in Piscataway; Nami Patel of Parsippany Hills High School; and Armani Smith of the STEM Innovation Academy of the Oranges in South Orange.

Inspiring Women in Law Take Center Stage at NJSBA Women's Leadership Conference

The NJSBA hosted another powerful day of inspiration and professional growth for attorneys at every stage of their careers. Attendees heard from accomplished women in the law who leveraged their law degrees and creativity to shape careers on their own terms. The day's keynote speaker was Christine Quinn—former New York City Council Speaker, author, cable-news political commentator and CEO of Women In Need.

Young Lawyers Division Teams Up to Fight Hunger

The NJSBA Young Lawyers Division, partnering with the Essex County Bar Association, volunteered at the mobile food market supporting the MEND hunger relief network. Together, they served 450 families with fresh, healthy food and collected over $1,000 worth of nonperishable items.

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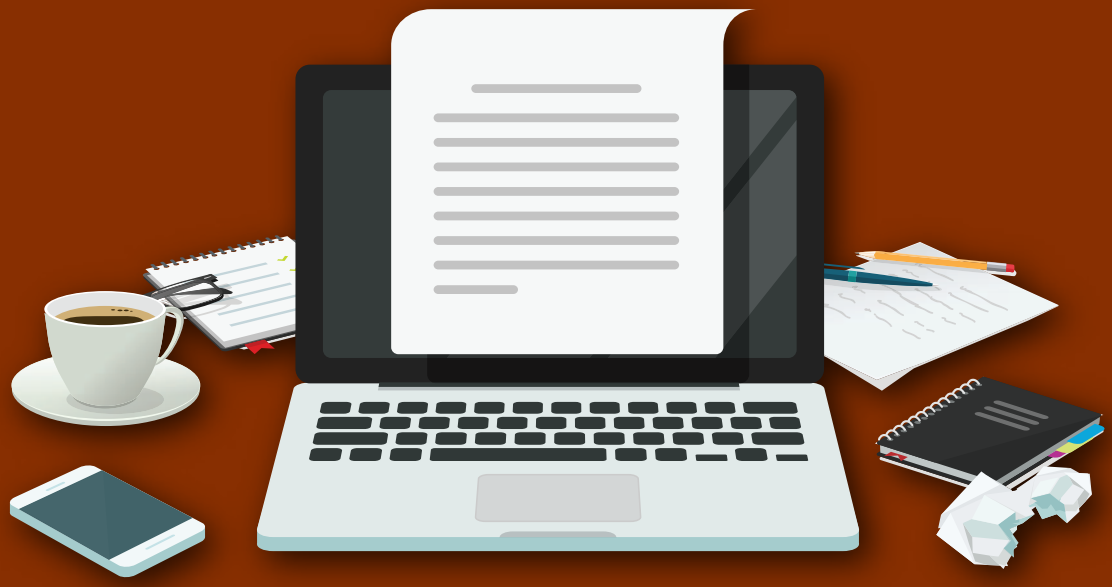

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