

**Holloran Center Rule of Law Working Group
Rule of Law Learning Outcome Materials**

**SUPPLEMENTAL DESCRIPTIONS OF
FOUNDATIONAL PRINCIPLES OF RULE OF LAW**

1. Independence

An independent judiciary is fundamental to the rule of law.¹ “The judiciary plays an essential role in giving life to other values, such as predictability and transparency.”² It does not mean that judges can do whatever they want but, rather, that they must be fair and impartial.³ In his 2024 Year End Report of the Federal Judiciary, Chief Justice Roberts wrote:

The independent federal judiciary established in Article III and preserved for the past 235 years remains, in the words of my predecessor, one of the “crown jewels of our system of government.” Indeed, it is no exaggeration to conclude, as Chief Justice Rehnquist did, that “the creation of an independent constitutional court, with the authority to declare unconstitutional laws passed by state or federal legislatures, is probably the most significant contribution the United States has made to the art of government.” Before the American founding, no other country had found a way to ensure that the people and their government respect the law. One reason judicial review has endured and served us well lies in yet another insight from Chief Justice Rehnquist, articulated in his 2004 Year End Report: “The Constitution protects judicial independence not to benefit judges, but to promote the rule of law.” Or, as Justice Kennedy put it, “Judicial independence is not conferred so judges can do as they please. Judicial independence is conferred so judges can do as they must.”⁴

In an essay reflecting on the independence of the judiciary, Justice Ginsburg began with the idea that, “Essential to the rule of law in any land is an independent judiciary, judges not under the thumb of other branches of Government, and therefore equipped to administer the law impartially.”⁵ In concluding her essay, she quoted two scholars on opposite sides of the political spectrum who agreed on the following point, “Judicial independence in the United States strengthens ordered liberty, domestic tranquility, the rule of law, and democratic ideals. At least in our political culture, it has proved superior to any alternative form of discharging the judicial

¹ See Robert Stein, *Rule of Law: What Does It Mean?*, 18 MINN. J. INT’L L. 293, 302 (2009).

² *Id.* at 301-302.

³ See *id.* at 302.

⁴ U.S. SUP. CT., 2024 YEAR END REPORT ON THE FEDERAL JUDICIARY (2024) (internal citations omitted), <https://www.supremecourt.gov/publicinfo/year-end/2024year-endreport.pdf>.

⁵ Ruth Bader Ginsburg, *Judicial Independence: The Situation of the U.S. Federal Judiciary*, 85 NEB. L. REV. 1, 1 (2011).

function that has ever been tried or conceived. It would be folly to squander this priceless constitutional gift to placate the clamors of benighted political partisans.”⁶

Just as an independent judiciary is fundamental to the rule of law, so too is an independent legal profession.⁷ As stated in the Preamble to the Model Rules of Professional Conduct, “Self-regulation [] helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.”⁸ In a recent opinion of the United States District Court for the District of Columbia, Judge Beryl A. Howell observed:

The importance of independent lawyers to ensuring the American judicial system’s fair and impartial administration of justice has been recognized in this country since its founding era

The Supreme Court, too, has recognized the importance of lawyers to the functioning of the American judicial system, since “[a]n informed, independent judiciary presumes an informed, independent bar.” *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001). This is so because 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.” *Williams v. Beto*, 354 F.2d 698, 706 (5th Cir. 1965). Absent their crucial independence, lawyers would “become nothing more than parrots of the views of whatever group wields governmental power at the moment.” *Cohen v. Hurley*, 366 U.S. 117, 138 (1961) (Black, J., dissenting).⁹

Law is carried out through the actions of government lawyers and private lawyers. Given their pivotal roles, all lawyers must uphold the law, support the independence of the judiciary and the legal profession, and ensure that the government follows the law.

2. Equality

Often considered to be a cornerstone of our society, the equality principle -- the understanding that the law must be applied to everyone according to its terms no matter who they might be, whether rich or poor, White or Black, government official or citizen – encompasses two distinct but related concepts: one, no one is above the law; and two, the law should be applied impartially and not arbitrarily.¹⁰ The first aspect (sometimes referred to as vertical

⁶ *Id.* at 13-14 (quoting Bruce Fein & Burt Neuborne, *Why Should We Care About Independent and Accountable Judges?*, 84 JUDICATURE 58, 63 (2000)).

⁷ See Stein, *supra* note 1, at 302.

⁸ MODEL RULES OF PRO. CONDUCT PREAMBLE ¶ 11 (A.B.A. 1983).

⁹ *Perkins Coie LLP v. U.S. Dep’t of Justice*, No. 25-cv-716 (BAH), 2025 WL1276857, at *1-2 (D. D.C. May 2, 2025) (footnotes omitted).

¹⁰ See TOM BINGHAM, *THE RULE OF LAW* 55 (2010); E-mail Exchange Between Jerry Organ and Brian Tamanaha (July 7, 2025) (on file with authors).

equality) is discussed here. For more information on the second aspect (horizontal equality), please see supplemental materials for the rule of law principle "Fairness and Consistency."

The equality principle is reflected in the drafting of the United States Constitution and its revolutionary "enthronement of the law" as expressed in the Supremacy Clause in Article VI.¹¹ As Thomas Paine expressed in 1776, "in America, the law is king. For as in absolute government the king is law, so in free countries the law ought to be king, and there ought to be no other."¹² In his articulation of the rule of law principles, Robert Stein, former ABA President and Dean of the Minnesota Law School, states "The law is superior to all members of society, including government officials vested with either executive, legislative, or judicial power."¹³ Thus, the rule of law compels the government to comply with the law.

While equality is a cornerstone of the rule of law, American history is rife with examples of many who were not considered "equal under the law."¹⁴ At points, the rule of law has been interpreted and applied to deprive Indigenous people, African-Americans, people of color, women, members of the LGBTQ+ community, immigrants, and others of equal treatment and rights under the law. This inequality fosters conflict and crisis over the rule of law in the United States.¹⁵ The efforts of many groups marginalized by the rule of law have brought changes in the law and helped move the rule of law in American society toward greater recognition of the principle of equality before the law.

3. Transparency

Robert Stein attempted to "clearly identify the principles and values that are inherent" in the rule of law.¹⁶ One of the principles Stein identified is that the "law is known, stable, and predictable."¹⁷ Stein traces this principle that the law should be predictable back to the writings of Aristotle.¹⁸ He also cites to more recent articulations of this concept of predictability of the law by United States Supreme Court Justices Kennedy and O'Connor.¹⁹ Stein also references the work of British Chief Justice Tom Bingham.²⁰

¹¹ *Id.* at 12, 26; Stein, *supra* note 1, at 298; ALBERT V. DICEY, INTRODUCTION TO THE STUDY OF LAW OF THE CONSTITUTION 181, 188-196 (St. Martin's Press 1959) (1885).

¹² Stein, *supra* note 1, at 298 (quoting THOMAS PAINE, COMMON SENSE 34 (Oxford U. Press 1995) (1776)); *see also* Sandra Day O'Connor, *Vindicating the Rule of Law: The Role of the Judiciary*, 2 CHINESE J. INT'L L. 1, 6-7 (2003) ("law is superior to any group or person no matter how powerful and should always constrain the 'rule of man'").

¹³ Stein, *supra* note 1, at 302.

¹⁴ PAUL GOWDER, THE RULE OF LAW IN THE UNITED STATES: AN UNFINISHED PROJECT OF BLACK LIBERATION 2 (Hart Pub. 2021). *See* Gowder generally for an excellent discussion of the tensions between the founding aspiration and the imposed reality of the rule of the law in the United States, particularly as to the history and contribution of African Americans to the development of the rule of law.

¹⁵ *See id.* 2-17; Julian Sempill, *What is the Rule of Law? Political, Traditional, Rhetorical*, in ROUTLEDGE HANDBOOK OF THE RULE OF LAW 61-65 (Routledge 2025).

¹⁶ Stein, *supra* note 1, at 296.

¹⁷ *Id.* at 302.

¹⁸ *Id.* at 297 (citing Aristotle, *Rhetoric* 32 (George A. Kennedy trans., 2d ed. 2007)).

¹⁹ *Id.* at 299-301.

²⁰ *Id.* at 301.

Bingham asserts that “[t]he law must be accessible and so far as possible intelligent, clear and predictable.”²¹ He makes three arguments supporting this proposition. First, specifically as to the criminal law, people need to be able to know what the law is to be able to conform their behavior to it.²² Second, more generally, people need to understand what their rights and obligations are so that they can “claim the rights or perform the obligations.”²³ Third, according to Bingham, the economy depends on laws and rules that are accessible, precise, and predictable.²⁴

4. Fairness and Consistency

In the context of the rule of law, fairness hinges on judgments free from bias, pressure, or external influence.²⁵ The rule of law demands fairness at every stage—in drafting, interpreting, enforcing, and applying laws.²⁶ Fairness requires unbiased hearings and the protection of fundamental legal rights.²⁷ For more on these concepts, see Equality and Due Process.

Fairness is shaped by several key considerations: judicial respect for individual rights, the need for effective and efficient public administration, deference to the decisions of elected representatives, and the preservation of clear roles among different branches of government.²⁸ Together, these elements help define the overall structure of the duty of fairness.²⁹

Consistency, in turn, refers to the *uniform and predictable application* of laws and standards across similar cases or individuals. It ensures that like cases are treated alike, and that justice is not subject to arbitrary or discriminatory discretion.³⁰

5. Participation

Participation, as a principle of the rule of law, means that “[m]embers of society have the right to participate in the creation and refinement of laws that regulate their behaviors.”³¹

²¹ TOM BINGHAM, *THE RULE OF LAW* 37 (2010).

²² *Id.* at 37-38.

²³ *Id.* at 38.

²⁴ *Id.* at 38-39.

²⁵ See David F. Levi, *Protecting Fair and Impartial Courts: Reflections on Judicial Independence*, 104 *JUDICATURE* 2 (2020).

²⁶ See Ao Jeong Man Chon, *Research on Maintaining Judicial Fairness: Institutional Innovation and Practical Exploration*, 2025 International Conference on Management, Economic and Sustainable Social Development, SHS Web of Conf. 213, Art. 02001 (Mar. 25, 2025).

²⁷ See Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 *CT. REV.* 4 (2007).

²⁸ See PAUL DALY, *UNDERSTANDING ADMINISTRATIVE LAW IN THE COMMON LAW WORLD* Chapter 3 (Oxford University Press 2021).

²⁹ See *id.*

³⁰ See NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* Chapter 8 (Oxford Univ. Press 1978).

³¹ Robert A. Stein, *What Exactly Is the Rule of Law?*, 57 *HOUS. L. REV.* 185, 197-98 (2019). Justice Anthony Kennedy emphasized this same point during a lecture in Malaysia: “To these ends, the Law must establish and safeguard the constitutional structures necessary to build a free society in which all citizens have a meaningful voice in shaping and enacting the rules that govern them. . . . Our experience supports the conclusion that a government in

Introducing a democratic dimension³² to the rule of law provides what some have called a “thicker account[]” of the concept.³³ Yet this democratic layer is formalistic rather than substantive; it “says nothing about what the content of the law must be.”³⁴ What it does require is a particular process for determining that content—namely, active participation by those who will be subject to the law.³⁵

Philosopher Jürgen Habermas identifies this participatory principle as foundational to democratic authority: “[T]he modern legal order can draw its legitimacy only from the idea of self-determination: citizens should always be able to understand themselves . . . as the authors of the law to which they are subject”³⁶ Law, in this account, derives its normative authority from the consent of the governed.³⁷

But introducing the concept of consent raises a further question: How broad must that consent be to qualify as adequate participation in support of the rule of law? Unanimous agreement is rarely feasible. Instead, the standard emphasizes procedure: “What is required of each citizen is individual consent to be governed according to democratic mechanisms—agreement about the procedure utilized to make decisions about the content of law, not consent as to the content of each law produced.”³⁸

Beyond participation in democratic governance more broadly, the principle of participation within the rule of law also includes public engagement in the legal system itself. This encompasses, among other things, the opportunity and responsibility to serve as a juror³⁹ and to offer testimony in legal proceedings. It also protects the right to publicly critique

which the citizens participate in developing the rules by which they are bound is an essential element of the rule of law.” Stein, *supra* note 1, at 299-300 (citation omitted). *See also* U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS., GUIDELINES FOR STATES ON THE EFFECTIVE IMPLEMENTATION OF THE RIGHT TO PARTICIPATE IN PUBLIC AFFAIRS, U.N. Doc. A/HRC/39/8, ¶ 19(c) (2018) (“Laws . . . should ensure the equal participation of individuals and groups in the design, implementation, and evaluation of any law, regulation, policy, programme[,] or strategy affecting them.”).

³² Because our focus is on the rule of law in the United States, we are not taking a position on whether a democratic system of government is a prerequisite to the rule of law. *Compare* Stein, *supra* note 1, at 198 (“While theoretically possible, it is difficult, if not impossible, to find an example of . . . a nondemocratic benevolent dictatorship under the rule of law”) with JEDEDIAH BRITTON-PURDY, A DEMOCRATIC RULE OF LAW 1 (2024) (“The rule of law is entirely possible without democracy, but democracy is impossible, indeed, unintelligible without a certain kind of rule of law”), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5052568.

³³ BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 91 (Cambridge Univ. Press 2004).

³⁴ *Id.* at 99. Indeed, “systems that use democratic procedures to determine the content of the law can [nevertheless] produce evil laws.” *Id.* at 100.

³⁵ *See* Jane Mansbridge, *Everyday Talk in the Deliberative System*, in DELIBERATIVE SYSTEMS 23 (2012) (“In a democracy, legitimacy derives not from mere consent but from the opportunity for all affected to participate in the decision-making process.”).

³⁶ JUERGEN HABERMAS, BEYOND FACTS AND NORMS 499 (William Rehg trans., MIT Press 1996), cited in TAMANAHA, *supra* note 33, at 99; JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 95–99 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690) (emphasizing that a government’s legitimacy flows from consent of the governed).

³⁷ *See* TAMANAHA, *supra* note 33, at 99.

³⁸ *Id.* at 100.

³⁹ *See* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 206 (1995).

governmental officials and hold them accountable for their decisions. In this respect, participation extends beyond formal roles to include public acts that challenge or resist official authority—reflected in this country’s robust traditions of protest, dissent, and conscientious objection.⁴⁰

6. Human Dignity

A characteristic of an ideal society governed by the rule of law is one in which, “The law is just and protects the human rights and dignity of all members of society.”⁴¹ The protection of human dignity should exist at the same time as the need to protect “the autonomy of an individual and their right to freely make decisions on actions that concern them.”⁴²

In the international law context, Thomas Weatherall observed that, “[H]uman dignity is a purpose of law, given that the dignity of the individual as a free and autonomous being can be realized only in the context of a community where it is protected by the institution of law. Consequently, the rule of law is necessary for the respect of the dignity of the human person and, as a corollary, to disregard the rule of law is to violate human dignity.”⁴³ The United Nations states that “dignity and respect are afforded to people through the enjoyment of all human rights and are protected through the rule of law.”⁴⁴

7. Due Process

Both the Fifth Amendment and the Fourteenth Amendment contain a Due Process Clause, which means the Due Process Clause applies to both the federal government and the state governments.

Two aspects of due process have been emphasized in case law. First, there is procedural due process – that the government has to provide notice and an opportunity to be heard and an impartial decision-maker before taking action harmful to the life, liberty or property of a person.⁴⁵ This reinforces the foundational principles of transparency and fairness, and consistency. Second, there is substantive due process – an elusive and contested concept which can function as a limit on government power to regulate conduct in a manner that unduly constrains individual liberty.

Due process also speaks to the right of individuals to have access to the legal system to have their concerns heard and adjudicated, including having access to lawyers who can help them navigate the legal system and advocate on their behalf. We continue to have an “access to

⁴⁰ See Rachel López, *Critical Curriculum Design: Teaching Law in an Age of Rising Authoritarianism*, 109 MINN. L. REV. HEADNOTES 81, 88-89 (2025).

⁴¹ Stein, *supra* note 1, at 302.

⁴² Radomir G. Zekavica, *The Rule of Law in the Function of Human Dignity*, 24 J. OF CRIMINALISTICS & LAW 17, 22 (2019).

⁴³ THOMAS WEATHERALL, *JUS COGENS: INTERNATIONAL LAW AND SOCIAL CONTRACT* 41 (2015).

⁴⁴ *Rule of Law and Human Rights*, U.N., <https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/>.

⁴⁵ See Henry J. Friendly, *Some Kind of Hearing*, 123 U. PENN. L. REV. 1267 (1975) (discussing the development of case law relating to procedural due process with respect to injuries that require due process and with respect to the nature of the process required).

justice” problem in the United States, with many individuals having to advocate for themselves.⁴⁶

⁴⁶ SANDEFUR, REBECCA L., ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY (August 8, 2014), <https://ssrn.com/abstract=2478040>.