

THE RULE OF LAW: ONE JUDGE'S PERSPECTIVE

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ORIGINS OF THE RULE OF LAW

Ancient Greek and Roman scholars first argued that law, not a ruler's whims, should govern society.¹ Medieval England built on this idea. In 1215, the Magna Carta established that a king could not punish citizens without due process,² and later that century, legal scholar Henry de Bracton described the English legal system as "[n]ot under man but under God and law."³

The modern concept of the rule of law took shape in 17th-century England in response to the political and economic upheaval of the civil war and the Glorious Revolution.⁴ John Locke argued that lawmakers must obey the laws they pass.⁵ Montesquieu added that true liberty requires a system where power checks power.⁶ The Framers drew heavily on Locke and Montesquieu, and Madison defended these principles in the Federalist Papers (Nos. 47–48).⁷ The Massachusetts and Virginia declarations similarly embraced "a government of laws and not of men."⁸

TWO DIFFERING VANTAGE POINTS

1. Instrumental (procedural):

Laws must be general, prospective, clear, and knowable. They must apply to everyone and look forward, not backward. Even an authoritarian regime can satisfy these basic procedural requirements.⁹

2. Functional (substantive):

Connects those legal procedures directly to freedom, liberty, and democracy. This is the version many Americans think of today.¹⁰

INSTRUMENTALISM VS. FUNCTIONALISM

Separation of powers is not strictly an element of either the instrumental or functional view. Rather, it is the procedural means many scholars consider necessary to accomplish the Constitution's substantive liberty-enforcing end.¹¹

As a general rule, instrumentalists would strike down actions that exceed a branch's textual authority, regardless of practical policy justifications (like in *Trump v. Slaughter*).¹² Functionalists look at whether shared or overlapping powers are narrow, justified, and harmless to another branch's core role (like in *Morrison v. Olson*).¹³ Members of the modern Supreme Court across the ideological spectrum, including Justices Thomas, Breyer, Kagan, Gorsuch, Kavanaugh, and Jackson have described separation of powers as an important safeguard for the rule of law.¹⁴ However, they often disagree over how rigorously it should be enforced, and they frequently split along instrumental and functional lines when testing these boundaries.

CASE STUDY: WORCESTER V. GEORGIA (1832)

Between 1828 and 1830, Georgia passed a series of "extension acts" designed to dissolve the Cherokee government, strip the Tribe of its legal rights, and annex its land. In *Worcester v. Georgia*, the Supreme Court unanimously ruled that Georgia could not extend its state laws over Cherokee territory.¹⁵ Georgia refused to even show up in court; President Andrew Jackson declined to enforce the ruling; and the Senate ultimately approved a land-removal "treaty" that the Cherokee Nation never authorized.¹⁶ This institutional failure led directly to the forced displacement of over 16,000 Cherokees in a tragic march known as the Trail of Tears, resulting in thousands of deaths from exposure, disease, and starvation.¹⁷ All in complete disregard of the Supreme Court's decision.

The rule of law failed because the President and Congress failed to put the Constitution and limits on their respective roles—the rule of law—first, preferring partisan or political interests.¹⁸ As this case shows, under our Constitution, rule-of-law breakdowns usually involve the tag team actions of governmental branches, rather than of just one branch.

A RECURRING HISTORICAL TEST

Many major constitutional disputes in U.S. history, including Abraham Lincoln's suspension of habeas corpus, the Supreme Court's desegregation decisions, President Nixon's claims that any presidential act is "not illegal" during Watergate, and the Supreme Court's 2024 immunity ruling in *Trump v. United States*¹⁹ have featured vigorous debates about the rule of law through the lens of the separation of powers. These cases illustrate that, under the United States' Constitution, the rule of law is not just a political norm. It is baked into the separation of powers itself.

THE JUDICIAL PERSPECTIVE

Because the Constitution has assigned to the Judicial Branch the duty to interpret and apply the Constitution, the Article III courts serve as a rule-of-law fulcrum when they issue separation-of-powers decisions. For courts, the rule of law is not a political or philosophical matter. Nor is the rule of law just a positive social value. Instead, the separation of powers encapsulates the rule of law, and it is why our system of checks and balances exists. So when confronted with separation of powers issues, the measure of the courts' decision-making should not be which President appointed which judge, or the political popularity of the ruling. The proper touchstone is the decision's effectuation of the rule of law. Once a court does its job, "[l]et the Nation * * * do theirs."²⁰

¹ BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 7–8, 11 (2004).

² *Id.* at 26.

³ Rachel Reed, *The Rule of Law*, HARV. L. BULL., Spring 2026, at 31, 33.

⁴ TAMANAHA, *supra* note 1, at 56.

⁵ JOHN LOCKE, SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 118 (Mark Goldie ed., Oxford Univ. Press 2016) (1689).

⁶ TAMANAHA, *supra* note 1, at 52.

⁷ Kristen Rundle & Jeremy Waldron, *The Rule of Law*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta & Uri Nodelman eds., Summer ed. 2026), <https://plato.stanford.edu/archives/sum2026/entries/rule-of-law/>.

⁸ THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 120–21 (Digireads Publ'g 2009) (1784); GEORGE MASON, THE VIRGINIA DECLARATION OF RIGHTS § 5 (1776); MASS. CONST., pt. 1, art. XXX (1780).

⁹ Margaret Jane Radin, *Reconsidering the Rule of Law*, B.U. L. REV. 781, 784–87 (1989); Jeremy Kessler, *The Origins of the “Rule of Law”*, 87 LAW & CONTEMP. PROBS. 1, 5–6 (2025).

¹⁰ Radin, *supra* note 9, at 787–91.

¹¹ D. Brooks Smith, *Judicial Independence and the Rule of Law*, 27 LEWIS & CLARK L. REV. 395, 416 (2023).

¹² 146 S. Ct. 2283 (2026); *see also* Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 312 (1989); Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2075 (2022).

¹³ 487 U.S. 654 (1988); *see also* *Trump v. Cook*, 146 S. Ct. 2234 (2026); Verkuil, *supra* note 12, at 340–41; Bowie & Renan, *supra* note 12, at 2028.

¹⁴ *See, e.g., DOT v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 70 (2015) (Thomas, J., concurring in the judgment); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 241–42 (1995) (Breyer, J., concurring in the judgment); *Biden v. Nebraska*, 600 U.S. 477, 544–545 (2023) (Kagan, J., dissenting); *Gundy v. United States*, 588 U.S. 128, 156 (2019) (Gorsuch, J., dissenting); *Bostock v. Clayton Cnty.*, 590 U.S. 644, 780 (2020) (Kavanaugh, J., dissenting); *Trump v. CASA, Inc.*, 606 U.S. 831, 922–923 (2025) (Jackson, J., dissenting).

¹⁵ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

¹⁶ Ryan Rowberry, *The Short History of the Rule of Law in the United States (1954–2016)*, 79 STUDIA IURIDICA 14, 19 (2019); Matthew L. Sundquist, *Worcester v. Georgia: A Breakdown in the Separation of Powers*, 35 AM. IND. L. REV. 239, 239, 243 (2011).

¹⁷ Sundquist, *supra* note 16, at 245–48; Stephen Breyer, *The Cherokee Indians and the Supreme Court*, 87 GA. HIST. Q. 408, 424–25 (2003).

¹⁸ Sundquist, *supra* note 16, at 249–55.

¹⁹ Reed, *supra* note 3, at 32, 35.

²⁰ Breyer, *supra* note 17, at 420.