LAWYERS AS PEACEMAKERS

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After decades as a California litigator in a large international law firm, I have served for twenty-five years as general counsel of The Church of Jesus Christ of Latter-day Saints. During much of that time I also served as a Church ecclesiastical officer. This unique perspective, both lawyer and churchman, has given me much to reflect on during the last quarter-century. At the outset of my service, the international Cold War had already given way to a domestic culture war. As existential threats have receded, political and cultural conflicts have become increasingly bitter. The law is often at the center of those conflicts.

I bring to the practice of law my beliefs as a disciple of Jesus Christ. They are part of who I am. A signature teaching of Jesus Christ is "Blessed are the peacemakers."[1] I believe the heart of what lawyers and judges do—or should be doing—is peacemaking. However imperfect, the rule of law, including its administration by lawyers and judges, is fundamentally about resolving conflicts peacefully—about establishing a just peace in a free

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1. Matthew 5:9 (King James).

society. Our heritage of law, where we are governed by precepts rather than raw power, is precious. Yet it is also vulnerable and by no means inevitable. Some would portray the rule of law as little more than a veneer for arbitrary power. The readers of this *Journal* know better. To be sure, the law must evolve to meet the challenges of the day; unjust laws can and should be changed to better reflect the community's sense of right and wrong. Although that may not happen as fast as partisans demand, evolution and refinement occur constantly and are inherent in the rule of law. Undermining the rule of law as our primary means of peaceful conflict resolution would be a grave mistake with terrible implications for our nation.

Never has the role of lawyer as peacemaker been more essential than in this fraught moment, for we are now critical not only in ensuring just and peaceful resolutions in particular cases but also in preserving the rule of law itself. In this article I will recount the crisis of deep national division that confronts us today and explain how lawyers and judges can contribute to healing those divisions by increasing our effectiveness as peacemakers.

I. OUR CURRENT CRISIS

A. Americans Are Increasingly Divided over a Wide Range of Issues and Our Divisions Are Growing Wider

America is deeply divided politically. To a degree, it is natural in a free society that we should disagree with each other. One person prefers a small government and lower taxes. Another prefers a welfare state with a more robust social safety net for the vulnerable and unfortunate. Our constitutional system gives us both the right as equal citizens to debate our differences and to elect representatives who best reflect our considered opinions. What is troubling is the noticeable erosion of trust in each other and in our public institutions. So-called "identity" politics have replaced the politics of engagement.

The late Professor James Q. Wilson concluded that Americans are deeply riven over fundamental differences—especially political differences—and that "polarization has seeped down into the public, where it has assumed the form of a culture war."[2] Public opinion polls confirm as much. Pew Research Center reports that divisions between Republicans and Democrats on "fundamental political values" have reached unprecedented levels, and "the magnitude of these differences dwarfs other divisions in society, along such lines as gender, race and ethnicity, religious observance or education."[3]

Long-term trends at least partly explain these deep fissures in our political life.[4] Both major political parties have purified themselves ideologically: liberal Republicans and conservative Democrats have all but disappeared. Moderates and independents are shouted down or confronted with hostile primary contests. Compromise, especially compromise on political disputes of any significance, has become a death knell for career politicians in both parties.[5] Americans more and more support a political party whose members share their lifestyle. "[T]he parties have come to represent not just diverging material interests but different kinds of people with different moral values and ways of living."[6]

Political polarization has stoked widespread anxiety about the future. Nine out of ten Americans "believe

2. James Q. Wilson, *How Divided Are We?*, COMMENTARY (Feb. 2006), https://www.commentarymagazine.com/articles/james-wilson/how-divided-are-we/.

3. Pew Research Ctr., *The Partisan Divide on Political Values Grows Even Wider* (Oct. 2017), https://www.pewresearch.org/politics/2017/10/05/the-partisan-divide-on-political-values-grows-even-wider/.

4. Jonathan Haidt & Sam Abrams, *The Top 10 Reasons American Politics Are So Broken*, WASH. POST (Jan. 7, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/01/07/the-top-10-reasons-american-politics-are-worse-than-ever/.

5. *See* DANIELLE M. THOMSEN, OPTING OUT OF CONGRESS: PARTISAN POLARIZATION AND THE DECLINE OF MODERATE CANDIDATES 5 (2017) (Political polarization has made working across the political aisle so ineffective that "moderates are opting out of the congressional candidate pool, further exacerbating the ideological gulf between the parties in Congress.").

6. *Id.*

their country is divided over politics and 60% feel pessimistic about their country overcoming these divisions to solve its biggest problems."[7] Unresolved differences are not only eroding personal relationships, but they also undermine our capacity to solve common problems. "Highly polarized citizens often refuse to engage with each other, reactively dismissing out of hand both potential flaws in their own views and potential merits of their other opponents'. Under these conditions, constructive debates are impossible and mutually acceptable policies elusive."[8] A recent book-length survey of American history concludes that "[t]he country faces a huge number of difficult problems that are not only not yet being solved, but are exacerbated by the dysfunctional condition of Washington."[9]

Distrust is often directed squarely at the government. A global study of institutional trust concluded that

> [s]kepticism about the fairness of our current systems is mounting. The perception is that institutions increasingly serve the interests of the few over everyone. Government, more than any institution, is seen as least fair; 57 percent of the general population say government serves the interest of only the few, while 30 percent say government serves the interests of everyone.[10]

Technology has deepened our distrust. The internet enables everyone to anonymously broadcast opinions in the most extreme terms without personal cost. Too often, this leads to the formation of virtual "tribes," who seek and process information from no other sources than those of like mind. Social media amplifies the volume of a single extreme opinion by making it viral. Cancel

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7. Gordon Heltzel & Kristin Laurin, *Polarization in America: Two Possible Futures*, 34 CURRENT OPINION IN BEHAVIORAL SCIS. 179 (2020), http://europepmc.org/backend/ptpmcrender.fcgi?accid=PMC7201237&blobtype=pdf.

8. *Id.* at 180.

9. WILFRED M. MCCLAY, LAND OF HOPE: AN INVITATION TO THE GREAT AMERICAN STORY 420 (2019).

10. EDELMAN INTELLIGENCE, EDELMAN TRUST BAROMETER 2020 EXECUTIVE SUMMARY, at 4, https://www.edelman.com/sites/g/files/aatuss191/files/2020-01/2020%20Edelman%20Trust%20Barometer%20Executive%20Summary_Single%20Spread%20without%20Crops.pdf (last visited on Apr. 8, 2021).

culture punishes certain opinions as purportedly outside the bounds of permissible discourse. Organized campaigns have deliberately torn down the reputations of previously respected public figures, often for trivial offenses, with the aim of ruining a person's professional life.

Editors are fired for running controversial pieces; books are withdrawn for alleged inauthenticity; journalists are barred from writing on certain topics; professors are investigated for quoting works of literature in class; a researcher is fired for circulating a peer-reviewed academic study; and the heads of organizations are ousted for what are sometimes just clumsy mistakes.[11]

As if these long-term trends were not enough, multiple shocks during 2020 intensified our national divisions. We have endured a once-in-a-century pandemic that prompted government officials to place unprecedented restrictions on personal liberty, led to the highest unemployment figures since the Great Depression, and killed hundreds of thousands of our fellow Americans.[12] We have passed through a presidential election whose results were contested for weeks and the outcome of which turned on multiple battleground states where less than one percent of the vote separated the winning and losing candidates.[13] And we have witnessed widespread rioting not seen in decades. The death of George Floyd while in the custody of the Minneapolis Police ignited wave after wave of protests that devolved into destructive and often violent riots in many of the nation's largest

11. *A Letter on Justice and Open Debate*, HARPER'S MAG. (July 7, 2020), https://harpers.org/a-letter-on-justice-and-open-debate/.

12. *Covid Data Tracker*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (reporting almost 26,000,000 cases and 435,000 deaths) (last visited Apr. 8, 2021).

13. *See 2020 US Election Results*, REUTERS GRAPHICS, https://graphics.reuters.com/USA-ELECTION/RESULTS-LIVE-US/jbyprxelqpe/ (last visited Feb. 16, 2021) (showing that Joe Biden won by less than 1% of the popular vote in Arizona, Georgia, and Wisconsin).

cities.[14] Brazen disrespect for the rule of law reached a shocking nadir with a mob's assault on the United States Capitol at the very moment that members of Congress were performing their constitutional duty to certify the results of the presidential election. This attack was a stark reminder that contempt for the rule of law can threaten not only the peace and safety of Portland and Chicago and Kenosha, but also the very foundations of American democracy.

In short, long-simmering conflicts between Americans appear intractable. I share the presentiment of the late Rabbi Jonathan Sacks: "[T]he politics of anger that has emerged in our time is full of danger—if not now, then certainly in the foreseeable future."[15]

B. Too Many Americans Are Losing Faith in the Rule of Law Itself

It is particularly worrisome that our contentious age has led many Americans to lose faith in the legitimacy of our political institutions.[16] Politicians on both sides of the political divide in recent years, most notably in the national election just concluded, have challenged without supporting evidence the legitimacy of our elections, seriously eroding confidence in the very foundation of our democracy. Some are demanding fundamental change—even revolutionary change.

Another ominous sign is the erosion of popular trust in the judiciary. "In 2015, Gallup found that only 53 percent of Americans had 'a great amount' or 'a fair amount'

14. *See* Douglas Belkin, *Violence Erupts Around Protests Across U.S.*, WALL STREET J. (July 26, 2020), https://www.wsj.com/articles/violence-erupts-around-protests-across-u-s-11595784837?mod= searchresults_pos18&page=1.

15. Rabbi Lord Jonathan Sacks, Remarks at 2017 Irving Kristol Award Annual Dinner Renew the American Covenant (Oct. 24, 2017) (transcript available at https://www.aei.org/research-products/speech/2017-irving-kristol-award-recipient-rabbi-lord-jonathan-sacks-remarks/).

16. *See* Dan Vogel et al., *The Foundations of America's Legitimacy in the Eyes of Its Citizens*, CTR. FOR PUB. IMPACT (Nov. 2, 2020), https://www.centreforpublicimpact.org/foundation-americas-legitimacy-eyes-citizens/ (describing how "around 20% of America . . . have little to no faith in most every institution").

of trust in the judicial branch of the federal government."[17] That barely half of the country trusts the federal judiciary is genuinely troubling. "America is a country built on the rule of law, and from as far back as the adoption of our Constitution, our faith in our judiciary has been a defining characteristic. . . . A loss of faith in the judiciary corrodes faith in the country itself."[18]

Some say that the government does not consistently comply with the rule of law, as in how federal officials have conducted the War on Terror[19] or how courts have endorsed the concentrated powers of the administrative state.[20] Criticism of this kind is troubling and worthy of serious discussion. But at least these critics implicitly accept that the rule of law is an ideal that government officials should live up to.

More challenging are critics who deny that the rule of law represents an ideal at all. One Harvard law professor famously criticized the rule of law in these terms. "It undoubtedly restrains power, but it also prevents power's benevolent exercise. It creates formal equality—a not inconsiderable virtue—but it promotes substantive inequality by creating a consciousness that radically separates law from politics, means from ends, processes from outcomes."[21] Another law professor was even more pointed. She opined that the rule of law poses "a serious

17. Benjamin H. Barton, *American (Dis)Trust of the Judiciary*, INS. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. 3 (Sept. 2019), https://iaals.du.edu/sites/default/files/documents/publications/barton_american_distrust_of_the_judiciary.pdf.

18. *Id.* at 4.

19. *See* Conor Friedersdorf, *America Fails the 'Rule of Law' Test*, THE ATLANTIC (July 11, 2014), https://www.theatlantic.com/politics/archive/2014/07/how-america-fails-the-rule-of-law-test/ 374274 (criticizing the FISA court, the U.S. Department of Justice's Office of Legal Counsel, and the practice of issuing national security letters to private individuals and corporations).

20. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 498 (2014) (Administrative power "does more than simply depart from one or two constitutional provisions. It systematically steps outside the Constitution's structures, thereby creating an entire anti-constitutional regime.").

21. Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977).

threat to progressive, egalitarian, and identity-based politics."[22]

These root-and-branch critics view our legal system much as Thomas More's future son-in-law, William Roper, viewed English law in the classic play, *A Man for All Seasons*. More had just finished confronting his old student, Richard Rich, who left bitter-hearted because More would not employ him. Roper joined More's wife and daughter in insisting that More should arrest Rich. More refused. "And go he should if he was the devil himself until he broke the law!"[23] Roper complained, "So now you'd give the Devil benefit of law!"[24] More agreed. "Yes. What would you do? Cut a great road through the law to get after the Devil?"[25] Yes, Roper replied, "I'd cut down every law in England to do that!"[26] More's rejoinder was devastating:

> And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, *for my own safety's sake.*[27]

Frustrations over the pace or depth of societal change—even much-needed change—should not mislead us into abandoning the rule of law. Like More, we should understand that giving even our fiercest adversaries the protections of law is necessary "for [our] own safety's sake."[28] Here's why.

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22. ROBIN WEST, RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW 5 (2003).

23. ROBERT BOLT, A MAN FOR ALL SEASONS 39 (1960).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* (emphasis added) (stage directions removed).

28. *Id.* (emphasis added) (stage directions removed).

II. ESSENTIALS OF THE RULE OF LAW

A. The Rule of Law Is a Precious American Heritage that Needs Constant Tending and Defense

Too many lack any real understanding of what the rule of law is and why it is important. Like Roper, they care about results but not the process by which those results are achieved. We need to deepen our understanding of this nation's great legal heritage, which is designed to achieve noble ends through a fair process.

A classic definition of the rule of law holds that "government in all its actions is bound by rules fixed and announced beforehand."[29] Requiring the government to operate by fixed and settled rules "make[s] it possible to foresee with fair certainty how that authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."[30] To meet this standard, laws must also apply equally. "[T]he principles of law which officials would impose upon a minority must be imposed generally."[31] For "nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected."[32]

These axioms of government under law have characterized American thought and practice from the beginning. Puritans who fled England for religious freedom pledged that they would "constitute and frame such just and equal Laws, Ordinances, Acts, Constitutions, and Offices . . . as shall be thought most meet and convenient

29. F.A. Hayek, *Road to Serfdom*, *in* 2 THE COLLECTED WORKS OF F.A. HAYEK 112 (Bruce Caldwell ed., Univ. Chicago Press 2007) (1944).

30. *Id.*

31. Railway Exp. Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

32. *Id.*

for the general good of the Colony."[33] Colonial charters likewise expressed Americans' commitment to the rule of law. The *Laws and Liberties of Massachusetts* declared that "every person within this Jurisdiction . . . shall enjoy the same justice and law that is general for this Jurisdiction . . . without partialitie or delay."[34] Early state constitutions, adopted after independence from Great Britain, followed the same pattern. The Virginia Bill of Rights required the government to comply with the separation of powers.[35] The Massachusetts Constitution of 1780, written by John Adams, repeatedly affirmed the rule of law. In its preamble, the document states, "It is the duty of the people . . . to provide for an equitable mode of making laws, as well as for impartial interpretation and a faithful execution of them; that every [person] may, at all times, find his security in them."[36] Article XXX commits the Commonwealth of Massachusetts to the separation of powers, "to the end it may be a government of laws, and not of men."[37]

Leading patriots of the American Revolution prized the rule of law. Thomas Paine wrote that "in America THE LAW IS KING."[38] The Founding generation "conceived of liberty as freedom according to law."[39] Far from seeing themselves as "law-breakers," the patriots of 1776 saw themselves as "preservers of the law . . . . What they wanted was liberty under the limitations prescribed by

33. WILLIAM BRADFORD, OF PLYMOUTH PLANTATION, 1620–47, at 76 (Samuel Eliot Morison ed., 1996).

34. *The Laws and Liberties of Massachusetts*, *in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION 124 (Donald S. Lutz ed., 1998).

35. Virginia Bill of Rights, art. 5 (1976), *in* SOURCES AND DOCUMENTS ILLUSTRATING THE AMERICAN REVOLUTION, 1764–1788, AND THE FORMATION OF THE FEDERAL CONSTITUTION 1 (S.E. Morison ed., 2d ed. 1929) ("The legislative and executive powers of the state should be separate and distinct from the judiciary . . . .").

36. MASS. CONST. of 1780, pmbl.

37. *Id.* art. XXX.

38. Thomas Paine, *Common Sense* (1776), *in* COLLECTED WRITINGS 35 (Eric Foner ed., 1995).

39. RANDOLPH GREENFIELD ADAMS, POLITICAL IDEAS OF THE AMERICAN REVOLUTION 136–37 (1939) (footnotes omitted).

the British constitution. They felt that they were being persecuted by the real law breakers, the Parliament that had violated the constitution."[40] Thus, "our Constitution arose out of a longstanding culture or tradition that deeply respected the rule of law."[41] At work was a distinctly American political culture "where the use of power over the lives of men was jealously guarded and severely restricted."[42]

Americans' strenuous efforts to restore government under law sharply contrasts with later revolutions. Of the revolution in his country, Alexis de Tocqueville wrote that

> [s]ince the goal of the French Revolution was not only to change the old government but to abolish the old kind of society, it had to simultaneously attack all the established powers, eliminate old influences, wipe out traditions, transform mores and practices, and in a way to empty the human mind of all the ideas on which obedience and respect had previously been based.[43]

Nothing as sweeping and invasive has been tried here.

Instead, long experience living under colonial charters and other instruments meant that, by the Founding era, "written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments."[44] Channeling the creation and use of law is much of what the Constitution does. It prescribes who holds the separate powers to make, execute, and adjudicate law.[45] To prevent consolidation of these powers, the Constitution

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40. *Id.* at 137.

41. Steven G. Calabresi, *The Historical Origins of the Rule of Law in the American Constitutional Order*, 28 HARV. J.L. & PUB. POL'Y 273, 274–75 (2004).

42. BERNARD BAILYN, IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 319 (1967).

43. 1 ALEXIS DE TOCQUEVILLE, THE OLD REGIME AND THE REVOLUTION 98 (François Furet and Françoise Mélonio eds., Alan S. Kahan trans., 1998).

44. Hurtado v. California, 110 U.S. 516, 531 (1884).

45. *See* U.S. CONST. art. I, § I (vesting lawmaking power in Congress); *id.* art. II, § 1 (vesting executive power in the President); *id.* art. III, §1 (vesting judicial power in the Supreme Court and other federal courts).

contains what James Madison called "auxiliary precautions."[46] Congress enacts laws but the President may veto them.[47] The President appoints officers to execute the laws, but only with the Senate's "advice and consent."[48] Federal courts, beginning with the Supreme Court, exercise "the judicial power of the United States"[49] but only with respect to "the supreme Law of the Land," which consists of "[t]his Constitution and the Laws of the United States," as well as foreign treaties.[50] And leading federal and state officials take an oath before entering office—not to the President or anyone else, but to support and defend the Constitution.[51] These arrangements "were skillfully calculated to achieve the rule of law."[52] As the Supreme Court has affirmed, "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."[53]

The national heritage represented by the rule of law does not perpetuate itself. Like a democracy, the rule of law is always only one generation away from extinction. Limiting power through law is an ideal worth tending and defending. Below I offer a few ideas about what we as lawyers and judges can do to sustain it.

46. THE FEDERALIST NO. 51 (James Madison), at 349 (Jacob E. Cooke ed., 1961).

47. *See* U.S. CONST. art. I, § 7.

48. *See id*. art. II, § 2.

49. *See id*. art. III, § 1.

50. *See id*. art. VI.

51. *See id.*

52. ELLIS SANDOZ, A GOVERNMENT OF LAWS 41 (1990).

53. Ex parte Milligan, 71 U.S. (4 Wall.) 2, 120–21 (1866).

B. The Rule of Law Ensures that Disputes Are Peacefully Resolved through Fair and General Rules, Evenhandedly Applied by Neutral Decisionmakers, Rather than by Force

For more than two centuries, we have enjoyed many of "the blessings of liberty" under a Constitution firmly grounded in the rule of law.[54] Elections have returned lawmakers to Congress and state legislatures in keeping with popular votes. Presidents have taken office through the electoral procedures set forth in the Constitution and federal statutes. Courts, federal and state, have remained open to decide cases even during wartime and other crises like the COVID-19 pandemic. Bound by fixed and settled rules, government officials are generally unable to bend the law to benefit themselves or to punish an adversary. Obedience to law by every level of government encourages respect for the law and for those authorized to wield its awesome powers. The principle that "no one is above the law" applies to high officials no less than to the newest member of a city council.[55] Even presidents can be held to account through the constitutionally prescribed process of impeachment. To be sure, the laws and policies produced by these legal processes have not been perfect. No human institution is, and that includes our constitutional order. But whatever its faults, perhaps our Constitution's greatest virtue is that it has preserved a system of law that affords us the freedom to make changes *peacefully* "in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, [and] promote the general Welfare."[56]

But the rule of law does more than prevent the abuse of government power. It also establishes an orderly

54. U.S. CONST. pmbl.

55. *See* Trump v. Vance, 140 S. Ct. 2412, 2432 (2020) (Kavanaugh, J., concurring in judgment) ("In our system of government, as this Court has often stated, no one is above the law. That principle applies, of course, to a President.").

56. U.S. CONST. pmbl.

framework for citizens to live together in relative harmony and peacefully address grievances with each other. As one historian noted, "the rules and categories of law penetrate every level of society, effect vertical as well as horizontal definitions of men's rights and status, and contribute to men's self-definition or sense of identity."[57] Property rights delimit what one owns. Common law claims for battery, trespass, and conversion partner with criminal laws against assault, murder, and robbery in maintaining a society where property and life are not taken at a whim. Contract law assumes a level of trust founded on the rule of law: a handshake can be as meaningful as a signature only because courts respect verbal agreements and because people generally want to act in trustworthy ways themselves and depend on the trustworthiness of others. Legal protections for individual choices are vital, but so too are protections for private institutions. "[F]reedom requires not just a state but also and even more importantly a society, a society built of strong covenantal institutions, of marriages, families, congregations, communities, charities, and voluntary associations."[58]

By preventing the abuse of government power and maintaining a robust framework of private cooperation, the rule of law promotes "ordered liberty"[59]—a concept reflecting "the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society."[60]

Holding that balance in equipoise depends on widespread obedience to law. Obedience to law is more than a matter of self-interest. It is an act of personal responsibility toward our neighbors and our personal contribution toward the world our children and grandchildren

57. E. P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 267 (1975).

58. Rabbi Lord Jonathan Sacks, *supra* note 15.

59. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

60. Poe v. Ullman, 367 U.S. 497, 542 (Harlan, J., dissenting).

will inherit. Fortunately, as Tocqueville long ago observed, Americans tend to respect the law. He explained that because virtually every adult is a voter, "one who is not part of the majority today will perhaps be among its ranks tomorrow; and this respect that he now professes for the will of the legislator, he will soon have the occasion to demand for his own will."[61] In a country founded on government by consent, the people "not only obey the law because it is their work, but also because they can change it when by chance it injures them."[62]

Of course, sometimes the law must change. The reason for the law may no longer exist, as when courts stopped requiring a landowner to deliver a slice of turf with the title to property. Or the law may perpetrate grave injustices that cannot be countenanced. The Thirteenth Amendment abolished the odious practice of slavery and the Nineteenth Amendment ended the disenfranchisement of women. Less profound but nevertheless important, property law came to incorporate the notions of public and private nuisance; contract law embraced unconscionability and fraud in the inducement. In each of these instances, the law changed when what had been taken for granted became intolerable.

Certainly, the Constitution invites change when the American people agree that amendment is desirable. Our national charter thus "secured itself against violence and revolution by providing a peaceful method for every needed reform."[63] President Coolidge described that process well:

> Should the people desire to have the Congress pass laws relating to that over which they have not yet granted to it any jurisdiction, the way is open and plain to proceed in the same method that was taken in relation to income taxes, direct election of

61. 2 TOCQUEVILLE, *supra* note 43, at 394.

62. *Id.* at 395.

63. 2 GEORGE BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 367 (1882) (Fred B. Rothman & Co. 1983).

> senators, equal suffrage, or prohibition—by an amendment to the Constitution.[64]

Among the freedoms we ought to cherish is ability "to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people.[65]

But for some, impatience for sweeping change is a serious temptation. Remaking the world now may appear to be a more satisfying prospect than negotiating workaday improvements within a legal system that deliberately protects multiple interests. But it would be a mistake to jettison the rule of law out of impatience with the deliberate pace of the law's regular processes. As a left-leaning English historian reluctantly conceded:

> [T]he rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good. To deny or belittle this good is, in this dangerous century, when the resources and pretentions of power continue to enlarge, a desperate error of intellectual abstraction. . . . It is to throw away a whole inheritance of struggle *about* law, and within the forms of law, whose continuity can never be fractured without bringing men and women into immediate danger.[66]

To glimpse the dangers from abandoning the rule of law, imagine a world without it. You could be arrested for irritating a city official, or for no reason at all. Your property could be seized because a powerful neighbor envied your home or car or other possessions. You might even find yourself facing execution for belonging to the wrong religious group or the wrong political faction, or simply because someone with sufficient power wanted to take your life as a warning to others. Basic property and contract rights would be insecure, making numerous

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64. Calvin Coolidge, The Limitations of the Law, Address before the American Bar Assoc. (Aug. 10, 1922), *in* THE PRICE OF FREEDOM 202 (1924).

65. Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291, 312–13 (2014).

66. THOMPSON, *supra* note 57, at 266.

economic transactions impossible. Private (often violent) enforcement measures and informal protection rackets would take the place of lawyers, impartial judges, and magistrates sworn to uphold the law. Raw and often arbitrary power would reign. This nightmare of tyranny has occurred so rarely in this country precisely because America's political institutions rest on a solid foundation of principle—"the limitation of government by law."[67]

Until a law is changed through processes the law provides, obedience remains our duty. As Lincoln taught, "although bad laws, if they exist, should be repealed as soon as possible, still while they continue in force, for the sake of example, they should be religiously observed."[68] The duty to preserve the rule of law falls on every American. We must obey the law so long as it remains valid, even as we constantly seek to refine and reform it to better serve the people.

With the Constitution as our framework, with numerous political institutions from local to federal to redress grievances, and with an independent judiciary that remains the envy of much of the world, force and violence are never the solution to our society's imperfections. "There is no grievance that is a fit object of redress by mob law," Lincoln explained.[69] Abolishing slavery was an

67. CHARLES HOWARD MCILWAIN, CONSTITUTIONALISM ANCIENT AND MODERN 24 (1940). American history thankfully contains few incidents of genuine tyranny, such as Missouri Governor Boggs's infamous Extermination Order against members of the Latter-day Saints and Executive Order 9066 authorizing the mass internment of Japanese Americans. *See* EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830–1900, at 74 (1988) (describing the Missouri governor's order "to treat the Mormons as enemies who '*must be exterminated* or driven from the state, if necessary for the public good'"); Korematsu v. United States, 323 U.S. 214, 219 (1944) (sustaining the forcible relocation of American citizens of Japanese descent to internment camps), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018) ("*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'") (Jackson, J., dissenting) (quoting *Korematsu*, 323 U.S. at 248).

68. Abraham Lincoln, Address to the Young Men's Lyceum of Springfield, Illinois (Jan. 27, 1838), *in* 1 ABRAHAM LINCOLN, SPEECHES AND WRITINGS, 1832–1858, at 33 (Don E. Fehrenbacher ed., 1989).

69. *Id.*

overwhelming moral imperative that eventually led to civil war. Yet Lincoln denied that "the interposition of mob law [was] either necessary, justifiable, or excusable."[70]

Police are as vital as courts to the rule of law. Without protection from violence and the threat of violence, we no longer live in a civilized society. Any society that forgets that principle invites the awful conditions memorably described by Thomas Hobbes: "[C]ontinual fear and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short."[71]

III. THE HEALING POTENTIAL OF LAWYERS AND JUDGES

A. Lawyers and Judges Have a Vital Role in Promoting the Rule of Law and Locating Prospects for Resolving Conflicts Peacefully

Lawyers and judges have a key role to play in the fair, wise, and impartial application of the law. Neither self-interest nor zealous advocacy for clients should obscure the deeper obligation to the rule of law itself.

Edmund Burke, striving without success to convince the British Parliament not to pursue a war with America, pointed out that the colonists' intransigence was due in no small part to the fact that many Americans had studied law. "This study renders [Americans] acute, inquisitive, dexterous, prompt in attack, ready in defense, full of resources."[72]

Decades later, Tocqueville, observed that "[t]he American aristocracy is at the lawyers' bar and on the judges' bench."[73] This is so, he explained, because

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70. *Id.*

71. THOMAS HOBBES, LEVIATHAN 82 (Michael Oakeshott ed., 1946) (1651).

72. Edmund Burke, Speech on Moving His Resolutions for Conciliation with the Colonies (Mar. 22, 1775), *in* 1 SELECT WORKS OF EDMUND BURKE 242 (1999) (1874).

73. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (BILINGUAL EDITION) 439 (Eduardo Nolla ed., James T. Schleifer trans., 2010).

American lawyers and judges of his day helped their fellow citizens "feel an almost invisible brake that moderates and stops them" from undermining fundamental rights and the rule of law.[74] Tocqueville explained further: "Men [and women] who have made law their specialty have drawn from this work habits of order, a certain taste for forms, a sort of instinctive love for the regular succession of ideas, that make them naturally strongly opposed to the revolutionary spirit and to the unthinking passions of democracy."[75] Tocqueville concluded that "without this mixture of the spirit of jurists with the democratic spirit, I doubt, however, that democracy could govern society for long."[76] The rule of law, and the lawyers and judges who are its stewards, is essential to the survival of democracy.

Despite the passage of time, these descriptions of the legal mind sound familiar. Burke and Tocqueville identified traits that we might summarize as *resourcefulness* and *resolution*. Armed with these characteristics, lawyers and judges have the capacity to bridge some of the gaps that divide us, thereby replacing contention with healing and peace.

B. How Might Today's Lawyers and Judges Help to Moderate Passions and Bring People Together to Foster the Conditions for Justice and Peace?

Not all lawyers and judges could claim that they own the traits admired by Burke and Tocqueville. But they are traits that, if cultivated and properly directed, could be beneficial in our current crisis.

1. A Lawyer Is Resourceful

Legal training enables us to identify precise points of difference—but also possible points of compromise and

74. *Id.*
75. *Id.* at 432.
76. *Id.* at 437.

reconciliation. Lawyers and judges are uniquely situated to channel and moderate political and legal controversies so as to avoid undermining fundamental principles of freedom and justice. In battles over cultural or moral issues, lawyers can help chart approaches that seek fairness for all Americans, rather than winner-take-all outcomes that breed resentment and perpetual conflict.

Consider, for instance, the intense conflicts between religious freedom and LGBT rights. These conflicts have occupied center stage in the culture war for decades. Litigation over whether to recognize a right to same-sex marriage has been only part of the controversy.[77] LGBT activists have struggled to obtain legal protection for equal opportunities in employment and housing.[78] Recently, the U.S. Supreme Court expanded such protection in employment by interpreting Title VII of the Civil Rights Act of 1964 as a ban on discrimination based on sexual orientation or gender identity.[79] At the same time, construing nondiscrimination norms too broadly can threaten fundamental rights of religious freedom. Religious Americans can lose the freedom to exercise their religion, and faith communities can lose the freedom to define their beliefs and sacred practices, govern their religious affairs, and gather with those who share and live the faith.

In 2015, Utah enacted legislation that models a fresh approach. Working with Equality Utah and key members of the Utah Legislature, The Church of Jesus Christ of Latter-day Saints publicly supported a bill that protects LGBT residents from discrimination in employment and housing while preserving religious freedom. Senate Bill 296 added sexual orientation and gender

77. *See* Obergefell v. Hodges, 576 U.S. 644 (2015) (holding that the Fourteenth Amendment guarantees the right of same-sex marriage); Hollingsworth v. Perry, 570 U.S. 693 (2013) (holding that the proponents of Proposition 8 lacked standing).

78. *See, e.g.*, Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013) (amended version of the Act, which the Senate adopted but the House of Representatives rejected).

79. Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

identity as protected classes to Utah law, making discrimination on these grounds in employment or housing unlawful.[80] S.B. 296 also exempted religious organizations from the employment discrimination requirements and preserved the freedom of private schools like Brigham Young University to maintain student housing in keeping with their sincere religious standards.[81] A companion measure, Senate Bill 297, entitled same-sex couples to be married by a county clerk or an authorized agent without forcing a person to perform such a marriage against his or her conscience.[82] S.B. 297 likewise prevented the state from compelling a religious organization or religious official to perform a marriage contrary to religious belief or revoking the authority to marry for the exercise of that right.[83]

Passage of these bills by one of the country's most religious and Republican states marked a hopeful new chapter in the political trajectory of LGBT rights. "The legislation and, more importantly, the peacemaking approach to working out deep differences eventually came to be known as 'fairness for all.'"[84] It has brought greater harmony and peace to a deeply religious state that also has a substantial LGBT population. Despite critiques and criticisms, for those who live in Utah it has been a great success. None of this would have been possible without the resourcefulness of attorneys on both sides who worked tirelessly and with great creativity to fashion a fair and sustainable peace. Notwithstanding good will within faith communities, LGBT rights groups, and other community stake holders, only lawyers had the

80. *See* S.B. 296, 2015 Gen. Sess. (Utah 2015) (enacted as Utah Code Ann. §§ 34A-5-106(1), 57-21-5(1)).

81. *See* Utah Code Ann. § 34A–5–102(1)(i)(ii) (employment); § 57–21–3(2)(a) (housing).

82. § 17–20–4(2).

83. *See* § 63G-20-201(2).

84. Chris Stewart & Gene Schaerr, *Why Conservative Religious Organizations and Believers Should Support the Fairness for All Act*, 46 J. LEGS. 134, 151 (2019).

skills to forge the compromises and craft the terms that made greater justice, freedom, and peace a reality.

In the same spirit, an even bolder measure appeared in Congress when Representative Chris Stewart introduced the Fairness for All Act of 2019 (FFA Act).[85] It is the product of four years of negotiations between lawyers for a national LGBT rights organization, American Unity Fund, and lawyers for leading traditional religious organizations, including The Church of Jesus Christ of Latter-day Saints, the National Association of Evangelicals, and the Seventh-day Adventists. If enacted, the FFA Act would be the most sweeping revision of federal civil rights law in the past half-century. It adds express protections for LGBT rights in public accommodations, federal financial assistance, employment, and housing.[86] The FFA Act also treats religious freedom seriously, as a civil right itself.[87] Representative Stewart plans to reintroduce the FFA Act early in 2021, once the new Congress gets underway. Durable compromises on major policy initiatives such as these are impossible without the creative work of lawyers using their skills for the common good.

By proposing difficult trade-offs to reconcile people separated by divergent life experiences and basic

85. H.R. 5331, 116th Cong. (2019).

86. *See id.* §§ 2–5.

87. Specifically, the Act establishes legal protections in areas that "the religious community . . . needs to maintain its religious identity and flourish in an increasingly secular society with expanding SOGI [sexual orientation gender identity] equality norms and growing hostility toward traditional religious morality." Stewart & Schaerr, *supra* note 84, at 157. The Religious Freedom Restoration Act stands unchanged. *See id.* Religious organizations would not face the loss of their federal tax-exempt status because of their beliefs or practices regarding marriage, family, or sexuality. *See, e.g.*, H.R. 5331 at § 8. Churches, religious charities, and religious education would be exempt from nondiscrimination requirements where applying them would prevent these vital institutions from forming and maintaining their religious identity. *See id.* §§ 2 (public accommodations), 3 (federal financial assistance), 4 (education), 5 (housing). And religious schools and colleges would be free to continue operating according to their self-chosen religious standards as part of the diverse fabric of American education. *See id.* § 7 (protecting religious educational institutions from discrimination claims based on their religious missions).

commitments, both the Utah statute and the proposed FFA Act "reflect[ ] hard thinking about what matters most."[88] These legislative efforts exemplify the much-needed lawyerly trait of resourcefulness.

2. A Lawyer Is Resolute

Lawyers are people too, of course. We have families and jobs and personal interests and religious commitments and personal prejudices—all the richness, quirks, and frailties that come with being human. But we must rise above all that to defend the rule of law in the teeth of determined opposition, even when doing so seems to threaten our narrow interests. Lawyers and judges must be *resolute*.

Consider an incident from the life of John Adams. Thirty-four years old and still struggling to build a law practice in colonial Boston, Adams was asked to defend eight soldiers and their captain who had been charged with murder because of the deaths of five men in what came to be known as the Boston Massacre.[89] Local feelings ran high; Bostonians were understandably aggrieved at the presence of British troops, quartered there to enforce unpopular and arbitrary parliamentary policy. Despite the risks to his career, "Adams accepted, firm in the belief, as he said, that no man in a free country should be denied the right to counsel and a fair trial."[90] At trial, he squarely placed blame for the deaths on the provocations of an angry mob and on the government policy behind the conflict.[91] The principle of self-defense justified the soldiers' decision to fire on the crowd, Adams argued, and the jury agreed. It acquitted all but two of the soldiers, who were found guilty of the lesser charge of manslaughter.[92] As he feared, success in court drove

88. Stewart & Schaerr, *supra* note 84 at 148.
89. *See* DAVID MCCULLOUGH, JOHN ADAMS 65–66 (2001).
90. *Id.* at 66.
91. *Id.* at 67.
92. *Id.* at 68.

away clients, causing Adams to lose "more than half his practice."[93] Still, reflecting on this incident in his old age, he looked back with pride at "one of the most gallant, generous, manly and disinterested actions of my whole life, and one of the best pieces of service I ever rendered my country."[94]

Never have such noble qualities been more necessary in a lawyer than in today's divisive legal and political climate. By virtue of their training and their solemn oath as officers of the court, lawyers have it within their power to bridge differences, reduce societal conflict, and uphold the rule of law by fidelity to the law and providing vigorous, but fair, representation despite popular opinion.

Unpopular clients and unpopular causes need talented representation no less than the popular client and the easy case. Our adversarial system of justice absolutely relies on a full presentation of the legal case for each party's position. Cases should be decided on their legal merits—not on a popularity contest that denies a party competent legal representation because of partisan support or opposition. Yet there is evidence that some major law firms may be undermining this core principle by declining to represent unpopular clients and positions in high-profile cases involving social issues.[95] That is highly corrosive of the rule of law. Unless reversed, this trend will frustrate the already challenging work of courts in difficult cases. And it will alienate Americans who come to see the judicial system as being unfairly stacked against interests and perspectives that they value and admire.

Standing resolutely in the performance of our vital duties as lawyers and judges, regardless of whether we are personally sympathetic with a client or cause, is

93. *Id.*

94. *Id.*

95. Eugene Scalia, Remarks at the Federalist Society National Lawyers Convention (Nov. 15, 2019) (transcript available at https://fedsoc.org/conferences/2019national-lawyers-convention?#agenda-item-address-5).

essential both to the just administration of the law and to the public's perception and support of the rule of law itself.

3. Judges and Lawyers of Great Integrity

Besides resourceful and resolute lawyers, we need judges and lawyers of ironclad integrity. In paying tribute to Judge Learned Hand and Judge Augustus Hand—cousins who sat on the U.S. Court of Appeals for the Second Circuit—Justice Robert Jackson aptly described not only their virtues, but the virtues of any good judge.

> They have represented an independent and intellectually honest judiciary at its best. And the test of an independent judiciary is a simple one—the one you would apply in choosing an umpire for a baseball game. What do you ask of him? You do not ask that he shall never make a mistake or always agree with you, or always support the home team. You want an umpire who calls them as he sees them. And that is what the profession has admired in the Hands. That high-minded attitude toward their professional work and toward the judicial function is the priceless tradition that these men have established on our bench.[96]

Justice Jackson practiced what he preached. It was later said of him that he possessed "a calm which no crisis could disturb, and standards of honorable conduct which were both rigorous and unshakeable."[97]

All judges should aspire to such praise. Before entering office, federal judges take an oath binding them to "administer justice without respect to persons."[98] Judges threaten the rule of law when they disregard longstanding precedent for seemingly political or ideological

96. Robert H. Jackson, Why Learned and Augustus Hand Became Great, Remarks at New York County Lawyers Association Annual Dinner (Dec. 13, 1951) (transcript available at https://www.roberthjackson.org/wp-content/uploads/2020/06/why-learned-and-augustus-hand-became-great.pdf).

97. Warner W. Gardner, *Government Attorney*, 55 COLUM. L. REV. 438, 439 (1955).

98. 28 U.S.C. § 453.

reasons, using judicial power and prestige "as vehicles for resolving contested issues of social policy."[99] Returning to a modest view of the judicial role would go a long way toward repairing those divisions that come when one faction or another seeks to win in court what they lose at the ballot box. Judges must remain impartial stewards of the law, stubbornly resisting the temptation to be partisans or ideologues.[100] For the law to be an instrument of peacemaking, judges must remain faithful to established legal doctrines and principles and not to particular causes.

The integrity of lawyers is no less essential. Lawyers are advocates, of course, and our system of justice depends on advocates who present a court with the strongest possible arguments for each party. But the imperative of advocating a cause must never override the larger imperative of upholding the rule of law. Judges rely on lawyers to help them distill the law and understand its contours. Legal advocacy must be, above all else, thoroughly honest and forthright. Zealous representation should be tempered by basic decency and fairness: civility and comity between attorneys should be the norm. Lawyers can be role models for what it means to disagree vigorously about vitally important matters in a spirit of goodwill and even friendship. Oral argument in the U.S. Supreme Court takes on a more civilized tone because advocates commonly refer to opposing counsel as "my friend." Something of that same spirit ought to influence how lawyers interact with each other.

4. Habits of the Legal Mind to Temper

Our professional training as American lawyers steeps us in the language and mindset of personal rights.

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99. William E. Nelson, *The Imperfections of the Rule of Law*, 67 SMU L. REV. 781, 792 (2014).

100. One is reminded of Maitland's classic indictment against England's Star Chamber Court: "It was a court of politicians enforcing a policy, not a court of judges administering the law." F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 263 (1908).

We contrive rights to remedy every wrong. But in doing so we may miss opportunities to guide clients toward a harmonious resolution of their grievances. Professor Mary Ann Glendon of Harvard Law School tellingly diagnosed the distortions that follow from what she called overinflated "rights talk."

> Our rights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground. In its silence concerning responsibilities, it seems to condone acceptance of the benefits of living in a democratic social welfare state, without accepting the corresponding personal and civic obligations.[101]

Dallin H. Oaks, former Utah Supreme Court Justice and current member of the First Presidency of The Church of Jesus Christ of Latter-day Saints (the Church's highest governing body), echoed Glendon's emphasis on personal responsibility: "Civic responsibilities like honesty, self-reliance, participation in the democratic process, and devotion to the common good are basic to the governance and preservation of our country."[102]

Reducing every dispute to a matter of rights too often devolves into superficial claims and counterclaims of constitutional right. Although I have the greatest respect for constitutional law and constitutional lawyers, their perspective and concerns can crowd out other means of resolving serious differences. The Constitution was never intended to supplant our efforts to reach a consensus through democratic self-government. On a previous occasion, I elaborated on this concern:

> I sometimes fear that we have relied too much on the Constitution to do the hard work of citizenship for us. The Constitution—including the First

101. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 14 (1991).

102. Dallin H. Oaks, *Rights and Responsibilities*, 36 MERCER L. REV. 427, 435 (1985).

> Amendment—was never intended to make us lazy citizens, to absolve us from the duty and imperative to be vigilant in defense of our religious rights and interests. Rather, the Constitution's fundamental purpose was to establish a system of government for finding sustainable compromises allowing us to live within the broader society. As citizens of this nation, we have a duty to work with our fellow countrymen to find workable solutions to vexing problems—including clashes of rights and fundamentally competing interests.[103]

The conflicts that divide us may be bridged by resourceful and resolute lawyers, as well as by thoroughly independent judges. But ultimately, in a country where We the People are sovereign, we have no one but ourselves to look to for answers to our current perplexities. Remaining mired in a right-versus-right mindset is confining and dangerous. We have an obligation to work with our fellow citizens to find durable solutions to our common problems. We need fewer thrusts for cultural dominance and more generous-hearted and creative-minded understanding of neighbors who do not share your lifestyle and outlook. We need ideologically imperfect but livable compromises. More than ever, we need peacemakers.

IV. CONCLUSION

In thinking about the ways out of our crisis, I have been reminded of President Lincoln's first inaugural. Having prevailed in a bitterly divided election (imagine if President Biden had received no votes south of the Mason-Dixon line), Lincoln reminded the disaffected South how much they shared with the rest of the country. He closed his speech with a benediction that applies, I'm convinced, to us.

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103. Elder Lance B. Wickman, Promoting Religious Freedom in a Secular Age: Fundamental Principles, Practical Priorities, and Fairness for All, Address at the 2016 Religious Freedom Annual Review (July 7–8, 2016).

> We are not enemies, but friends. We must not be enemies. Though passion may have strained, it must not break our bonds of affection. The mystic chords of memory, stretching from every battle-field, and patriot grave, to every living heart and hearthstone, all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature.[104]

Our laws, no less than other "mystic chords," are among the ties that bind us together as Americans. Our common assent to the rule of law is part of our ancient compact to lay down our arms and resolve our disagreements peacefully. It constitutes us as a nation of fellow citizens with a shared heritage and future. We lawyers and judges must never forget that we are the essential stewards of the rule of law and of the peace it exists to preserve.

104. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* 2 ABRAHAM LINCOLN, SPEECHES AND WRITINGS, 1859–1865, at 224 (Don E. Fehrenbacher ed., 1989).