THE TENSIONS BETWEEN LEGAL INSTRUMENTALISM AND THE RULE OF LAW

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(Very Rough Draft)

INTRODUCTION

The United States legal tradition combines two core ideas. The first idea, known broadly as the "rule of law," is that government officials and citizens are obligated to abide by a regime of legal rules that govern their conduct. The second idea, what I call legal instrumentalism, is that law is a means to an end; or, put in more familiar terms, law is an instrument for the social good. Both ideas are taken for granted and are equally fundamental in the contemporary U.S. legal culture. Seldom is it recognized that the combination of these two ideas is a unique historical development of relatively recent provenance, and that in certain crucial respects they are a mismatched pair.

The rule of law is a centuries-old ideal, but the notion that law is a means to an end became entrenched only in the course of the nineteenth and twentieth centuries. That was the view of law famously advocated by Jeremy Bentham and Rudolph von Jhering, and in the United States by Oliver Wendell Holmes, Roscoe Pound, and the Legal Realists. These theorists argued that law should be declared at our will and shaped to achieve our collective social purposes. Prior to their arguments, law was characterized as the immanent order of natural principle or of the customs and moral norms of the society or community. Law is not an empty vessel to be filled in by our leave, it was thought; rather law is predetermined in some sense, consistent with what is necessary and right.

To set the stage for this exploration, a central dynamic driving the situation will be summarily stated at the outset.[1] The instrumental view of law was promoted as an integrated two part proposition: law is an instrument *to* serve the social good. In the course of the twentieth century, the first part of the proposition swept the legal culture while the second part became increasingly problematic. Many came to believe that there is no such thing as a social good, or that there is no way to identify or agree upon what is in the social good. Interests unavoidably conflict, people and groups have different, sometimes clashing values, and there are no independent standards to resolve such disputes. An instrumental view of law in a context of intransigent disagreement over the social good leads to a Hobbsean battle of all-against-all though and over the legal order itself, a battle to seize the implements of law and wield its coercive force against opposing groups. This battle, many signs of which can be seen today, takes place in legislation, administrative and executive actions, and in judicial appointments and judging. Law is seen decreasingly in terms of an order of binding rules, and increasingly as a tool or weapon to be manipulated to achieve desired ends—herein lay the deep rub between an instrumental view of law and the rule of law ideal, which are antithetical in thrust.

Four specific points of tension between the rule of law ideal and an instrumental view of law will be covered in this article. The first two points relate primarily to legislative and executive actions, and the final two mainly on the judiciary. The first point focuses on the fact that the instrumental view of law came at the expense of the classical rule of law ideal that there are independent legal limits on law itself. The

[1] The basic ideas in this article are taken from a more extensive historical and theoretical work that explores the emergence of an instrumental view of law and its consequences, Law as a Means to an End: Threat to the Rule of Law (Cambridge Univ. Press, forthcoming 2006).

second point involves the implications of the disagreement over the social good—why should the law be considered obligatory if it merely enforces the interests of private groups? The third point relates to the detrimental consequences on binding legal rules of purposive and pragmatic judicial reasoning oriented toward ends. The final point involves widespread doubts about the very possibility of judicial objectivity, doubts which undermine the notion of the rule of law.

Before taking up these four points, a brief discussion of the 1960's and 1970's is necessary. This pivotal period marked both the entrenchment of an instrumental view toward law and the presence of sharp conflict over the social good.

LEGAL INSTRUMENTALISM AND MORAL RELATIVISM IN THE ACADEMY

A massive social upheaval rocked the United States in the 1960's and 1970's, with civil right marches and boycotts, violent protests against the Vietnam War, political assassinations and bombings, economic insecurity, the drug culture, and the political corruption of Watergate. Law was caught up in the middle of this social-political conflagration. People on the left too often saw law line up on the side of power and privilege, answering peaceful marches and sit-ins with police brandishing night sticks and snapping dogs. People on the right thought that defiant public displays of civil disobedience threatened social order, which was encouraged by the meek response of law enforcement. Progressives cheered the Warren Supreme Court as the one legal institution doing the right thing, while the right despised the Court as activist usurpers writing their

own personal liberal views into the Constitution. All sides thought it evident that a "crisis of legal liberalism" was at hand.[2]

Legal historian Calvin Woodward wrote in 1968 that prevailing attitudes within the legal academy were thoroughly Legal Realist. Notwithstanding the silencing of the Legal Realists in the course of the Second War World, the resonance of their incisive critiques of conceptual and rule formalism continued like a subterranean river. "At least in the better law schools," Woodward remarked, "'functionalists' and 'realists' are no longer lonely aliens in a hostile world. In truth they probably outweigh in influence, if not in numbers, the Langdellians."[3] This realistic perspective portrayed law as a means to an end. Graduates from the better law schools, he might have added, became professors at law schools across the land, carrying with them and further propagating these views.

Woodward recognized that responsibility for the triumph of instrumental views of law could not be laid on the Realists alone:

> …the society-wide trend toward secularization is the culmination of a centuries-long development that has transformed the Law from a "brooding omnipresence in the sky" into a down-to-earth instrument of social reform and, at the same time, translated…the lawyer from a quasi-priestly figure into a social engineer. Legal education…has both reflected and contributed to this long-term trend.[4]

In the course of the 20th Century society at large underwent a general loss of belief in objectively existing principles.[5] With a seemingly irresistible momentum, in each

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[2] Lestor Mazor, "The Crisis of Legal Liberalism," 81 *Yale L.J.* 1032 (1972).
[3] Calvin Woodward, "The Limits of Legal Realism: An Historical Perspective," 54 *Virginia L. Rev*. 689,732 (1968).
[4] Id. 733.
[5] An unparalleled historical exploration of the ideas that led to this state can be found in Richard Tarnas, *The Passion of the Western Mind: Understanding the Ideas that Have Shaped our World View* (NY: Harmony Books 1991).

passing decade "the knowledge of good and evil, as an intellectual subject, was being systematically and effectively destroyed."[6] Prominent political thinker Walter Lippmann worriedly remarked in 1955 that "the school of natural law has not been able to cope with the pluralism of the later modern age—with the pluralism which has resulted from the industrial revolution and the enfranchisement and the emancipation of the masses of the people."[7] The 20th Century brought the "disenchantment" of the world. The spectacular evil and suffering inflicted by all sides on all sides in two World Wars, followed by the rise of Soviet totalitarianism, pummeled the faith in reason and human progress that informed so much of 18th and 19th Century political thought.[8]

Woodward was generally supportive of an instrumental view of law, but he sounded a cautionary note: "Predictably, the result [of these ideas] is a generation of law teachers who find it difficult to believe—by this I mean profoundly believe—in the existence of law beyond what fallible courts say it is; a generation of law students who consequently do not learn to be restrained in any essential way by the law…"[9]

A decade later, the Dean of Cornell Law School, Roger C. Cramton, wrote that legal instrumentalism had become "the ordinary religion of the law school classroom."[10] This "orthodox" wisdom, conveyed daily by law professors to their students, is "an instrumental approach to law and lawyering," along with "a skeptical attitude toward

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[6] Arthus Allen Leff, "Economic Analysis of Law: Some Realism about Nominalism," 60 *Virginia L. Rev*. 451,454 (1974)
[7] Walter Lippmann, *The Public Philosophy* (NY: Mentor Books 1955) 85.
[8] See Robert A. Nisbet, *Social Change and History* (NY: Oxford Univ. Press 1969).
[9] Woodward, "Limits of Legal Realism," supra 734.
[10] Roger C. Cramton, "The Ordinary Religion of the Law School Classroom," 29 *J. Legal Educ*. 247 (1978).

generalizations, principles, and received wisdom."[11] Cramton credited (or blamed) Holmes, the Legal Realists, and pragmatism for these attitudes about law:

> Today law tends to be viewed in solely instrumental terms and as lacking values of its own, other than a limited agreement on certain 'process values' thought to be implicit in our democratic way of doing things. We agree on methods of resolving our disagreements in the public arena, but on little else. Substantive goals come from the political process or from private interests in the community. The lawyer's task, in an instrumental approach to law, is to facilitate and manipulate legal processes to advance the interest of his client.[12]

Cramton captured the prevailing view of law as an empty vessel, matched by a vision of the lawyer who instrumentally utilizes legal rules and processes for clients. Students were required to articulate solid arguments for opposing sides, or to build up one side then proceed to break it down; they were prompted to critically scrutinize judicial opinions. The lessons brought home by these standard pedagogical techniques is that everything is up for argument, and that legal rules are not binding dictates, but resources to be strategically marshaled and presented with rhetorical acuity.

There is a temptation to shrug "so what" at this instrumental characterization of law, so routine is it now. Woodward and Cramton found it worthy of comment precisely because, although it had been creeping up for decades, it was contrary to earlier ways of teaching law, the memory of which had not yet been extinguished. They openly worried about the unknown implications of a purely instrumental view of law being purveyed in law schools.

Cynicism about government was also in full bloom. Another prominent legal historian, G. Edward White, observed in 1973 that a feature of contemporary life was "an

[11] Id. 248.
[12] Id. 257.

acknowledged gap between the goals of officeholders and those of their constituents, as well as a widespread judgment that those same officeholders are furthering their own goals while merely paying lip service to their constituents' needs."[13] Critics of government were "linked in their perception that terms such as 'public interest' and 'social welfare' have lost their meaning: the terms are capable of such wide, divergent, and contradictory interpretations that they are useless as standards of performance."[14]

"A final and possibly the most significant aspect of American culture in the 1970's," White remarked, "is the disintegration of common values or goals. In the place of consensual values around which members of American society can cohere stand sets of polar alternatives…"[15] Beyond the fact of the sharp disagreement over values was the bleak prospect that without access to absolute moral standards these disputes could not be resolved. Arthur Leff remarked in 1974 that the absence of objective moral foundations "is a fact of modern intellectual life so well and painfully known as to be one of the few which is simultaneously horrifying and banal."[16] Leff's 1979 article, "Unspeakable Ethics, Unnatural Law," raised a hopeless plea for some source of moral and legal grounding in an apparently groundless world. Initially confident that objective principles could be better secured in reason or science, moderns had banished God and natural law only to arrive at an unanticipated and apparently insurmountable destination: "*There is no such thing as an unchallengeable evaluative system*. There is no way to prove one ethical or legal system superior to any other, unless at some point an evaluator is asserted to have

[13] G. Edward White, "The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change," 59 *Virginia L. Rev*. 280,295 (1973).
[14] Id.
[15] Id. 296.
[16] Leff, "Economic Analysis of Law," supra 455.

the final, uncontradictable, unexaminable word."[17] His essay memorably left off with the words "God help us."[18] Roberto Unger's influential (among the radical left) *Knowledge and Politics* (1975) argued that the modern belief in the subjectivity of values drove deep contradictions into liberal legal systems with no evident solution. It ended "Speak, God."[19] In the air at the time was a palpable awareness that society and law had been cut adrift irretrievably from its old moorings with no new anchorage in sight.

By the mid-1970's, then, the law was pervasively seen in purely instrumental terms and there was sharp disagreement over the social good, setting in place the contemporary dynamic that drives the tension between the rule of law and an instrumental view of law.

COLLAPSE OF HIGHER LAW, DETERIORATION OF THE COMMON GOOD

In the past two hundred-plus years, the United States legal culture has been deprived of two sets of ideals that provided the foundation for the law for more than a millennium. The defining characteristic of the first set of ideals was that law consists of fundamental principles which the sovereign law-maker is bound to obey. This was the traditional understanding of the rule of law—the notion that there are legal limits on law itself, limits derived from divine law, natural principle, reason, or customs descended from time immemorial.[20] The defining characteristic of the second set of ideals was that law represents the common good or public welfare. This quality made the law *of and for* the community, deserving of obedience by citizens.

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[17] Arthur Allen Leff, "Unspeakable Ethics, Unnatural Law," 1979 *Duke L. J.* 1229,1240 (1979)(emphasis in original).
[18] Id. 1249.
[19] Robert M. Unger, *Knowledge and Politics* (NY: Free Press 1975) 295.
[20] See Tamanaha, *On the Rule of Law*, supra.

Both of these sets of ideals provided important underpinnings for the rule of law. The former idea conveyed the sense that there are unalterable legal limits on law; the latter idea indicated why the law is entitled to rule. The Parts in this Section will articulate the role and function formerly played by these longstanding ideas and the consequences of the vacuum left by their decline.

COLLAPSE OF HIGHER LIMITS ON LAW

Natural law and principle, reason, and customs from time immemorial were thought to be the source of, to be binding upon, and to be superior to the positive law of the state. Thomas Aquinas famously asserted "A law that is unjust seems not be a law."[21] "Hence every human positive law has the nature of law to the extent that it is derived from the Natural law. If, however, in some point it conflicts with the law of nature it will no longer be law but rather a perversion of law."[22] Echoing this position, Blackstone wrote that "This law of nature…is of course superior in obligation to any other….[N]o human laws are of any validity, if contrary to this; and as such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original."[23] The core idea was that there are *legal limits on the law itself*—that legal officials are legally bound to higher law. This was at the core of early English understandings of the ancient constitution and the common law.[24]

This view of the primacy of unwritten law over legislation was standard at the establishment of the colonies. The 1677 Charter of Fundamental Laws of West New

[21] Thomas Aquinas, *Summa Theologiae*, trans. R.J. Henle (South Bend, Ind.: University of Notre Dame Press 1993) 96.4 sec.4.
[22] Id. 95.2.
[23] Quoted in Boorstein, *Mysterious Science of the Law*, supra 49.
[24] See Pocock,

Jersey "began with the provision that the 'common law or fundamental rights' of the colony should be 'the foundation of government, which is not to be altered by the Legislative authority.'"[25] Historian Daniel Boorstin found in the colonial period a "widely accepted assumption that there were definite limits which the legislators were not free to transgress,"[26] limits comprised of what were understood to be ancient common law provisions as well as certain passages of scripture. The prevailing belief was that "the primary and normal way of development of civil institutions was by custom and tradition rather than by legislative or administrative fiat."[27] Leading up to and following the revolution, a number of state courts invalidated legislation thought to be contrary to natural law or fundamental common law rights.[28]

Belief in natural law and in the primacy of the common law continued to influence jurists throughout the nineteenth century. A 1905 study of the jurisprudence of the preceding century found that "Several American courts have asserted the doctrine that the judiciary can disregard a statute which plainly violates the fundamental principles, although it may not contravene any particular constitutional provision."[29] A highly effective mechanism judges utilized to control legislation was to render narrow or defeating constructions. "Indeed, one of the rules of statutory construction, 'statutes in derogation of the common law are to be construed strictly,' constituted for many years a check on legislative innovation far more subtle but scarcely less stringent than written constitutional limitations."[30] Roscoe Pound remarked in 1910 that "Judges and jurists do

[25] Quoted in Leonard W. Levy, *Origin of the Bill of Rights* (New Haven: Yale Univ. Press 1999) 7.
[26] Boorstein, *The Americans*, supra 20.
[27] Id.
[28] Charles G. Haines, "Political Theories of the Supreme Court From 1789-1835," 2 *Am. Pol. Sci. Rev.* 221,222-223 (1908).
[29] Simeon Baldwin, *The American Judiciary* (NY: Century Co. 1920[1905]).
[30] Jacobs, *Law Writers and the Courts*, supra 10.

not hesitate to assert that there are extra-constitutional limits to legislative power which put fundamental common-law dogmas beyond the reach of statutes."[31]

In the course of the early 20th Century, when the non-instrumental understanding of the common law gave way to the instrumental view, also swept away was the notion that the common law and natural principles constitute limits on legislation. The implications of the Enlightenment, the secularization of society, doubts about the existence of objective moral principles, a culturally heterogeneous and class differentiated populace, pitched battles within society among groups with conflicting economic interests in the late 19th Century, an increasingly specialized economy with complex regulatory regimes far beyond the ken of common law concepts, the disenchantment of the world in the 20th Century—all contributed to undermining old notions of natural principles and controlling common law. After this denouement, the only substantive restrictions on legislation were those found in the words of the Constitution.

Constitutional enforcement of substantive limits on law making, while similar in function to classical rule of law limits like natural law, is different in a fundamental respect. Classical rule of law limits were thought to exist entirely apart from the will of law makers. The Declaration of Independence reflected this understanding: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights..." The Ninth Amendment of the Constitution announced the same sentiment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." A widely shared understanding at the time was that "Common law and written

[31] Pound, "Law in Books and Law in Action," supra 27.

constitutions expressed and elaborated these notions [of fundamental rights and limits on government], but did not create them."[32] Up through the early 20th century it was still thought by many judges that the bill of rights was "merely declaratory of fundamental natural rights;" and 'legislation is to be judged by those rights and not by the constitutional texts in which they are declared."[33]

This view did not survive the 20th century. As belief in natural law waned, the Supreme Court came to characterize rights and restraints on legislative powers in positivist terms tied to the language of the Constitution. The only limits on legislation were those limits specified in the Constitution (though not always restricted to the explicit text). Identical to ordinary legislation, such limits were the product of will-based law making. "[I]n the American *written Constitution*," wrote eminent constitutional scholar Edward Corwin, "higher law at last attained a form which made possible the attribution to it of an entirely new sort of validity, the validity of a *statute emanating from the sovereign people*."[34] The supremacy of the Constitution came to be understood as grounded on "its rootage in popular will."[35] Every provision of the Constitution can be altered or abolished by amendment (albeit with higher hurdles to scale). This understanding is radically unlike former limits imposed by natural principles and common law principles, which were not the product of human will but were immanent principles of right.

THE CONSEQUENCE OF THE COLLAPSE

[32] Tribe, *American Constitutional Law*, supra 561.
[33] Pound, "Law in Books and Law in Action," supra 28.
[34] Corwin, "'Higher Law' Background of American Constitutional Law," supra 89 (emphasis in original).
[35] Id. 4.

Constitutional restrictions provide a new form of limitation that accomplishes some of the work done by the older understandings, but it does so in a reduced sense. It is law limiting itself, a step higher, but still a contingent body of law that can be changed through amendment (or a re-interpretation) if so desired. Lost in this transformation was the time-honored understanding that there are certain things the government and legal officials absolutely cannot do with and through law—that the law possesses integrity unto itself and must comport with standards of good and right. The elimination of this former standard is emphasized in legal theorist Joseph Raz's description of what, under modern understandings, can be entirely consistent with the rule of law: "A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and racial persecution, may, in principle, conform to the requirements of the rule of law…"[36] The government must abide by and apply stable and certain general rules set out publicly in advance. Beyond these minimal formal characteristics, the law can consist of any content whatsoever and serve any end whatsoever. Legal arguments can even be made to justify torture, as recently occurred.

When law was thought to have an inviolable built in principled integrity, invocations of that core provided a source within law to resist malign uses of the law. Instrumentalism, in contrast, entails only means-ends reasoning. Once an end has been decided upon, law can be used in any way necessary to advance the designated end, without limit. Instrumental questions may be raised about the efficiency of law in achieving ends, but as long as the formal or procedural requirements of law are met, there can be no *legal* objections against using law in an abhorrent or evil fashion.

[36] Joseph Raz, "The Rule of Law and its Virtue," in The Authority of Law, supra 211.

When the law has been deprived of its own integrity, it is nothing but an instrument to be utilized in whatever way necessary to achieve the ends desired. There is little to separate law from any other tool, or weapon. The legitimacy of law then rides on the rightness of the ends the law is utilized to advance. That is the next subject.

HISTORICAL PRIMACY OF THE "COMMON GOOD" IDEAL

A constant refrain in the history of the rule of law ideal is that the law is, and should be, for the common good. Plato asserted that the laws should be "for the sake of what is common to the whole city."[37] Aristotle wrote that a "true government" must have just laws, and just laws are oriented towards the "common interest."[38] Aquinas defined law as "an ordinance of reason for the common good."[39] Germanic customary law in the Medieval period tied the primacy of the law to the traditional order of the whole community.[40] Locke insisted that, as a matter of natural law, the legislative power "in the utmost bounds of it, is limited to the public good of society."[41] "It is an ancient principle…that governmental powers should be exercised for public purposes only[.]"[42]

This idea has been central to the U.S. legal tradition from its inception. The Mayflower Compact—*the* founding political document of the colonies—written two generations before Locke's famous Second Treatise, was a covenant to form a "civill body politick for our better ordering and preservation…to enacte, contistitute, and frame such just and equall lawes, ordinances, acts, constitutions, and offices, from time to time,

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[37] Plato, *Laws,* T. Pangle trans. (NY: Basic Books 1980) 715b.
[38] Aristotle*, The Politics*, E. Barker, trans, (Cambridge: Cambridge Univ. Press 1988) 68-69.
[39] Aquinas, Summa Theologica, supra 90.4.c.2.
[40] See Fritz Kern, *Kingship and Law in the Middle Ages* (NY: Harper Torchbooks 1956).
[41] Locke, *Second Treatise of Government*, supra Chap. XI, Section 135.
[42] Jacobs, *Law Writers and the Courts*, supra 100.

as shall be thought most meete and convenient for the general good of the Colonie, unto which we promise all due submission and obedience."[43] The very first charge against King George in the Declaration of Independence was his refusal to assent to laws "the most wholesome and necessary for the public good."

The negative corollary of the assertion that legal power is only legitimate when used to further the common good is that it is inappropriate for law to benefit particular groups within society at the expense of the common good. This too has been a constant theme in the U.S political-legal culture from the founding. Article VII of the Massachusetts Constitution expresses the common good ideal and its negative corollary: "Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men." Historian of the Revolution Bernard Bailyn observed that the founder's goal was that "the system would lead to the selection as representatives those who would be likely to stand above special interests and pursue the true interests of all their constituents, as well as the common good of society."[44]

To recount the historical primacy of this ideal is not to say it has always been believed or honored. Innumerable political writers have noted that law regularly serves particular interests, often those of the elite or most powerful. According to Plato, Thrasymachus declared that "justice is the interest of the stronger."[45] Karl Marx famously said much the same. But this point is not exclusive to radical critics of the legal order. Clear-eyed about law even as a young man, in 1873 Oliver Wendell Holmes wrote

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[43] Mayflower Compact, quoted in Corwin, "Higher Law Background of American Constitutional Law," supra 65.
[44] Bernard Bailyn, *To Begin the World Anew: the Genius and Ambiguities of the American Founders* (NY: Vintage Books 2003) 117.
[45] Plato, *The Republic* (NY: Random House 1991) Book I, 344.

that "This tacit assumption of the solidarity of interests of society is very common, but seems to us to be false…in the last resort a man rightly prefers his own interest to that of his neighbors. And this is as true in legislation as in any other form of corporate action."[46] "[W]hatever body may possess the supreme power for the moment is certain to have interests inconsistent with others which have competed unsuccessfully. The more powerful interests must be more or less reflected in legislation; which, like every other device of man or beast, must tend in the long run to aid the survival of the fittest."[47] Legislation, he said, "is necessarily made a means by which a body, having the power, puts burdens which are disagreeable to them on the shoulders of everyone else."[48] The only prospect for tempering this tendency that Holmes could envision was the spread of an educated sympathy among the dominant groups to "reduce the sacrifice" required of minorities. Accordingly, he said, "it is no sufficient condemnation of legislation that it favors one class at the expense of another; for much or all legislation does that, and none the less when the *bona fide* object is the greatest good of the greatest number."[49]

Awareness that reality often disappoints the ideal does not in itself discredit the ideal. Even Holmes thought law could and should promote sound social policy. The underlying point of these accounts, including from skeptics, is that what entitles the law to obedience, at least in the eyes of the citizenry, is the claim that it furthers the public good. Unless one is in a favored position, why abide by the rule of law if the law mainly secures the advantage of some in society at the expense others?

[46] Oliver Wendell Holmes, "The Gas Stoker's Strike," 7 *American L. Rev*. 582,583 (1873).
[47] Id.
[48] Id.
[49] Id. 584.

JUDICIAL TAINTING OF THE NOTION OF THE COMMON GOOD

Two main sources have contributed to the deterioration of the notion of the common good within the US political-legal culture, one particular to law and the second related to general social attitudes. The legal contribution was the stain left by courts that invoked the general welfare or public purpose notion when striking legislation in the late 19th century. Judges in this period scrutinized the legislatively designated public purpose behind a statute to determine whether, by their own lights, it was real.[50] The Missouri Supreme Court in 1897, for example, invalidated legislation that prohibited mining and manufacturing companies from the abusive practice of paying employees their wages in scrip exclusively redeemable at company stores: "If [the statute] can stand, it is difficult to see an end to such legislation, and the government becomes one of special privileges, instead of a compact 'to promote the general welfare of the people.'"[51] Time and again courts utilized this reasoning to void legislation that extended protection to employees and unions, as well as other types of legislation. In the name of prohibiting laws that favored special interests, the courts appeared to critics be protecting the special interests of employers and capital.

Judges could no longer be trusted to decide questions about legitimate public purposes. In the mid-1930's, under pressure from critics, courts abdicated a monitoring role in economic legislation. The question of whether legislation furthers the common good was effectively left to the legislature without any check. This development eliminated a key structural feature of the system. The founding generation invested faith in the judiciary to stand above and serve as an effective check on special interests.

[50] An excellent exploration of these decisions can be found in Jacobs, *Law Writers and the Courts*, supra.
[51] State v. Loomis, 115 Mo. 307,316 (1893).

"[T]he independence of the judges may be an essential safeguard," wrote Alexander Hamilton in the *Federalist Papers*, "….[which] not only serves to moderate the immediate mischiefs of those [laws] which may have been passed, but it operates as a check upon the legislative body in passing them[.]"[52]

BATTLES TO SEIZE THE LAW

Many of the Realists, like others of their time, reposed an inordinate faith in the capacity of social science to help answer disputes over the common good or public welfare. The difficulties in resolving these questions were subsequently glossed over in the spirit of consensus that prevailed in the aftermath of the Second World War. The clashes that broke out in the 1960's and 1970's, many of which continue to this day, changed everything. Fundamental disputes exist over what social justice requires, over the proper trade offs between liberty and equality or between formal and substantive equality, over the enforcement of moral and religious norms in the public and private spheres, over the rights of women, minorities and gays and lesbians, over the appropriate distribution of resources and opportunities, over conditions of employment, over the balance between economic development and harm to the environment, and so on. The old faith that the sciences will supply answers these questions now smacks of naïvete—the natural and social sciences are themselves caught up in the battles among groups, with contrary studies enlisted to serve all sides

Modern epistemological skepticism leads many to believe that these disputes are impossible to resolve in principle. Reflected in the academic phrase "incommensurable paradigms," it is thought that people on opposing sides begin from fundamentally

[52] Hamilton, Federalist 78, in *Federalist Papers*, supra 477.

incompatible starting premises which precludes coming to agreement. Characteristic of this view is the final riposte in an argument—"I guess we just see the world differently"—after which the disputing parties walk away convinced in the soundness of their position, seeing no need to further contemplate or engage the opposition. These attitudes fuel the militant "groupism" that is a standout feature of contemporary social-political-legal discourse.

Using every available legal channel, beginning in the 1960's and continuing today, a multitude of groups aggressively pursue their agendas: women's groups, immigrant groups, gay rights groups, fundamentalist Christian groups, racial or ethnic groups, environmental groups, labor unions, libertarians, consumer groups, trade associations, merchants associations, professional associations, and more. All of these various groups, many in direct opposition to one another in various legal arenas—in cause litigation, in legislative and administrative lobbying, and in battles over judicial appointments—routinely claim to be acting in the name of the public good or welfare.

Under such circumstances it may appear advisable to try to find the most acceptable balance among the competing interests. Pound proposed this as the goal of an instrumental approach to law. Finding a balance among competing interests, it should be noted, is not the same as the classical ideal of a shared common good. "The goal of representation, Hamilton wrote, was not to mirror the infinity of private interests in the way a pure democracy would do, but to meld the contesting forces into the permanent and collective interests of the nation."[53] The idea was to find a position that "in the end would benefit all."[54]

[53] Bailyn, *Begin the World Anew*, supra 118.
[54] Id. 119.

Current attitudes toward law, however, often do not even strive for the less ambitious goal of balancing. Combatants are not seeking to find a compromise or balance among competing interests: individuals and groups vigorously seek to secure the legal enforcement of their particular agenda to the exclusion of or conquest over others. Dialogue with opponents is dismissed as pointless: groups have their own truths, so it is better to prevail over the other side than risk being prevailed upon. This set of attitudes—admittedly a construct—comprises an aggressive posture that strives for nothing less than victory within and through the law.

The combatants over and through law, it is critical to recognize, do not necessarily envision themselves as pursuing their particular group interests *at the expense of* the common good. Building upon a cluster of familiar ideas that have persisted in the U.S. political-legal culture for more than two centuries, it is possible to pursue one's own particular agenda through law with the conviction that one is thereby promoting the public good. These ideas are: the liberal idea that the public good is advanced as if by an invisible hand when individuals pursue their own good; the Social Darwinist idea that society involves a competitive struggle in which the fittest survive, which helps society progress;[55] the market-place of ideas image, in which ideas are tested under fire, with truth and merit emerging victorious, as Holmes put it, "the best test of truth is the power of the thought to get itself accepted in the competition of the market"[56]; the democratic ethos that whatever prevails in a political contest has earned the stamp of community consent; and the adversarial legal system in which parties are wrung through a litigation procedure that produces deserving winners and losers.

[55] See Hofstadter, *Social Darwinism in American Thought*, supra
[56] Abrams v. United States, 250 U.S. 616,630 (1919)(Holmes, J., dissenting).

Common to these ideas is that they encourage participants to exclusively pursue their individual or group agenda, they involve a process of competitive combat, they invest faith in the capacity of the process to select or produce the correct outcome, they draw upon metaphors to discredit interference with the "natural" workings of the process as improper meddling that generates distortions, and they assert that winning is verification of right or entitlement. The victors or survivors or products of these processes, by having gone through and prevailed, are anointed with representing the public or common good.

The losers don't see it that way. They complain that the process unfairly rewards those with greater resources, that the system has a built in tilt against them, that the decision-makers are biased or corrupt, that competition or combat is not a proper way to decide what is right, that winners are the most rapacious or unscrupulous rather than deserving. But these complaints have little traction. If there is no way to agree upon a shared common good, if positions cannot some how be combined or superseded at a higher level, there appears to be no alternative to leaving it to the ordeal of combat to pick winners.

The idea that the law represents the common good is hard pressed to hold up under these circumstances. The law is little more than the spoils that go to winners in contests among private interests, who by their victory secure the prize of enlisting the coercive power of the legal apparatus to enforce their agenda. What keeps the losing combatants in line, what convinces them to abide by the rule of law, is not the normative obligation generated by the fact that the law represents the common good (which they share in). Losers comply owing to the threat that the legal apparatus will apply force to

secure compliance over the unwilling, and out of the hope that they might prevail in future contests to take their turn to wield the law.

This is a barren vision. It is rule of some groups over others *by* and through the law, more so than a community united under the rule of law. This is entirely unlike the traditional view that the law is entitled to rule because it is in the good of all.

THE THREAT TO LEGALITY

The preceding two points of tension emphasized that the old notion that law is limited by immanent legal standards of right and good no longer holds sway, the old notion that the power of law is to be utilized only to advance the common good has deteriorated, and both of these old ideas represented essential underpinnings of the rule of law tradition. The final two points of tension, taken up in this Section, shift the focus to the idea of legality—to what it means to be governed by a system of rules.

The U.S. legal system, it will be argued, is in imminent danger of becoming less of a system of law. This assertion with be demonstrated through two familiar themes in the context of judging. The first is that the rule-bound character of the system is reduced when achieving purposes or focusing on ends becomes the paramount goal of judges in their decisions. The second is that a legal system requires that judges render decisions according to the applicable rules, not according to their own political views or preferences. Both of these themes raise vexing issues about the separation of law and politics in the decision-making of judges. The legal quality of the system—the reality of the rule of law—hinges upon how these issues are dealt with.

HOW PURPOSIVE ORIENTATION DETRACTS FROM RULES

Friedrich Hayek offered a highly influential definition of the rule of law: "Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced before-hand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."[57] In legal theory circles this is labeled the "formal" understanding of the rule of law because it focuses only on the formal characteristics of law rather than on its content. The core idea is that the government must abide by legal rules declared publicly in advance.

The formal rule of law is complementary to an instrumental view of law when considered in connection with legislative declarations of law. Both the formal rule of law and an instrumental approach hold that law is an empty vessel that can consist of any content whatsoever to serve any end desired. Lon Fuller remarked that the formal rule of law is "indifferent toward the substantive aims of the law and is ready to serve a variety of such aims with equal efficiency."[58] That is precisely how the instrumental approach portrays law: an empty vessel open with respect to content and ends.

When moving from legislation to judging, however, the proposition that *judges should strive to achieve purposes and ends when deciding cases*, which has also been promoted as an aspect of the instrumental view of law, raises a direct conflict with the formal rule of law. Proponents of an instrumental approach to law, from Pound, to the Realists, to the Legal Process School, to contemporary legal pragmatists, have urged that judges pay attention to social consequences and strive to achieve legislative purposes and

[57] F.A Hayek, *The Road to Serfdom* (Chicago: Univ. of Chicago Press 1994) 80.
[58] Lon Fuller, *The Morality of Law*, 2nd revised edition (New Haven: Yale Univ. Press 1969) 153.

social policies when deciding cases. Sensible as this might sound at first blush, this approach necessarily diminishes the rule-bound quality of the system.

Hayek argued that an attempt by a judge to achieve particular results in particular cases is inherently inconsistent with the rule of law. "[W]hen we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free. It is because the lawgiver does not know the particular cases to which his rules will apply, and it is because the judge who applies them has no choice in drawing the conclusions that follow from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule."[59] Alexander Hamilton similarly wrote, "To avoid an arbitrary discretion in courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them…"[60]

The fundamental tension between following rules and striving for purposes or ends in particular cases cannot be eradicated because it strikes at the very meaning of a legal rule. In earlier periods this tension showed up in the familiar dilemma between the duty of judges to strictly apply the law, versus doing equity in the individual case. Critics of equity complained that it undermines the certainty and equality of application of law.

The quality of being rule-bound is the essence of a system of legality. "At the heart of the word 'formalism,'" wrote legal philosopher Fredrick Schauer, "lies the

[59] Friedrich Hayek, *The Constitution of Liberty* (Chicago: Univ. of Chicago Press 1960) 153.
[60] Hamilton, Madison, and Jay, *Federalist Papers*, supra, Federalist 78, 478.

concept of decisionmaking according to *rule*."[61] What makes a rule a "rule" is that it specifies in general terms in advance a mandate that decision-makers must follow to the exclusion of—screening out—any other considerations. The rule provides a sufficient and obligatory reason for the decision. This is so without regard to the purpose behind the rule or the consequences of the applying the rule:

> In summary, it is exactly a rule's rigidity, even in the face of applications that would ill serve its purpose, that renders it a rule. This rigidity derives from the language of the rule's formulation, which prevents the contemplation of every fact and principle relevant to a particular application of a rule….Formalism in this sense is therefore indistinguishable from "rulism," for what makes a regulative rule a rule, and what distinguishes it from a reason, is precisely the unwillingness to pierce the generalization even in cases in which the generalization appears to the decisionmaker to be inapposite.[62]

If achieving a purpose or end is allowed to prevail over a rule, the rule is relegated to "a mere rule of thumb, defeasible when the purposes behind the rule would not be served."[63] A rule of thumb is not a binding rule.

Legal philosopher David Lyons made the same basic point: a legal system in principle cannot combine being rule bound and trying to achieve ends (what he calls "optimizing outcomes"). Achieving ends swallows up being rule-bound. "To insist on maximum promotion of satisfactions and on deference to past authoritative decisions only when that deference could reasonably be expected to have such optimific

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[61] Fredrick Schauer, "Formalism," 97 *Yale L.J.* 509,510 (1988)(emphasis in original). Also informative on this subject is Schauer's *Playing by the Rules: A Philosophical Examination of Rule Based Decision Making in Law and Life* (Oxford: Clarendon Press 1991).
[62] Schauer, "Formalism," supra 535.
[63] Id.

consequences is to deny that courts are bound in the slightest degree by statutes or precedent."[64]

In addition to the fact that striving to achieve purposes or ends detracts from the binding quality of legal rules, these are starkly dissimilar tasks. Striving to achieve a purpose or end in law, legal theorist Duncan Kennedy observed, "involves the expression, interaction and measurement of values in conflict, and the assessment of the implications for those conflicting values of infinitely complex factual situations."[65] "Rule application, in sharp contrast, involves the objective or 'cognitive' operation of identifying particular factual aspects of situations followed by the execution of unambiguous prescriptions for official action."[66] Although rule application is more involved than this description indicates, there is no question that the task of achieving purposes or ends—which requires a judge to grapple with hard issues of value and social policy, and to determine likely future consequences—is more complicated, far more uncertain, and far less ascertainable than applying legal rules to an existing situation.[67]

There are several reasons why attention to purposes and ends raises complex non-legal questions and can lead to results contrary to a legal rule. Some legal rules on the books are obsolete and inconsistent with current policies. Some statutes are poorly drafted or embody purposes and policies that are internally at odds (the product of political compromise). The main problem, however, is inherent to the nature of legal rules and will arise in the best conceived legal regimes. Legal rules are set forth in general terms in advance and cannot anticipate or account for every eventuality.

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[64] David Lyons, "Legal Formalism and Instrumentalism—A Pathological Study," 66 *Cornell L. Rev*. 949,967 (1981).
[65] Duncan Kennedy, "Legal Formality," 2 *J. of Legal Studies* 351,364 (1973).
[66] Id.
[67] See also Unger, *Knowledge and Politics*, supar 89; Unger, *Law in Modern Society*, supra 192-200.

Consider the situation in which a poorly educated and dim-witted but not incompetent person signs a legally binding contract with punitive terms; the harsh terms of the contract are explained to the party, who willingly signs without realizing that a much better contract could be obtained across the street. A judge committed to the formal rule of law will duly enforce the contract according to its terms regardless of the outcome. A judge focused on ends will strive to find a way to ameliorate or avoid the onerous contractual terms, even though the conditions for a valid contract have clearly been met. Either way there is an unpalatable consequence: the judge who enforces the contract will impose a harsh and unfair result; the judge who avoids the contract will ignore binding legal rules and tread on the legal rights and expectations of a contracting party.

The situation is further complicated because alternative views of the purposes of contract law circulate within the legal culture. The judge in this scenario is moved by consideration of fairness, but other possible considerations are enhancing economic efficiency, preserving the sanctity of promise or agreements, encouraging desirable business practices, protecting vulnerable segments of the populace, achieving certainty in contractual relations, and more. There is no pre-established hierarchy among alternative values and purposes, and there is no set method for resolving clashes among alternatives. In tort cases, similarly, judges routinely weigh such considerations as the consequences to economic development, the need for new product research, the deterrence effect, the availability of products for consumers at affordable prices, the costs of injuries to society, and so forth. Analysis relies on political, scientific, economic considerations, many debatable, and on speculative predictions of future consequences, matters about which judges have no particular expertise or reliable information. A judge who considers these

purposes and ends when applying legal rules is at sea in an embarrassingly rich set of options.

Yet a further level of complication exists because most purposive approaches invoke not just the purpose of a legislative or common law provision—hard enough to discern—but also the purpose of an entire area of law or of the legal system as a whole. At each higher level of generality there is more room for disagreement and more contestable choices must be made. Moreover, explicitly stated purposes will not necessarily be consistent with real underlying purposes. Take the recently enacted South Dakota abortion ban: the facial purpose is to ban abortions, but the real purpose is to provoke litigation that leads to the overturning of *Roe v. Wade*. When law is a means to an end, and when there are competing views of ends, it is not evident that specific legal regimes or the legal system as a whole will have overarching or internally consistent purposes.

Finally, it should be recognized that the very notion of searching for a purpose behind legislation or common law doctrines trades on an abstraction. Since legislators often have different motives, intentions, and purposes in mind, and the common law is the product of innumerable judicial decisions partaking of different streams with the law, identifying *the* purpose is invariably a judicial construction.[68] Hart and Sacks of the legal process school, for example, suggested that the purpose should be discerned by assuming that legislators are "reasonable persons pursuing reasonable purposes reasonably."[69]

Judges who advocate focusing on purposes and ends concede that this orientation is in tension with being bound to legal rules. Legal pragmatist champion Judge Richard

[68] See William N. Eskridge, *Dynamic Statutory Interpretation* (Cambridge, Ma.: Harvard Univ. Press 1994) 25-34.
[69] H. Hart and A. Sacks, The Legal Process (1994) 1378.

Posner, for example, acknowledges that "Pragmatic reasons do not sound very lawlike…"[70] Supreme Court Justice Stephen Breyer, known as a pragmatist judge, advocates that a constitutional or legislative text should be interpreted "in light of its purpose" with attention to "consequences," including "contemporary conditions, social, industrial, and political, of the community to be affected."[71] Breyer contrasts this purposive approach with "textualist" or "literalist" approaches, most identified with Justice Scalia;[72] textualists decide cases based upon the (public) meaning of the words of the constitutional or legislative provision at the time of enactment, without paying attention to purpose or consequences. Breyer concedes that his approach under certain circumstances "would leave the Court without a clear rule" and that "a court focused on consequences may decide a case in a way that radically changes the law."[73]

UNSTABLE COMBINATION OF RULE-BOUND AND PURPOSE-ORIENTED

Although legal theorists have put forth compelling arguments that rule-bound judging and a focus on purposes and ends *cannot in principle* be combined, this combination has in fact taken place in the U.S. legal culture. Phillipe Nonet and Philip Selznick, in *Toward A Responsive Law,* wrote in 1978 that judicial decision making in was in the process of evolving away from an emphasis on formal legality toward utilizing instrumental rationality to achieve policies and purposes. In the same year legal theorist Patrick Atiyah commented on the notable shift in judicial decision-making toward

[70] Posner, "Forward: A Political Court," supra 98.
[71] Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (NY: Knopf 2005)18. For a more elaborate account of striving for purposes, see Aharon Barak, *Purposive Interpretation in Law* (Princeton: Princeton Univ. Press 2005).
[72] Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton Univ. Press 1996).
[73] Breyer, *Active Liberty*, supra 129,119.

"pragmatism," involving greater judicial attention to achieving ends.[74] Roberto Unger wrote in 1975 that "the courts…are caught between two roles with conflicting demands: the role of the traditional formalist judge, who asks what the correct interpretation of rules of law is, and the role of the calculator of efficiencies, who seeks to determine what course of action will most effectively serve a given goal…[75] A study that interviewed judges on four state Supreme Courts in the late 1960's found that judges fell into three categories in their perception their judicial role. About half considered themselves to be strict law appliers, a fourth considered themselves to be law makers, and another fourth considered themselves to be pragmatists who engaged in both roles while aiming at just results and sound policy.[76] Although more recent studies are lacking, it is a fair to surmise that a greater proportion of contemporary judges are judicial pragmatists, though no doubt the other two orientations are also well represented. Judicial decisions today routinely cite policy considerations, consider the purposes behind the law, and pay attention to law's social consequences.

This apparent shift in judging orientation toward greater consideration of purposes and ends has not been wholesale, as the above study implies. Moreover, movement has not taken place in only in one direction; theorists have noted a "new formalism" in contract law, for example, which partakes of aspects of both rule formalism and pragmatism.[77] Some judges remain strictly rule-oriented while others have become more pragmatic; the same judge might be rule-oriented in certain cases but pragmatic in others.

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[74] See Atiyah, *From Principle to Pragmatism*, supra.
[75] Unger, *Knowledge and Politics*, supra 99.
[76] K.N. Vines, "The Judicial Role in the American States," in J.B. Grossman and J. Tanenhaus, eds., *Frontiers of Judicial Research* (New York: J. Wiley 1969); see also J.T. Wold, "Political Orientations, Social Backgrounds, and Role Perceptions of State Supreme Court Judges," 27 *Western Pol. Quarterly* 239 (1974).
[77] See Mark L. Movsesian, "Rediscovering Williston, 62 *Wash. & Lee L. Rev*. 207 (2005).

Despite this multifarious reality, the official line of the legal culture is still that judges are rule-bound in their decisions. In his opening statement in the Senate hearings for his appointment to the Supreme Court, Judge Alito declared that "The judge's only obligation, and it's a solemn obligation, is to the rule of law. And what that means is that in every single case the judge has to do what the law requires."[78] Justice Alito, who like Justice Scalia has avowed his fidelity to the text, joins the bench with Justice Breyer, who advocates a more purposive and consequentialist approach. This mix of judicial philosophies amongst judges exists at all levels of the judiciary. Individual judges sometimes shift from one philosophy to another. Scalia will respect longstanding precedent even if wrongly decided (as adjudged by original meaning) out of a prudential unwillingness to disrupt settled legal understandings. Scalia concedes that this is a "pragmatic exception" to his textualist approach,[79] so even an extremist of the rule-bound ilk may invoke pragmatic considerations.

The result of this mish-mash of contrasting orientations is a system of judging suspended in uncertain and shifting space, with some judges freed of the shackles of being rigidly rule-bound, yet not entirely comfortable with this freedom, and other judges insisting on being rule-bound (though not every time). There is no standard rule of decision judges follow to determine when they should stick with the rules or depart from the rules to achieve ends—nor is it clear that it is possible to formulate such a rule. Not only are the legal rules less binding because of more purposive and pragmatic reasoning, but the legal system as a whole manifests a greater degree of unpredictability because judges have different orientations amongst themselves as well as by a single judge.

[78] Transcript of Alito Opening Statement before Senate Judiciary Committee, *New York Times*, Jan. 10, 2006, A18.
[79] Scalia*, A Matter of Interpretation*, supra 140.

Legal theorists who have considered the situation concur that it is detrimental to the rule of law.[80] Nonetheless, it is conceivable that judges individually and collectively are able to moderate the tensions identified above in a manner that maintains a robust rule of law system, still largely certain, equal in application, and predictable. Not enough information about judicial reasoning and its consequences is presently available to know for sure. But large consequences that might follow from a seemingly small shift in orientation must not be underestimated. Judges formerly were oriented toward strictly following the law (with an eye on ends); with the rise of instrumentalism, judges are encouraged to strive to achieve purposes and ends (with an eye on the legal rules). Both orientations consider rules and ends, but the former assigns overarching priority to the rules while the latter raises up ends. This shift must have a negative effect on the extent to which decisions are rule bound.

If judges have indeed found an ideal combination of being rule-bound while considering purposes and ends, surely it is a precarious balance to maintain. Pressure is put on this balance by the growing view that it is naïve or false to believe that judges can rule in an objective or unbiased fashion. Skepticism about judicial objectivity is the greatest looming contemporary threat to the formal rule of law.

MODERN SKEPTICISM ABOUT JUDICIAL OBJECTIVITY

All of the classic phrases used to capture the rule of law ideal—"the rule of law, not man"; a "government of laws, not men"; law is reason, not passion; law is objective, not subjective—identify the law with the image of the objective judge.[81] Judges are mere

[80] See Tamanaha, *On the Rule of Law*, supra Chaps. 5 & 6.
[81] Id. 122-26.

"mouthpieces of the law." Their fidelity is to the law alone. They are unbiased, neutral, evenhanded, devoid of non-legal influences. Chief Justice John Marshall insisted that "Courts are mere instruments of law, and can will nothing."[82]

Ever since the Legal Realists punctured the formalistic view of judging, however, persistent doubts have remained about the accuracy of this picture, doubts that have been exacerbated in the contemporary legal culture by the spread of postmodern views that background and subjectivity inevitably color perception. A recent book by Lee Epstein and Jeffrey A. Segal, political scientists who have conducted leading studies of judicial decision making, approvingly quotes pioneer in the field C. Herman Pritchett "that judges 'are influenced by their own biases and philosophies, which to a large degree predetermine the position they will take on a given question. Private attitudes, in other words, become public law."[83] Judge Posner wrote a review of the Rehnquist Court's final term that he entitled "A Political Court," asserting that "The evidence of the influence of policy judgments, and hence of politics, on constitutional adjudication on the Supreme Court is everywhere at hand."[84] While Posner's statement is directed at judging on the Supreme Court, he clearly believes that judges generally are influenced by their personal ideology and other non-legal factors when deciding cases.[85] In a comprehensive study of federal appellate judging, prominent legal scholar Cass Sunstein (and co-

[82] Osborn v. Bank of United States, 22 US (9 Wheaton) 736,866 (1824).
[83] Lee Epstein and Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments* (New York: Oxford Univ. Press 2005) 3.
[84] Richard A. Posner, "Foreword: A Political Court: The Supreme Court 2004 Term," 119 *Harv. L. Rev.* 32,46 (2005).
[85] See Scherer, *Scoring Points*, supra.

authors) flatly stated that "No reasonable person seriously doubts that ideology, understood as normative commitments of various sorts, helps to explain judicial votes."[86]

This perception has also penetrated the public, exacerbated by the rampant politicization of the judicial appointments process in recent years. "When asked if 'in many cases judges are really basing their decisions on their own personal beliefs' 56% [of the public] agree and only 36% disagree."[87] Yet, confirming the continuing hold of the objective judge ideal, a poll taken during the Alito hearings found that 69 percent of the public believe that the personal views of Justice should not have a role in their decisions.[88]

For the sake reducing the degree of complexity, the discussion in the preceding Part assumed that judges objectively resolve questions about the interpretation of the law and about the appropriate purpose, or social policy, or the right outcome in a given case. But questions about subjectivity cannot be kept apart from the debate over whether judges should be strictly rule-oriented or should also focus on purposes and ends. Text-oriented critics object that purposive or pragmatist approaches involve wide-ranging inquiries beyond the interpretation and application of legal rules, inquiries that invite if not require judges to draw upon their subjective views.

Similar criticisms about the necessity for personal judicial choices have been lodged against another major theory of interpretation, the principles approach, urged by Ronald Dworkin and others who insist that judges apply background moral or political

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[86] Cass R. Sunstein, David Schkade, and Lisa Michelle Ellman, "Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation," 90 *Virginia L. Rev.* 301,352 (2004).
[87] Judges and the American Public's View of Them," Results of Maxwell Poll, conducted in October 2005, available at www.maxwell.syr.edu.
[88] "Poll: Americans Undecided on Alito," CBS News, Jan. 9, 2006, available at http://www.CBSNews.

principles or natural law principles.[89] Textualists like Scalia and pragmatists like Posner argue that "principles" approaches are plagued by controversial questions of value. Although proponents of the principles approach think these questions are resolvable on some objective basis, according to critics value choices are concealed and couched in the terminology of broader principles.[90]

Questions about judicial objectivity also apply to textualist or literalist approaches that claim to strictly apply legal rules. Alternative readings of rules and their meanings are often still available, their application to novel or unanticipated circumstances involves choices, and open-ended standards and principles require judgments and choices.[91] Moreover, even rule-bound judges make exceptions, which suggests that they have room to maneuver when they so desire.

So whether one is a textualist or a pragmatist, or an advocate of legal principles, the same fundamental question must be confronted: to what extent do judges' subjective views infect their purportedly objective legal decisions on the correct application of legal rules and the correct identification of purposes and ends?

Many observers, to repeat the challenge, take Legal Realism and postmodernism to have taught that the distinction between an objective perspective and a subjective perspective is at a deep level illusory. A judge's personal preferences inevitably color that judge's conclusion about the correct interpretation of the legal rules and about the correct ends in a case. The judge's subjectively desired ends shape how the judge selects, interprets and utilizes the applicable legal rules. Judges who attempt in good faith to

[89] See Dworkin, *Law's Empire*, supra.
[90] See Posner, "A Political Court," supra 85; Scalia, *A Matter of Interpretation*, supra.
[91] Both sides of these arguments are developed in Breyer, *Active Liberty*, supra, and Scalia, *A Matter of Interpretation*, supra.

render decisions in an objective fashion, striving to screen out the influence of subjective views, will nevertheless fail, according to this view, because the process operates subconsciously beneath their awareness.

The threat posed to the rule of law by this set of ideas cannot be exaggerated. If judges substantially base their legal decisions—whether involving rule application alone, or some combination of rules and ends—upon their personal views, then the rule of law ideal is a fraud. Judges are still constrained in that they must work within acceptable legal conventions, but these conventions and the available body of rules and exceptions are capacious enough to provide judges the leeway to reach desired outcomes much of the time. "The 'law'…becomes mere instruments or barriers that judges must utilize strategically to advance their *a priori* political objectives."[92] The private will of the particular judge, not the law, is determinative.

This threat is enhanced by the fact that, since the 1960's and 1970's, law schools have taught students to view and use legal rules instrumentally, to be marshaled and manipulated to achieve ends. This orientation toward legal rules is reinforced in the practice of law. Lawyers who ascend to the bench after a lengthy indoctrination in an instrumental view of law will find it easy to approach legal rules instrumentally rather than as binding dictates; they will find it natural to think about outcomes they personally think right and to try to arrange and interpret the legal rules to reach these outcomes.

To the extent that personal attitudes dictate legal decisions, stability, certainty, predictability, and equality of application will suffer because the outcomes of cases will vary in accordance with the divergent personal views of judges. Ex ante, every legal

[92] Cornell W. Clayton, "The Supply and Demand Sides of Judicial Policy-Making (Or, Why Be So Positive About the Judicialization of Politics?)" 65 *Law & Contemp. Probs*. 69 (2002).

dispute is a crapshoot whose outcome can be predicted only after the case is assigned, when the personal predilections of the individual judge are known. Supreme Court watchers already have this mindset, routinely engaging in vote counting along political lines.[93]

So described—a legal system shot through with subjectively influenced, willful judging—the threat to the rule of law seems dire. A more careful examination, however, will reveal that things are not quite as bad as this scenario suggests. Not yet anyway. The threat to the rule of law posed by this complex of ideas, it will be argued shortly, is not that judges are incapable of rendering decisions in an objective fashion. Rather, the threat is that judges come to *believe* that it cannot be done or believe that most fellow judges are not doing it. This skepticism, if it becomes pervasive among lawyers, judges, and the public, will precipitate a self-fulfilling collapse in the rule of law.

The prevailing skepticism about judicial objectivity is based upon a widely shared misunderstanding of Legal Realism and postmodernism, neither of which deny that there is a real and meaningful difference between instructing judges to render decisions objectively, dictated by the law, versus instructing judges to render whatever decisions they think right.

REALISTS AND THE POSSIBILITY OF JUDICIAL OBJECTIVITY

The Realist critique of rule formalism came in two versions. Radical rule skeptics, like Jerome Frank in his most extreme moments (before he became a judge), denied that legal rules determine judicial decisions. Judges arrive at decisions they

[93] See Molly McDonough, "Pitching to a New Lineup: Supreme Court Practitioners Will Aim Their Arguments At Different Justices," *ABA Journal EReport*, Feb. 3, 2006, at http://www.abanet.org/journal/report/f3sct.html.

subjectively prefer, then work backwards, manipulating legal rules to support these predetermined ends. The criticisms of moderate Realists were not entirely skeptical of legal rules, only of certain unrealistic claims about the rules. They put forth a negative argument that denied that rule application is a purely mechanical process, and they denied formalist claim that there are no gaps or conflicts in the applicable legal rules. Judges regularly have leeway within the applicable body of legal rules and exceptions, and they are required or able to make choices. Unlike the arguments of radical rule skeptics, this more moderate critique does not deny that judges decide cases in accordance with rules, and it does not claim that decisions are always determined by what judges personally prefer.

Karl Llewellyn and Felix Cohen, two leading Realists, asserted that there is a shared craft to legal interpretation and legal argument which makes it a relatively stable and predictable exercise that is not entirely determined by the personal views of judges. Cohen criticized the "hunch" theory of judging (of Frank and Hutcheson) for improperly denying "the relevance of significant, predictable, social determinants that govern the course of the judicial decision."[94] He added that "actual experience does reveal a significant body of predictable uniformity in the behavior of courts."[95] Cohen insisted that judicial decisions must be understood as "more than an expression of individual personality;"[96] they are the product of an institutional legal context that insures consistency. He speculated—calling it "guesswork"—that a judge's decisions may be affected by the attitudes of his class, but Cohen also insisted that "judges are craftsmen, with aesthetic ideals, concerned with the aesthetic judgments that the bar and the law

[94] Cohen, "Transcendental Nonsense and the Functional Approach," supra 843.
[95] Id.
[96] Id.

schools will pass upon their awkward or skillful, harmonious or unharmonious, anomalous or satisfying, actions and theories."[97] The shared understandings and practices of legal argument provide constraints on judges. After opining that the ambiguity of legal material allows judges "to throw the decision this way or that," Llewellyn tempered this by recognizing that "while it is possible to build a number of different logical ladders up out of the same cases and down again to the same dispute, there are not so many that can be built defensibly."[98]

John Chipman Gray, who the Realists admired, recognized that judges "decide cases otherwise than they would have decided them had the precedents not existed, and follow the precedents, although they may think that they ought not to have been made."[99] Realist hero Holmes once said "It has given me the great pleasure to sustain the Constitutionality of laws that I believe to be as bad as possible, because I thereby helped to mark the difference between what I would forbid and what the Constitution permits."[100] It was his view that, notwithstanding the presence of discretion, judicial decisions can and should conform to the law.[101] Holmes' critique of the majority in the *Lochner* case was precisely that the personal (and class) laissez faire views of the judges were an *improper* basis for a constitutional decision. "I strongly believe," Holmes stated in his dissent, "that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law."[102] When called upon to make decisions that

[97] Id. 845.
[98] Llewellyn, The Bramble Bush, supra 73.
[99] John Chipman Gray, *The Nature and Sources of the Law* (NY: Columbia Univ. Press 1909) 34.
[100] Quoted in Menand, *Metaphysical Club*, supra 67.
[101] See M. Cohen, *Law and the Social Order*, supra 213.
[102] Lochner v. New York, 198 U.S. 90 (Holmes, J. dissenting).

turn on policy, Holmes felt that the duty of the judge was to find the correct social policy, not to simply enact their own policy preference.[103]

According to Justice Benjamin N. Cardozo, another favorite of the Realists:

> In countless litigations, the law is so clear that judges have no discretion. They have the right to legislate within gaps, but often there are no gaps. We shall have a false view of the landscape if we look at the waste spaces only, and refuse to see the acres already sown and fruitful….Judges have, of course, the power, though not the right, to ignore the mandate of a statute and render judgment in spite of it. They have the power, though not the right, to travel beyond the walls of the intersticies, the bounds set to judicial innovation by precedent and custom. None the less, by that abuse of power they violate the law…[104]

Cardozo acknowledged that the personal views of judges have an impact, but not to a degree that is completely outcome determinative: "So sweeping a statement exaggerates the element of free volition. It ignores the factors of determinism which cabin and confine within narrow bounds the range of unfettered choice."[105] "The judge, even when he is free, is still not wholly free."[106]

Many Realists took a middle position that avoided either extreme of mechanical reasoning or rule skepticism, articulated here by philosopher Morris Cohen:

> [T]he judge's *feelings* as to right and wrong must be logically and scientifically trained. This trained mind sees in a flash of intuition that which the untrained mind can succeed in seeing only after painfully treading many steps. They who scorn the idea of the judges as a logical automaton are apt to fall into the opposite effort of exaggerating as irresistible the force of bias or prejudice. But the judge who realizes before listening to a case that all men are biased is more likely to make a conscientious effort at impartiality than one who believes that elevation to the bench makes him at once an organ of infallible logical truth.[107]

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[103] See White, *Social Thought in American*, supra 208-09.
[104] Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, Conn.: Yale Univ. Press 1921) 129.
[105] Id. 170.
[106] Id. 141.
[107] M. Cohen, *Law and the Social Order*, supra 182-83.

The Realist reminder that judges are subject to subconscious influences was meant to help them be vigilant toward and overcome these influences; it was not a call to surrender to their inevitability. The Realists believed and advocated that judicial decisions should not be entirely the products of judges' personal views and ideology, and they did not consider this a hopeless demand.

POST-MODERNISM AND JUDICIAL OBJECTIVITY

The Realists do not have final say on the matter, of course. Although problems of relativism and subjectivity were well known at the time the Realists wrote, they lived before postmodernism drove deep doubts about the possibility of objectivity into the legal culture and society. Postmodernism suggests that "The human subject is an embodied agent, acting and judging in a context that can never be wholly objectified, with orientations and motivations that can never be fully grasped or controlled."[108] According to this view, judges subconsciously see the law through an ideologically colored lens, no matter how sincerely motivated they might be to decide objectively.

This is not the place to put forth a detailed response to postmodernism,[109] but two quick responses can be given which accepts the basic postmodern proposition while denying its skeptical implications. Judges indeed approach the law from the standpoint of their personal views. More immediately, however, they see the law from within the lens of the legal tradition into which they have been indoctrinated, and from within the conventions of legal practice and judging in which they participate. The totality of the

[108] Tarnas, *The Passion of the Western Mind*, supra 396.
[109] See generally Tamanaha, *Realistic Socio-Legal Theory*, supra.

legal tradition—the legal language, the corpus of legal rules, concepts, principles, and ideas, legal processes and practices, hierarchical legal institutions, the craft of lawyering—has the effect of stabilizing legal meaning and providing restraints on the influence of the subjective views. Law is a socially produced and shared activity that participants are not free to do in any way they desire. Unacceptable moves and interpretations that do not comport with shared understandings of legal rules within the legal tradition simply "will not write." Judges who stretch legal rules beyond recognition risk disapproval from colleagues on a shared panel or an embarrassing rebuke upon appellate review. These are social and institutional mechanisms of perpetuating and enforcing conformity in the interpretation of legal rules.

This account incorporates the postmodern insight about the influence of background views on how people see the world, merely adding the reminder that the legal tradition is itself is such a body of background views, which becomes an integrated aspect of the judge's own perspective.[110] The Realists said as much in their emphasis on the craft of lawyering. Subconscious personal influences are not completely suppressed under this account, but must pass through a filtering perspective. This still leaves much room to maneuver, of course, and willful judges can always manipulate legal rules to achieve the ends they desire (though at the risk of reversal). But most judges most of the time consciously strive to render decisions in an objective fashion and there is sufficient stability and constraint within the legal tradition to make this process real.

The second response is that nothing in postmodernism denies that conscious orientation makes a real and important difference in behavior. The postmodern insight quoted above, indicating that subjective influences on perception are pervasive and not

[110] See Id. Chaps. 7 & 8.

entirely repressible, relates to subconscious influences, saying nothing direct about the implications of conscious orientations. Conscious orientation is a fundamental causal factor in behavior. The widely accepted theory that our ideas, beliefs, and actions substantially construct social reality is built upon the causal efficacy of intentional orientations.[111] Even accepting the irreducible presence of subconscious influences on perspective and judgments, therefore, objectivity in legal decisions is real and achievable in the conscious attitudes and motivations of judges who are committed to following the law.

Excluding the Supreme Court, this assertion is borne out by the high percentage of unanimous decisions rendered by panels of judges with contrasting ideological views.[112] The bulk of empirical studies of judicial decision making suggests that "ideological values play a less prominent role in the lower federal courts."[113] Studies of appellate course decisions have found that, while political considerations have some effect, legal doctrine appears to have an overarching influence.[114] Judges reliably follow binding precedent.[115] Judge Posner claims that "There is almost no legal outcome that a really skillful legal analyst cannot cover with a professional varnish."[116] But he is well versed on studies of judicial decision making, and carefully conditions the reach of his skepticism accordingly: "It is no longer open to debate that ideology…plays a significant

[111] John Searle, The Construction of Social Reality (NY: Free Press 1995).
[112] See Harry T. Edwards, "Collegiality and Decision Making on the D.C. Circuit," 84 *Virginia L. Rev*. 1335 (1998); Patricia M. Wald, "A Response to Tiller and Cross," 99 *Columbia L. Rev*. 235 (1999).
[113] D. Songer and S. Haire, "Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the US Court of Appeals," 36 *Am. J. Pol, Sci*. 963,964 (1992). For a review of political science studies on judicial decision making up through the mid-1990's, see Tamanaha, *Realistic Socio-Legal Theory,* supra, Chap. Seven.
[114] See Frank B. Cross, "Decisionmaking in the U.S. Circuit Courts of Appeals," 91 *Cal. L. Rev.* 1457 (2003); Frank B. Cross and Emerson H. Tiller, "Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals," 107 *Yale L.J*. 2155 (1998).
[115] Gregory C. Sisk, Michael Heise, Andrew P. Morriss, "Charting the Influence on the Judicial Mind: An Empirical Study of Judicial Reasoning," 73 *NYU L.. Rev*. 1377 (1998).
[116] Posner, "A Political Court," supra 52.

role in the decisions even of lower court judges *when the law is uncertain and emotions aroused*."[117] In many cases the law is relatively clear and judge is not especially exorcised. A comprehensive study by Sunstein, Schkade and Ellman demonstrated ideology-correlated differences (though not in all categories of cases) in the voting patterns of Democratic and Republican federal appellate judges, but they nonetheless found that there was a great deal of agreement in their legal decisions: "It would be possible to see our data as suggesting that most of the time, the law is what matters, not ideology."[118]

None of this denies that with respect to the Supreme Court there is compelling evidence to believe that the personal views of the judges have a substantial impact on their decisions.[119] This is a unique court, however, the conduct of which cannot be extrapolated to others. The problem is that the Supreme Court example, and the extreme politicization that now surrounds judicial appointments on the federal and state levels, may have begun to infect other courts. Studies suggest that as lower level federal judicial appointments have become more ideologically charged in the past few decades, the voting behavior of lower court judges has shown an up-tick in partisanship.[120]

THE SIGNIFICANCE OF A CONSCIOUSLY RULE-BOUND ORIENTATION

Imagine two judges, both with politically conservative personal views: one decides cases with a conscious orientation that strives to abide by the binding dictates of applicable legal rules to come up with the most correct legal interpretation in each case

[117] Id. 48.
[118] Sunstein, Schkade, Ellman, "Ideological Voting on Federal Courts of Appeals," supra 336.
[119] See Spaeth and Seagal., Attitudinal Model and the Supreme Court Revisited, supra.
[120] See Scherer, *Scoring Points*, supra.

(the Consciously Bound judge, CB); a second judge decides cases with a conscious orientation that strives to achieve ideologically preferred ends in each case and interprets and manipulates the legal rules to the extent necessary to achieve the ends desired (the Consciously Ends-Oriented judge, CEO).

Add four realistic conditions to this scenario. First, notwithstanding this conscious orientation, CB is subconsciously influenced by and sees the law through background personal views; the legal interpretations of CB are thus not completely free of political influences in this subconscious sense. Second, CEO is not able to achieve ends with total disregard for conventional legal understandings because decisions must be plausible in terms of legal conventions and maintain the external appearance of being rule-bound; the legal interpretations of CEO are thus not completely devoid of legal constraints. Third, in a large (but not total) subset of cases the legal rules allow for more than one legally plausible outcome, though usually one outcome can be ranked as more legally compelling or defensible than the others. Finally, in a small subset of cases the legal rules are open or invite external considerations, such that the judge cannot avoid rendering a judgment based upon non-legal factors. Note that these conditions accept all of the major points made by the Legal Realists as well as postmodernism.

Now imagine that, in a given case, both judges arrive at precisely the same outcome, supported by identical written decisions; had they been sitting together on a panel, they would have joined opinions. They are led to the same result and use the same reasoning because both judges adopt the same theory of constitutional interpretation. The difference is that CB settles upon the theory as the correct way to interpret the Constitution following a sincere and exhaustive study of constitutional law, whereas CEO

settles upon the theory because it tends to support the outcomes the judge personally prefers, and CEO is willing to depart from or "adjust" the theory when necessary to achieve the desired end in particular cases.

Would we evaluate the judges' respective decisions as equivalent? They are literally identical in *external* form and in consequence. A strong argument can be made, however, that, although identical in content and form, CB's decision is faithfully law-abiding while CEO's decision is an abusive exercise of power in the guise of law.

This scenario is meant to tease out the essential difference between subconscious influences on judging and willful judging. The sophisticated postmodern recognition that judges' background views subconsciously influence their interpretation of the law is correct. It is also correct that sometimes the law runs out or calls upon the making of judgments by judges. Too often, however, a leap is made from these points to the conclusion that, therefore, judges are deluded, naïve, or lying when they claim that their decisions are determined by the law. To the extent that a judge is consciously rule-bound when engaging in judging, the judge is correct in claiming to be rule-bound *in the only sense that this phrase can be humanly achieved.* Since judging is a human practice, it makes no sense to evaluate the decision making of judges by reference to a standard that is impossible to achieve, inevitably finding them wanting. There are other aspects to proper judging, like not favoring one side or the other, but being consciously rule-bound is the essence of a system of the rule of law. CB's decisions are (objectively) determined by the law in this sense, while CEO's decisions are not.

To be sure, owing to subconsciously influences on how the law is seen, the legal decisions of CB's with conservative views would differ somewhat from those of CB's

with liberal views, but their legal decisions would also substantially overlap (as Sunstein's study showed). The decisions of conservative CEO's and liberal CEO's, in contrast, would diverge markedly, with only minimal overlap (when the applicable law and legal conventions allow little room to maneuver). As this contrast shows, a system comprised entirely of CB's would be rule-bound and largely predictable based upon the strength of legal considerations. This analysis leads to the perhaps odd—but consistent—assertion that the decisions of all CB judges are *objectively* determined by the law even when their decisions disagree.

Now imagine an entire system filled with CEO's. That would be a different system, one which is "legal" in external form only; it would manifest legal reasoning and decisions that are quite different from a system filled with CB's. The judges in this scenario willfully strive to achieve ends, manipulating the legal rules as required (even if for well-meaning reasons), restrained by the law only in the weak sense that legal conventions will rule out certain outcomes. Skeptics like Judge Posner and political scientists who dismiss the significance of the conscious orientation of judges toward being rule-bound, miss this larger picture of the fundamental difference between a CB populated system and a CEO populated one.

Statistical correlations that political scientists have documented between the decisions of judges and their personal ideologies are to some degree a reflection of irrepressible subconscious influences, and to some degree a reflection of the openness of the law—open either because the legal answer is unclear or the law calls upon the judge to make a non-legal determination (factors which are more prevalent at higher level courts). These correlations, however, are never complete and are higher for certain

judges than for others.[121] With respect to those judges who manifest relatively higher correlations between their personal attitudes and their legal decisions when compared to judges in the same circumstances (Rehnquist and Douglas in certain classes of cases had correlations above 90 percent),[122] it is fair to surmise that their conscious orientation is less rule-bound in comparison their colleagues. From the standpoint of the rule of law, they can be condemned for this reason.

CLOSER LOOK AT A PRAGMATIC JUDGE

A pragmatic judge who focuses on outcomes is more like a CEO judge than a CB judge. "The way I approach a case as a judge," Posner stated, "is first to ask myself what would be a reasonable, sensible result, as a lay person would understand it, and then, having answered that question, to ask whether that result is blocked by clear constitutional or statutory text, governing precedent, or any other conventional limitation on judicial discretion."[123] This is not "decision making *according to* rule," which is what being rule-bound requires, but decision making according to the judge's sense of what is right, all things considered, unless prohibited by the law. An outcome that is not disallowed by the law, and thus acceptable for a judge who reasons like Posner, however, might not be the strongest legal outcome, but it is the latter which a rule-bound judge must apply.

This is not an abstract point. Posner offered his description of judging in a debate over the legality of the Bush Administration's warrant-less surveillance program to

[121] For a collection of such studies for lower federal courts, see Scherer, *Scoring Points*, supra.
[122] See Tamanaha, *Realistic Socio-Legal Theory*, supra Chap. 7.
[123] Richard A. Posner, "Tap Dancing," *The New Republic Online*, at http://www.tnr.com/doc.mhtml?i=w060130&S=heymanposner013106.

combat terrorism. Security experts and the public are sharply divided over the program in terms of value, necessity, and the consequences to privacy and liberty interests. A pragmatic judge searching for a "reasonable" result "as a lay person would understand it" could easily come down on either side of the issue, and throw up colorable legal arguments to justify either outcome. This does not suggest, however, that a decision *according to* the law would lead equally to both outcomes. The stronger legal position may be passed over in lieu of the weaker by a judge reasoning pragmatically, because the weaker argument cannot be ruled out. Under this approach, the individual who happens to be the judge will dictate the outcome, not the law. This example illustrates the legitimate concern of opponents of the pragmatic approach that it invites judges to render contestable value decisions, that it would reduce equality of application, and that it would generate uncertainty in the law.

The *sine qua non* of the rule of law is striving to decide cases according to the law. Over time, the decisions of Posner's pragmatist judge, who resembles a CEO judge in approaching legal rules with a controlling end in mind, would diverge from the decisions of a judge who is oriented toward doing what the law requires (rather than doing whatever the law does not disallow). A bench filled with pragmatic judges, in other words, would be a bench filled with CEO's, completely undercutting the rule bound nature of the system.

THE RULE OF LAW HINGES ON BEING CONSCIOUSLY RULE BOUND

The present threat to the rule of law, to return to the key point, is not that it is impossible for judges to be consciously rule bound when rendering their decisions,

striving to set aside subjective preferences and abide by the legal rules. Rather the threat comes from the *belief* that it cannot be done and the *choice* not to do it. In the present atmosphere, with prevailing misunderstandings about the Realist position and about the implications of postmodernism, judges may become convinced that to decide in a rule-bound fashion is a chimerical or naïve aspiration. They may think other judges are instrumentally manipulating legal rules to reach ends they personally desire, cloaking their personal preferences in legal logic. The temptation to do so is multiplied when judges recognize that, at least on the federal level and increasingly on the state level, their ideological views were a major consideration in securing their appointment, and everyone involved expects that their views will influence their legal decisions.

Nothing can be done about the subconscious springs of human intellect. What is not inevitable is that a judge would cross over from abiding by the binding quality of law, sincerely striving to figure out and adherer to what the law requires (however uncertain), to instrumentally manipulating the legal rules to reach a particular end, much as a lawyer does in service of the client. A judge will be bound by the law only to the extent that the judge believes it is possible to be bound by the law and sees it as her or his solemn obligation to render legally-bound and determined decisions. Living up to this obligation is the particular virtue of judging.

CONCLUSION

Taken together, the four themes covered in this essay present a worrisome picture for those who consider the rule of law an important ideal. A purely instrumental view deprives law of any internal moral integrity—law is an empty vessel that can be used to

do anything, no matter how reprehensible. Disputes over the common good—or more precisely, disputes between groups aggressively pursing their own vision and interests—dominate the legal landscape, showing up in battles over judicial appointments, and over legislation and administrative and executive actions. These battles leave the losers (and those who lack the resources to engage in the contest) in the position of seeing the law as a weapon wielded against them rather than as a public product that reflects the public welfare and generates an obligation of obedience. The apparent shift begun in the 1960's and 1970's towards more purposive and pragmatic reasoning in judicial decisions comes at the expense of binding legal rules. Widespread skepticism about the ability of judges to render objective decisions based upon the law threatens to become a self-fulfilling prophecy. These developments encourage the politicization of judicial selections, with a resultant politicization of judicial decisions, which is the antithesis of being rule bound.

The rule of law tradition in the U.S. legal culture is deeply rooted and resilient, and it has defied previous predictions of its imminent demise. Indeed no legal culture that has achieved the rule of law has witnessed its complete demise, a fact which offers some reassurance. The rule of law is a widespread and entrenched cultural attitude as much as a political ideal, which makes it difficult to obtain where it is lacking and which protects it from elimination where it exists. However, if events came to pass in which the rule of law in the U.S. did deteriorate to the point of near collapse, it is reasonable to think that the situation spelled out in this essay represents significant steps in this direction.