THE TENSION BETWEEN LEGAL INSTRUMENTALISM AND THE RULE OF LAW

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At the heart of the United States legal culture lie two core notions that exist in deep tension with one another: the idea that law is an instrument, and the rule of law ideal. Although they continue to coexist despite this tension, there are indications that the instrumental view of law is putting a serious strain on the rule of law ideal. In addition to the fact that both notions are equally fundamental in our legal culture, what makes this situation especially intransigent is that there is little attention to the debilitating effects that legal instrumentalism has on the rule of law. This internal tension is especially important to understand in connection with the prospects for establishing the rule of law around the world because both ideas are being promoting abroad simultaneously, as a package.

It will help the argument to state up front what is meant by legal instrumentalism and what is meant by the rule of law. Both ideas are plagued by a surplus of alternative understandings and variations, so here they will be stated in plain and simplified terms, to be elaborated upon later. Broadly speaking, the instrumental view of law is the notion that law is an instrument to achieve ends. At the systemic level, it has often been said that law is an instrument to serve the public good, or an instrument to direct social change; it has also often been said that law is an instrument of domination by one group over another within society. In this understanding the law is an empty vessel that can be filled in any way desired, at the will of the lawmaker, to achieve any end desired. At the level of legal practice, it has been said that lawyers instrumentally manipulate or utilize legal rules and processes to achieve the ends of their clients; in relation to judging it has been said that judges increasingly reason instrumentally to lead to particular outcomes when deciding cases.

Although there are many competing formulations of the rule of law ideal, they can be lumped into two basic versions.[1] The *substantive* version of the rule of law is the idea that there are legal limits on the government: there are certain things the government cannot do, even

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1. *See* BRIAN A. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004).

when exercising its sovereign lawmaking power. This version of the rule of law ensures the "rightness" of law in accordance with a preexisting higher standard. The *formal* version of the rule of law is the idea that the government is bound to abide by legal rules that are publicly set forth in advance, are certain and stable, and are applied equally to all in accordance with their terms. This version of the rule of law ensures the predictability of law, which allows citizens to plan their affairs with knowledge of the legal consequences of their actions. Both versions of the rule of law ideally share the basic proposition that the government and its officials, as well as citizens, operate within legal limits and are bound to follow legal rules. The basic difference is that the former version sets limits on the permissible content of law, whereas in the latter version the law can be whatever the law maker desires, as long as it satisfies the formal requirements set out above. Legal theorist Joseph Raz emphasized the key implication of this difference: "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 [formal] rule of law. . . ."[2] Substantive versions of the rule of law, by contrast, would rule out evil laws as invalid.

Using these general descriptions, the two types of tension between legal instrumentalism and the rule of law ideal can now be summarily stated. At the systemic level the tension arises because the idea that law is an instrument is, in itself, devoid of any limits on the content of law. The only constraints on law are social ones, relating to the efficacy of the law and its ability to overcome any resistance it may face in pursuit of the ends designated. The purely instrumental view of law, to state it more pointedly, directly challenges the notion that there are substantive limits on law. Law is there to serve ends designated by the lawmaker, whatever those ends might be and whatever the means required to achieve those ends.

Indeed, it is important to recognize, the modern shift in liberal societies away from a substantive understanding of the rule of law toward a formal understanding of the rule of law was concomitant with the rise of the instrumental view—they were linked as siblings born of the same complex of factors. This association is plainly evident in Raz's avowedly instrumental characterization of law in a formal rule of law system:

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2. JOSEPH RAZ, THE AUTHORITY OF LAW 211 (1979).

> A good knife is, among other things, a sharp knife. Similarly, conformity to the [formal] rule of law is an inherent value of laws, indeed it is their most important inherent value.... Like other *instruments*, the law has a specific virtue which is morally neutral in being neutral as to the end to which the *instrument* is put.[3]

A purely instrumental view of law, however, in addition to challenging the substantive rule of law, also has a tendency to undercut the formal rule of law. In relation to the conduct of lawyers and judges, an instrumental understanding of law suggests that legal rules and processes are tools to be manipulated to achieve desired objectives, rather than as binding dictates. Lawyers stretch and twist legal rules that stand in their way; judges reason toward ends or goals, setting aside or creatively interpreting legal rules if need be. In both situations an instrumental view of law detracts from the essential characteristic that defines rules: their binding quality. Legal instrumentalism at this level operates against the formal rule of law requirements that the legal rules be certain and stable, and be applied equally to all according to their terms.

Starting with a discussion of former non-instrumental views of law, I will support these assertions by outlining the growth and implications of instrumental views of law for the rule of law in the respects just indicated.

I. NON-INSTRUMENTAL UNDERSTANDINGS OF LAW

It is characteristic of non-instrumental views that the content of law is in some sense given; that law is immanent; that the process of law-making is not a matter of creation but one of discovery; that law is not the product of human will; that law has a kind of autonomy and internal integrity; that law is in some sense objectively determined.

In the Medieval period in Europe two distinct (yet commingled) types of law possessed these characteristics. The first type was natural law and divine law in the Catholic tradition—the Ten Commandments, for example. Divine and natural Law were thought to be binding upon and infused the positive law that governed society. They were pre-given by God and were the product of God's will, unalterable by man. They were objective in that they constituted absolute moral and legal truths that were binding on all. They set limits on the positive law. The content of these laws and principles were discerned through revelation

3. *Id.* at 225-26 (emphasis added).

(including scripture) and through the application of reason implanted in man by God. As medieval scholar Walter Ullmann put it, "the law itself as the external regulator of society was based upon faith. Faith and law stood to each other in the relation of cause and effect."[4]

The second type was customary law. Everyday life during the Medieval period was governed by customary law, or, more accurately, by overlapping and sometimes conflicting regimes of customary law: feudal law, the law of the manor, Germanic customary law, residues of Roman law, trade customs, and local customs. Customary law was said to have existed from time immemorial. It was derived from and constituted the very way of life of the community, the byways and folkways of the people. Law was "'the law of one's fathers', the preexisting, objective, legal situation. . . ."[5] As such, the content of customary law was not the product of any particular individual or any group's will, but was a collective emanation from below. Accordingly, the process of explicitly articulating and applying the law was a matter of discovering and declaring the unwritten law that was already manifested or immanent in the community life.

These intertwined understandings of law, which dominated for at least a millennium, were non-instrumental in the core respect that they represented a pre-given order that encompassed everyone, including state officials and the sovereign. It was a law for all that was the product of no one. The law was not subject to the will of anyone and not in the specific interest of anyone. It was the law of the community. Certain groups were in more favorable positions than others, to be sure, as nobles were to serfs, but everyone had a place within an organic society governed by law. Legislation in the modern sense of the enactment of positive legal norms did exist, but it was sparse and generally understood to involve making explicit the already existing immanent law. Emperors, kings and princes had the power to declare law, but this power was bounded by the natural, divine, and customary law. Acts of express law-making always took place within a framework of already existing, non-will based law.

Historical understandings of the common law in the United States provide two distinct examples of non-instrumental law. The first one, which held sway through the second half of the nineteenth century, is continuous with the above two Medieval understandings of law; the second one, which grew in the course of the nineteenth century and

4. WALTER ULLMAN, A HISTORY OF POLITICAL THOUGHT: THE MIDDLE AGES 101 (1965).

5. FRITZ KERN, KINGSHIP AND LAW IN THE MIDDLE AGES 70-71 (1956).

dominated for a short time into the twentieth century, characterized law as a science.

The common law in the U.S. was heavily influenced by English common law, although it came to follow a separate path. Blackstone's *Commentaries on the Laws of England* had an inestimable impact, providing the basic training material for apprentices who wished to become lawyers in the late eighteenth and nineteenth centuries, as well the leading text in early law schools.[6] The U.S. legal tradition was also influenced by a strong belief in the natural rights of life, liberty, and property, as indicated in the Declaration of Independence and the Bill of Rights.

Traditional English understandings of the common law, carried over to the U.S., pointed to two underpinnings.[7] First, as with the Medieval views described above, the common law was thought to be a product of the customs of the people from time immemorial, an "ancient collection of unwritten maxims and customs," Blackstone wrote.[8] It was said that the law represented the lived ways of the community, their collective wisdom recognized and refined into law—"the expression or manifestation of commonly shared values and conceptions of reasonableness and the common good."[9] This origin in the customs and usages of the people was thought to render the law consensual in nature. "This consent is deeper than agreeing to have other persons represent one in a legislative assembly. It comes from a recognition that the rules that governs one's life are *one's own*, they define that life, give it structure and meaning, are already practiced and so deeply engrained that they appear to one as purely natural."[10] At the same time, the common law was also the very embodiment of reason, natural rights and principle. This was so because universal custom and usage was thought to reflect and be evidence of natural principle, and also because judges refined the common law and its principles through reasoned analysis. When engaging in this activity judges were declaring law, not creating law.

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6. *See* Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731 (1976).

7. *See* DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF LAW: AN ESSAY ON BLACKSTONE'S COMMENTARIES (2d ed. 1996) (discussing Blackstone's Commentaries with superb incite).

8. WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAW OF ENGLAND 17 (photo. reprint 1979) (1767), *quoted in* GERALD POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 4 (1986).

9. POSTEMA, *supra* note 8, at 6-7.

10. *Id.* at 16-17.

Jesse Root, a leading U.S. lawyer, articulated in 1798 this characteristic understanding:

> [Our] common law was derived from the law of nature and of revelation; those rules and maxims of immutable truth and justice, which arise from the eternal fitness of things, which need only to be understood, to be submitted to; as they are themselves the highest authority; together with certain customs and usages, which had been universally assented to and adopted in practice, as reasonable and beneficial.[11]

According to Root, the common law: "is the perfection of reason"; "universal"; "embraces all cases and questions that can possibly arise"; "is in itself perfect, clear and certain"; "is superior to all other laws and regulations"; "all positive laws are to be construed by it, and wherein they are opposed to it they are void"; "it is immemorial."[12] There is a remarkable continuity to these views of the common law within the Anglo-American legal tradition that extends back centuries.[13]

By the early nineteenth century, these longstanding ideas about law had begun to lose their power, owing in part to Enlightenment ideas and owing in part to new social and economic realities that rendered the old common law rules obsolete. Borrowing from the newfound prestige of the natural sciences, science was the ascendant form of legitimation for law. Blackstone, whose *Commentaries* were based on a series of lectures he delivered at Oxford commencing in 1753, claimed that "law is to be considered not only as a matter of practice, but also as a rational science";[14] as such, it was "an object of academical knowledge" that ought to be studied in the University.[15] The extraordinary success of the *Commentaries* owed in large part to its organized categorization and systematic presentation of the common law, a feat not previously accomplished.

As the prestige of science grew, so did the identification of the common law as a science. Richard Rush, a leading U.S. lawyer,

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11. JESSE ROOT, OBSERVATIONS UPON THE GOVERNMENT AND LAWS IN CONNECTICUT, *Preface to Volume I,* iv (1798), *excerpted in* MARK DEWOLFE, READINGS IN AMERICAN LEGAL HISTORY 17, 16-24 (1949).

12. DE WOLFE, *supra* note 11, at 19.

13. J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY 32-33 (1957).

14. BOORSTIN, *supra* note 7, at 20.

15. DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 32 (1989).

published an essay in 1815 on "American Jurisprudence," which declared: "The law itself in this country, is, moreover, a science of great extent. We have an entire substratum of common law as the broad foundation upon which every thing else is built."[16] An unattributed 1851 essay in a major law journal described the sense in which law is a science:

> Like other sciences, [law] is supposed to be pervaded by general rules, shaping its structure, solving its intricacies, explaining its apparent contradictions. Like other sciences, it is supposed to have first or fundamental principles, never modified, and the immovable basis on which the whole structure reposes; and also a series of dependent principles and rules, modified and subordinated by reason and circumstances, extending outward in unbroken connection to the remotest applications of law.[17]

Among the legal elite this was a standard understanding. Nationally renowned law reformer, David Dudley Field, in 1859 effused that there is no science "greater in magnitude or importance" than "the science of law."[18]

Christopher Columbus Langdell, appointed in 1870 to be the first Dean of the Harvard Law School, offered an often cited articulation:

> Law, considered as a science, consists of certain principles or doctrines. . . . Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases. . . . It seems to me, therefore, to be possible to take such a branch of the law as Contracts, for example, and, without exceeding comparatively moderate limits, to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines. . . ."[19]

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16. RICHARD RUSH, AMERICAN JURISPRUDENCE (1815), *reprinted in* READINGS IN AMERICAN LEGAL HISTORY 268, 271 (Mark DeWolfe Howe ed. 1949).

17. Nature and Method of Legal Studies, 3 U.S. MONTHLY L. MAG. 381-82 (1851)

18. DAVID DUDLEY FIELD, MAGNITUDE AND IMPORTANCE OF LEGAL SCIENCE (1859), *reprinted in* STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 740, 740-745 (5th ed. 2000).

19. Christopher Columbus Langdell, *Preface* to Selection of Cases on the Law of Contracts, *reprinted in* PRESSER & ZAINALDIN, supra note 18, at 747. A similar characterization of law as a science was written by the Dean of Columbia Law School; *see*

Law, according to this account, was a science with inductive, analytical and deductive aspects. Decided cases were the raw material of law (its empirical component). Decisions fell into patterns, from which the governing rules, concepts and principles could be derived through induction. These rules, concepts and principles could be logically organized and their necessary content and implications made evident, then applied deductively to determine the outcomes in future cases. Lawyers, judges, and law professors engaged in this process in an ongoing basis. The common law and rights together formed a coherent and gapless whole which objectively determined the decision in any given case. These ideas formed the basis of a school of thought known as formalists, to be discussed later.[20]

Non-instrumental views of law as a science survived well the twentieth century. Yale law professor Walter Wheeler Cook observed in the American Bar Association Journal in 1927:

> Prominent teachers of law still tell us that we must preserve what they call the logical symmetry of the law, that after all the law is logical; and talk about deducting the rule to be applied to a new situation by logic from some 'fundamental principle." Back of all this, it is submitted, is nothing but the old logic; the assumption that in some way or other we can discover general 'laws,' 'general principles,' Aristotelian 'universals,' which by means of logical, that is, syllogistic reasoning, we can deal with new cases as they arise as merely new samples of preexisting classes. The nineteenth century notion of science as the ascertainment of all-embracing laws of nature, holding for all occasions [is still prevalent].
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> It would be safe to assert that essentially the same ideas underlie nearly all the teaching in our law schools.[21]

II. THE CONNECTION BETWEEN NON-INSTRUMENTAL VIEWS OF THE COMMON LAW AND THE SUBSTANTIVE RULE OF LAW IDEAL

As indicated at the outset of this article, a core meaning of the rule of law ideal is that substantive legal limits are placed on the government.[22] The rule of law in this sense entails the existence of legal

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William A. Keener, *Methods of Legal Education*, 1 YALE L.J. 143 (1892).

20. A superb study of Langdell's ideas is Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

21. Walter Wheeler Cook, *Scientific Method and the Law*, 13 A.B.A. J. 303, 306 (1927).

22. *See* TAMANAHA, *supra* note 1.

limits on the sovereign. J.G.A. Pocock explained how this shaped early seventeenth century views of the common law:

> But the attraction which the concept of the ancient constitution possessed for lawyers and parliamentarians probably resided less in whatever ultimate principle provided its base, than in its value as a purely negative argument. For a truly immemorial constitution could not be subject to a sovereign: since a king could not be known to have founded it originally, the king now reigning could not claim to revoke rights rooted in some ancestor's will. In an age when people's minds were becoming deeply, if dimly, imbued with the fear of some sort of sovereignty or absolutism, it must have satisfied many men's minds to be able to argue that the laws of the land were so ancient as to be the product of no one's will, and to appeal to the almost universally respected doctrine that law should be above will. . . . [W]e see how the concept of antiquity satisfied the need . . . for a rule of law which, like Magna Carta, would have no sovereign.[23]

Medieval versions of non-instrumental law, continued by early understandings of the English common law, set, or attempted to set, legal constraints on the power of kings and parliaments to declare whatever they willed as the law. Although in the United States the surrounding trappings (the Constitution) and the mechanism (judicial review) by which it operated were different, non-instrumental views of the common law throughout the nineteenth century similarly were utilized to set constraints on the power to make law. It was no accident that non-instrumental accounts of the common law typically evinced hostility toward legislation. Even when legislation was not subjected to judicial review by judges, it was strictly construed or given niggardly interpretations by judges to insure that it conformed to the common law and constitutional principles. It was in this sense that society was thought to truly be governed by the rule of law and not the unfettered will of law makers.

III. THE ENLIGHTENMENT'S IMPLICATIONS FOR NON-INSTRUMENTAL LAW

The eighteenth century Enlightenment was characterized by the rise in the prestige of science and reason as the most reliable sources of truth and knowledge. After the miraculous discoveries of Newton, who

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23. POCOCK, *supra* note 13, at 51-52.

announced a handful of natural laws that governed everything in the heavens and on earth, it was thought that all of the secrets of the natural order would be revealed by science. It was also thought by the Enlightenment *Philosophes* that, just as the natural order could be discovered and beneficially exploited, so too could the social order be mastered. A science of man and society—focusing on human nature—would yield knowledge about the natural principles of law and morality, enabling mankind to use reason to shape society to achieve material and political progress. Science and reason were applied to critically examine myths, superstitions, religious dogma, longstanding traditions and customs.

The critical thrust of Enlightenment views effectively undermined the two aforementioned Medieval pillars of non-instrumental views of law—natural and divine law, and longstanding custom. Many Enlightenment thinkers were hostile to Catholicism, specifically, and institutionalized religion generally. Divine revelation and Catholic natural law thus became less acceptable as sources of law. Similarly, the Enlightenment emphasis on critical scrutiny of received tradition undermined the prestige that had always attached to custom. What was once seen as the wisdom of the ages came to be seen as blind fetters of the dead past holding back progress. A new emphasis on historical studies, another product of the Enlightenment, produced demonstrations that historical times and longstanding custom and usage were, often as not, tyrannical and barbarous, not worthy of emulation or continuing deference.[24]

Many contemporaries of the period, including Blackstone, simultaneously held onto pre-Enlightenment views and Enlightenment views, notwithstanding their conflict. Historian Bernard Bailyn found this in the ideas that surrounded the American Revolution:

> The common lawyers the colonists cited, for example, sought to establish right by appeal to precedent and to an unbroken tradition evolving from time immemorial, and they assumed, if they did not argue, that the accumulation of the ages, the burden of inherited custom, contained within it a greater wisdom than any man or group of men could devise by the power of reason. Nothing could have been more alien to the Enlightenment rationalists whom the colonists also quoted—and with equal enthusiasm. These theorists felt that it was

24. *See*, for example, JOHN MILTON GOODENOW, HISTORICAL SKETCHES OF THE PRINCIPLES AND MAXIMS OF AMERICAN JURISPRUDENCE (Arno Press 1972) (1819). Originally published in 1819, this book has a remarkably modern critical sensibility.

> precisely the heavy crust of custom that was weighing down the spirit of man; they sought to throw it off and to create by unfettered power of reason a framework of institutions superior to the accidental inheritance of the past.[25]

Ultimately, however, the implications of Enlightenment arguments proved fatal to the foundations of law and morality. The *Philosophes* were not moral relativists or anarchists. To the contrary, their goals were to establish sounder, more rational, and scientific footings for law and morality, to bring about a more just society. At the outset they had no doubts that they would be successful in the search for rational moral and legal principles.

Today we know that they failed. The reasons for this are many, only two of which will be recited here. First, exploration of the world made it increasingly evident that there were a multitude of diverse moral systems with apparently little in common, suggesting that morality and law were largely conventional. Human nature was base and could at most be used to come up with a minimum set of rules necessary to survive in society. Second, the power and scope of reason became restricted. Reason was once thought capable of producing substantive principles of the right and good. But in the course of the Enlightenment reason came to be seen as instrumental. Reason enabled people to efficiently achieve their ends, but it could not identify the proper ends to be desired. Notions about the good and right appeared at bottom to be a product of surrounding cultural views and individual tastes or passions.

An enduring, bedeviling legacy of the Enlightenment is that it undercut former beliefs in divine and natural law, and faith in the wisdom of custom and tradition, once thought to provide correct principles for morality, law, and life, but it offered no persuasive replacements. Thus, it spelled the demise of non-instrumental views of law, for it undermined the very idea that law had or could have any kind of immanent substantive content or integrity. Law thereafter could only be a matter of expediency rather than inherent necessity.

IV. THE SPREAD OF INSTRUMENTAL VIEWS OF LAW IN THE UNITED STATES

Oliver Wendell Holmes and Roscoe Pound provided the most

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25. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION, ENLARGED EDITION 33-34 (enlarged ed., 1992).

systematic early arguments in support of an instrumental understanding of law. Holmes called Langdell the "greatest living legal theologian."[26] Holmes objected to Langdell's portrayal of law as a logically constructed self-contained system of rules and principles that could be deductively applied to produce answers in specific cases. He asserted that "you can give any conclusion a logical form."[27] He was not against legal principles and logical consistency as such, only against portraying this systematic coherence as the ultimate end of law, and he was skeptical of the claim that judges reasoned objectively in this manner. Holmes dismissed another often cited pillar of the common law: "The time has gone by when law is only an unconscious embodiment of the common will."[28]

Holmes urged in instrumental terms that "a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words."[29] "The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is an illusion, and repose is not the destiny of man."[30] Competing social interests must be weighed and choices based upon social policy must be made. Holmes urged that judges engage in this process openly rather than subconsciously or covertly. "[T]he result of the often proclaimed judicial aversion to deal with such [policy] considerations is simply to leave the very ground and foundation of the judgments inarticulate. . . ."[31]

Pound likewise attacked the characterization of law as an abstract, logical science. "Law is not scientific for the sake of science."[32] He accused adherents of this approach, what he called a "jurisprudence of conceptions,"[33] for emphasizing logical deduction from assumed dogmas of law with little attention to social consequences:

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26. Oliver W. Holmes, *Book Notices*, 14 AM. L. REV. 233, 234 (1880) (reviewing the second edition of Langdell's contract law casebook).

27. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

28. *Quoted in* WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT 180 (1998).

29. Holmes, *supra* note 27, at 469.

30. *Id.* at 465-66.

31. *Id.* at 467.

32. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

33. *Id.* at 611.

> . . . the jurisprudence of conceptions tends to decay. Conceptions are fixed. The premises are no longer to be examined. Everything is reduced to simple deduction from them. Principles cease to have importance. The law becomes a body of rules. This is the condition against which sociologists now protest, and protest rightly.[34]
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> . . .
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> That our case law at its maturity has acquired the sterility of a fully developed system, may be shown by abundant examples of its failure to respond to vital needs of present-day life.[35]

To serve as the epitome of flawed formalist reasoning, Pound offered *Lochner v. New York*, an infamous case in the annals of American jurisprudence.[36] To protect workers' health and safety, the New York legislature imposed limits on the working hours of bakers to no more than ten hours a day and sixty hours a week. The Court invalidated the statute as an: "unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family."[37] Basing the decision on the abstract liberty of contract, the Court ignored the reality that the bakers had no freedom to bargain—they took the conditions of employment imposed upon them by the employers, or didn't get the job.[38] Justice Holmes issued a still echoing dissent, which lacerated the majority for reading their own personal laissez faire views into the Constitution.[39]

In the same vein as Holmes, Pound wrote that "as a means to an end, [law] must be judged by the results it achieves, not by the niceties of its internal structure. . . ."[40] "We do not base institutions upon deduction from assumed principles of human nature; we require them to exhibit practical utility, and we rest them upon a foundation of policy and established adaptation to human needs."[41]

Karl Llewellyn, Jerome Frank, and Felix Cohen, and other Legal

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34. *Id.* at 612.

35. *Id.* at 614.

36. Lochner v. New York, 198 U.S. 45 (1908).

37. *Id.* at 56.

38. *Id.* at 57.

39. *Id.* at 75.

40. Pound, *supra* note 32, at 605; *see also* Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607 (1907).

41. Pound, *supra* note 32, at 609.

Realists, assumed a more radical stance than Pound, but on the need for an instrumental view of law they were in complete agreement. In Llewellyn's characterization, the Legal Realists "view rules, they view law, as means to end."[42] This was the "major tenet" of Legal Realism.[43]

Prevailing formalist views of the law involved two distinct notions: conceptual formalism and rule formalism. Conceptual formalism was the idea that legal concepts and principles, like liberty of contract, consisted of necessary content and logical interrelations, all of which could be discerned through reason. Conceptual formalism was a version of non-instrumental views of law described earlier. Rule formalism was the idea that the complete body of rules, principles and concepts was coherent, internally consistent, comprehensive, and gapless, and that judges could reason "mechanistically" from this body of common law to discover the right answer in any particular case.

The Realists attacked both notions. Felix Cohen called conceptual formalism "transcendental nonsense"—the "theological jurisprudence of concepts."[44] The Realists argued that the content of concepts was not somehow indelibly predetermined but was a matter to be filled in. There were conflicts and gaps among the rules, there were exceptions to every rule, and principles could lead to more than one outcome in a given context of application.[45] Moreover, a great deal of flexibility was present when determining what particular binding rule of law issued from a given case. Rather than starting from the rules and principles and reasoning toward the decision, the Realists suggested that the judges began instead with a rough sense of the decision and worked backward to find supportive legal rules and principles,[46] revising the decision if necessary in the course of coming to an acceptable conclusion.[47]

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42. Karl Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1223 (1931).

43. Myres S. McDougal, *Fuller v. The American Legal Realists: An Intervention*, 50 YALE L.J. 827, 834-35 (1941).

44. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935).

45. *See* Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 443 (1930).

46. *See* JEROME FRANK, LAW AND THE MODERN MIND 125-26 (Anchor Books 1963) (1930) (quoting cognitive psychologist Jean Piaget).

47. *See* John Dewey, *Logical Method and Law*, 10 CORNELL L. Q. 17, 23 (1924); Joseph C. Hutcheson, *The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision*, 14 CORNELL L. Q. 274, 285 (1929).

V. INSTRUMENTAL VIEW OF LAW IN LEGAL EDUCATION AND LEGAL PRACTICE

Over time the instrumental view of law came to dominate. Legal historian Calvin Woodward wrote in 1968 that "At least in the better law schools . . . 'realists' are no longer lonely aliens in a hostile world. In truth they probably outweigh in influence, if not in numbers, the Langdellians."[48]

> . . . 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 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.[49]

The Dean of Cornell Law School, Roger C. Cramton, wrote in 1978 that legal instrumentalism had become "the ordinary religion of the law school classroom." This "orthodox" wisdom among law professors, conveyed daily to their students, was "an instrumental approach to law and lawyering," along with "a skeptical attitude toward generalizations, principles, and received wisdom."[50]

> 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.[51]

Cramton thus captured the view of law as an empty vessel, matched by a vision of the lawyer whose role was to serve as an instrument of the client and who treated legal rules and processes in the

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48. Calvin Woodward, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689, 732 (1968).

49. *Id.* at 733.

50. Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 248, 250 (1978).

51. *Id.* at 257.

same manipulative way.

Inevitably, teaching students to view law instrumentally must have an impact on the practice of law. Lawyers can satisfy their duty to clients while remaining within the spirit of the law, seeing the law as binding dictates to be complied with. Another approach, however, is one in which lawyers manipulate and stretch law and legal processes to their very outer limits, no matter how far away from or contrary to its underlying spirit. Both are recognized approaches toward lawyering.[52] They might sound similar, but pushed to the extreme they are as far apart as this: do what the law requires when pursing the client's end, versus, do whatever it takes when pursuing the client's end (including manipulating or avoiding the law). Many lawyers in practice today take an attitude closer to the second than the first.

The second attitude toward law is ingrained in students in law school. Below is a fair characterization of what, since the 1970's, became a widely practiced method of teaching law:

> Most important of all, [lawyers] must have the ability to suspend judgment, to see both sides of a case that is presented to them, for they may be called on to argue either side. The task of the law professor is often to change a student's mind, and then change it back again, until the student and the class understand that in many situations that will come before them professionally they can with a whole heart devote their skills to either side. Then they have to block out much of that part of their mind that saw the other side, finding ways to diminish and combat what they once considered the strong points of the opponent's argument.[53]

Regularly, professors will ask the same student or different students to articulate the best arguments on both sides. Through this pedagogical technique, students are taught to ignore the binding quality of law. After three years of this, students understandably come to think that legal rules are nothing but tools lawyers utilize on behalf of whichever side they represent.

Consistent with the purely instrumental attitude toward legal rules

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52. For explorations of the different models of lawyering, *see generally* Rob Atkinson, *A dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259 (1995); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545 (1995).

53. SOL M. LINOWITZ WITH MARTIN MAYER, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY 116 (1994).

and processes, lawyers "are expected and even encouraged to exploit every loophole in the rules, take advantage of every one of their opponents' tactical mistakes or oversights, and stretch every legal or factual interpretation to favor their clients."[54] Robert Gordon described this common orientation:

> Lawyers should not commit crimes or help clients to plan crimes. They should obey only such ethical instructions as are clearly expressed in rules and ignore vague standards. Finally, they should not tell outright lies to judges or fabricate evidence. Otherwise they may, and if it will serve their clients' interest must, exploit any gap, ambiguity, technicality, or loophole, any not-obviously-and-totally-implausible interpretation of the law or facts.[55]

It should be emphasized that the claim here is not that all lawyers take such an unrestrained instrumental attitude toward legal rules all the time, but many lawyers do much of the time.

This characterization is not limited to private lawyers. The U.S. Justice Department Office of Legal Counsel's infamous "torture memo"—which presented a legal analysis of the limits on interrogation of prisoners imposed by legal prohibitions against torture—is a supreme example of lawyers exploiting "any gap, ambiguity, technicality, or loophole, any non-obviously-and-totally-implausible interpretation of the law or facts" in order to allow the greatest possible leeway for the U.S. interrogation of prisoners. It was an everyday lawyerly exercise in selective reading of the applicable body of legal rules that led to the desired result of identifying an extraordinarily high threshold for torture: "the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions—in order to constitute torture."[56] A great deal of pain and suffering can be inflicted before engaging in torture, by that legal interpretation, which is precisely what the Bush Administration wanted.

The lawyers got there in a transparently simple move. The U.S. statute that prohibited torture described it as "severe" pain and

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54. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 10 (1988).

55. *Id.* at 20.

56. Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, White House Counsel to the President 6 (Aug. 1, 2002), http://www.washingtonpost.com/wpsrv/nation/documents/dojinterrogationmemo20020801.pdf (last visited Dec. 30, 2005).

suffering, without defining what was "severe." Office of Legal Counsel lawyers searched for the most stringent definition of "severe pain" they could find, which happened to come in an insurance-related statute that mentioned organ failure and death when identifying emergency medical conditions.[57] Hence they defined torture as involving injury that rose to the level of organ failure and death. The overarching orientation of these lawyers was not to figure out what the law was trying to prohibit—"torture"—but rather was to produce an arguable interpretation of the law that would allow them to accomplish what they desired—to allow the application of as much pain possible in order to make prisoners talk, and to provide legal cover if the torture was discovered.

When this memo came to light, on the heels of disclosure of torture at Abu Ghraib prison, the public outcry was intense. For the purposes of this article, what is most revealing was the relatively unruffled response of lawyers, summarized by a legal scholar who noted the contrast with the public shock:

> Much of the legal profession . . . met the news with a dramatically different take. Charles Fried, for example, defended the OLC's work, asserting that '[t]here's nothing wrong with exploring any topic to find out what the legal requirements are.'. . . Eric Posner and Adrien Vermeule characterized the analysis as 'standard lawyerly fare, routine stuff.' Those lawyers who did criticize the memoranda concerned themselves with the deficiencies of the legal analysis. . . .[58]

Although the subject of torture was anything but routine, the memo was indeed routine stuff in the sense that every lawyer who reads it would find the style of argument of instrumentally manipulating the law to reach the end desired intimately familiar. It is what lawyers do.

Legal rules at their core have a binding quality. It is unclear what the full consequences will be to a legal system which is populated by lawyers who ignore the binding quality of rules to, without restraint short of committing a crime, instrumentally manipulate legal rules and processes on behalf of their clients. There are indications that the U.S. legal profession is headed in this direction.

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57. *See* Robert Vischer, *Legal Advice as Moral Perspective*, GEO. J. LEGAL ETHICS, (forthcoming 2006).

58. *Id.* (manuscript at 3).

VI. INSTRUMENTALISM AND JUDGING

When legal education teaches students to see and utilize law instrumentally, and the practice of law reinforces this attitude and approach, it would seem inevitable that a person who has operated in this environment for a decade or more before ascending to the position of judge will be affected in ways that lead to seeing law in more instrumental terms. In the 1970's legal theorists began to observe that judges increasingly engaged in instrumental reasoning to satisfy the purposes behind the law, or to further social policies or purposes, or to achieve social or individual justice.[59] In *Law and Society in Transition* (1978), Philippe Nonet and Philip Selznick argued that contemporary law was in the process of evolving to a higher legal stage of "responsive law" in which "there is a renewal of instrumentalism . . . for more objective public ends."[60] This was an advance, they claimed, over the previous formalistic stage of "autonomous law" in which law was seen as separate from politics, and decisions were made strictly according to legal rules with no attention to consequences. In this new higher stage "the logic of legal judgment becomes closely congruent with the logic of moral and practical judgment."[61]

With this spread of instrumental reasoning in judicial decisions, in everyday cases as well as in constitutional cases, judges were increasingly required to straddle two contrary thrusts: judges are asked to apply rules *and* to reason instrumentally to achieve policies and purposes, and just outcomes. Roberto Unger articulated the stark difference between these approaches:

> One way is to establish rules to govern general categories of acts and persons, and then to decide particular disputes among persons on the basis of the established rules. This is legal justice. The other way is to determine goals and then, quite independently of rules, to decide particular cases by a judgment of what decision is most likely to contribute to the predetermined goals, a judgment of instrumental rationality. This is substantive justice.[62]

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59. *See* ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS (1975); P.S. ATIYAH, FROM PRINCIPLE TO PRAGMATISM: CHANGES IN THE FUNCTION OF THE JUDICIAL PROCESS AND THE LAW (1978).

60. PHILLIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 15 (1978).

61. *Id.* at 89.

62. UNGER, *supra* note 59, at 89.

Modern judges, Nonet, Selznick, and Unger suggested, were asked to engage in both modes of analysis, which they oscillated between.[63]

Note that a built in tension exists between strict rule application and instrumental reasoning toward ends. Judges are charged with the task of applying legal rules, which involves coming to whatever conclusion is indicated by the body of rules. Achieving ends (satisfying policies, purposes, or individual or social justice), in contrast, is focused on coming to a particular outcome, regardless of what the rules require. What is a judge to do when the applicable legal rules point toward a different end, to an end contrary to the correct policy or purpose or to individual or social justice? A system committed to the rule of law would nonetheless insist that the judge come to the outcome required by the law. This respects the binding quality of rules. A system committed to an instrumental view of law, however, would have the judge ignore or manipulate the legal rules and come to the designated outcome, notwithstanding the dictates of the legal rules. Judges who do this will thus disregard the binding quality of legal rules. Moreover, matters are even more complicated and variable owing to the fact that every situation is unique. When the same policies, purposes, or sense of justice are asked to be satisfied under contrasting circumstances, the result will be a great variation in the application (or non-application) and interpretation of the same body of rules. That is what follows when achieving designated ends matter more than consistently applying legal rules. For the above reasons, the predictability, certainty, and equality of application of law will suffer. The rule of law will suffer.

This aforementioned infusion of instrumental reasoning relates to the achievement of agreed upon social policies, purposes, or notions of justice. A different though connected (and sometimes indistinguishable) way in which instrumentalism detracts from the rule of law in the context of judicial reasoning relates instead to instrumental reasoning in connection with the personal values and goals of judges. Owing to the influence of the Realists, the belief that judges' decisions are based upon ideologically preferred outcomes has grown in strength. Behaviorist political scientists have long claimed that judges are "politicians in black robes." By the Realist account, this operates as a subconscious process on the part of judges, who inevitably perceive the law through an ideologically colored lens. But it can also be conscious: when necessary, in the same way that a lawyer manipulates legal rules instrumentally to serve the interests of clients, legal rules can be twisted

63. NONET & SELZNICK, *supra* note 60, at 15; *see* ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 195 (1976).

by judges to arrive at outcomes they desire. "The 'law' . . . becomes mere instruments or barriers that judges must utilize strategically to advance their *a priori* political objectives."[64]

Viewing the law through the prism of one's personal beliefs is perhaps unavoidable, though to correct for this judges can attempt to scrutinize the influence their prejudices and views have on their decisions. What is not inevitable is that a judge would cross over from abiding by the binding quality of law, sincerely trying to figure out what the law requires (however unclear), to instrumentally manipulating the legal rules to reach a personally desired end, much as a lawyer does in service of a client. This traverses the fundamental divide between judges coming to the outcome determined by the law, versus judges coming to the outcome they personally prefer. The key factor in separating the two is the attitude and commitment of judges to live up to their obligation to follow the law.

The critical question is whether the pervasive spread of consummately instrumental views of law within the legal culture will have the effect of encouraging more judges more often to cross over from the first orientation to the second. Then more of their decisions will be based upon what they personally prefer, rather than upon what law requires. This would no longer be a system in which the legal rules have a binding effect on judges. It would no longer be a system of the rule of law, but instead the rule of the individuals who happen to be the judges.

VII. CONSTITUTIONALISM AND THE RULE OF LAW

Two separate arguments have been pressed about how an instrumental view of law detracts from the rule of law. The first argument, at the systemic level, was that seeing law as an instrument, an empty vessel to be filled in and applied to satisfy whatever end is desired, is inconsistent with the classical understanding of the rule of law that there are limits on the government: that even when exercising its power to make law, there were certain things the government could not do. The second argument was that lawyers manipulate legal rules and process to instrumentally achieve the ends of their clients, and, more to the point, that judges have begun to reason more instrumentally in their legal decisions to arrive at particular outcomes. Instrumental treatment of rules in these respects are detrimental to the binding quality

64. 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, 83 (2002).

of law and contrary to the formal rule of law.

Constitutional analysis involves an intersection of these two arguments. Constitutional provisions—for example, clauses enumerating governmental powers, or the bill of rights—specify what the government has the power to do and specify what it cannot do. In this sense, the U.S. Constitution represents the modern functional equivalent of former non-instrumental views of law. Both control and set limits on ordinary legislation (although the difference remains that the Constitution is an enactment of positive law that can be changed, whereas non-instrumental law was, in theory at least, beyond the will of the lawmakers).

Thus the U.S. Constitution is a higher form of law that it imposes content-based limitations on the government equivalent to the substantive rule of law. Instrumental thinking about law has penetrated so deeply and thoroughly, however, that it has come to dominate the analysis of substantive constitutional limits, as constitutional scholar Steven D. Smith observed:

> In its most visible aspect, constitutional law presents reason in instrumentalist or "means-end" terms. Scholars have pointed out that most of the doctrinal formulas articulated by the Court, whether under the First Amendment or the Fourteenth or the commerce clause, are presented in essentially the same monotonously instrumentalist terms. So laws are viewed as means to social ends, and a law's constitutionality is said to depend on how important the law's ends are and how effective and necessary the law is as a means to achieving those ends.[65]

Even in the context of constitutional limits, therefore, law has been largely emptied of any substantive values of its own.[66]

Yet another infusion of instrumental reasoning follows from an increasingly common form of constitutional analysis applied by the Supreme Court. In a number of important subject matters, the Supreme Court renders decisions using a "balancing approach" that weighs the various interests at stake. Balancing is nothing like rule application that

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65. Steven D. Smith, *The Academy, the Court, and the Culture of Rationalism*, *in* THAT EMINENT TRIBUNAL: JUDICIAL SUPREMACY AND THE CONSTITUTION 105 (Christopher Wolfe, ed. 2004) (citing Robert F. Nagel, *Rationalism in Constitutional Law*, 4 CONST. COMMENT. 9, 9-12 (1987) (citation omitted).

66. *See* ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES (2000).

has traditionally been the task of judges. Balancing involves case-by-case decisions that invite, or create a great deal of leeway for, instrumental reasoning to support the outcomes personally supported by the Justices.[67]

As this suggests, all of the implications of the second argument, about the increased instrumental reasoning of judges, apply full force to constitutional analysis. The instrumentalism that has come to be a routine part of judicial decision making similarly infects interpretations of the Constitution. Thus the problems that plague the formal rule of law also plague judicial interpretations of constitutional provisions.

VIII. POLITICIZATION OF THE LAW

A powerful logic and momentum are at work here, which can be seen when the above trends are taken to an extreme and linked together. Owing to the indeterminacy of language and general rules, and to the fact that every situation that arises is unique, legal rules and constitutional provisions and principles are inevitably susceptible to different interpretations. This is especially so in a deeply divided society where people see rules, principles and standards in different ways. Judges reason more instrumentally in cases because they are called upon to do so by a greater tendency toward achieving ends (policies, purposes, individual and substantive justice), and, separately, because more judges more of the time appear to be willing to disregard the binding quality of law to instrumentally manipulate the applicable rules to lead to the outcomes they personally desire. The effect of these developments is that legal decisions will be increasingly infused with political disputes, will increasingly be based upon political judgments, and will increasingly be determined according to the political predispositions of the judges. As a consequence of judges making what appear to be political rather than legal decisions, political fights will increasingly break out over who will become judges. Thereafter the judiciary will become politicized and sharply divided along political lines.

If all of this were to come to pass, the breakdown of the rule of law would not be far behind. Fortunately, the U.S. legal system has not traveled as far as this scenario, although the Supreme Court is not far from it. Political fights over judicial appointments are now commonplace at both state and federal levels, but it cannot yet be said

67. *See* Christopher Wolfe, *The Rehnquist Court and 'Conservative Judicial Activism,' in* THAT EMINENT TRIBUNAL: JUDICIAL SUPREMACY AND THE CONSTITUTION 200-01 (Christopher Wolfe ed., 2004).

that the judiciary as a whole is sharply divided along political lines and it cannot be said that decisions are more political than legal. Current events and attitudes reflect enough of this scenario, however, to suggest that it must be taken seriously.

CONCLUSION

An instrumental understanding of law does not inevitably undermine the rule of law. The most important ingredient for the rule of law to function is that lawyers and judges, in particular, must be imbued with the belief that at their core legal rules have a binding component. If the entire legal culture develops the sense that legal rules and processes are merely instruments to be manipulated to further whatever ends are desired, the rule of law will be hard pressed to survive.

The broader message of this article is that the continued existence of the rule of law is always a contingent matter: societies and cultures are constantly changing in unplanned and uncontrolled ways, often with unforeseen implications and consequences. The fact that we enjoy the benefits of a rule of law system today provides no assurance that it will be here tomorrow.