DePaul Law Review

Volume 56
Issue 2 *Winter 2007: Symposium - Is the Rule of Law Waning in America?*

Article 12

How an Instrumental View of Law Corrodes the Rule of Law

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INTRODUCTION[1]

The legal tradition in the United States 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 the 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 an instrument for the social good. Both ideas are taken for granted and are equally fundamental in contemporary U.S. legal culture. It is seldom 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 view of law was 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—the common law in particular—was characterized as the immanent order of natural principles 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; 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 reviewed at the outset. 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 sec-

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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. *See generally* BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW (2006).

ond 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 constitutes the social good. Interests inevitably conflict; people and groups have fundamentally clashing values, and there are no independent or absolute standards to resolve such disputes. An instrumental view of law in the context of intransigent disagreement over the social good leads to a battle of all against all through 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, in administrative and executive actions, and in judicial appointments and judging. Law is not seen as an order of binding rules, but increasingly as a tool or weapon to be manipulated to achieve desired ends. Therein lies the deep rub between an instrumental view of law and the rule of law ideal.

This Article discusses four specific points of tension between the rule of law ideal and an instrumental view of law. The first two points relate primarily to legislative and executive actions, the final two relate mainly to 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 second point involves the implications of the disagreement over the social good. 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 shifting legal theories in the 1960s and 1970s is necessary. This pivotal period marked both the entrenchment of an instrumental view of law and the presence of sharp conflict over the social good.

II. Legal Instrumentalism and Moral Relativism in the Academy

A massive social upheaval rocked the United States in the 1960s and 1970s, including civil rights 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 in the middle of this social-political conflagration. People on the left saw law line up on the side of power and privilege, answering peaceful marches and sit-ins with nightsticks and snapping dogs. People on the right thought that defiant displays of

civil disobedience threatened social order and were encouraged by the meek response of law enforcement. Progressives cheered the Warren Court as the one legal institution doing the right thing, while the right despised the Justices as activist usurpers writing their own personal liberal views into the Constitution. All sides thought it evident that a "crisis of liberal legalism" was at hand.[2]

Legal historian Calvin Woodard 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 World War, the resonance of their critiques of conceptual and rule formalism continued like a subterranean river. "At least in the better law schools," Woodard remarked, "'functionalists' and 'realists' are no longer lonely aliens in a hostile world. In truth they probably outweigh in influence, if not in number, 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.

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

> [T]he 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]

Over the course of the twentieth century, society at large underwent a general loss of belief in objectively existing principles.[5] With a seemingly irresistible momentum, "the knowledge of good and evil, as an intellectual subject, was being systematically and effectively destroyed."[6] The twentieth 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 in-

2. Lester Mazor, *The Crisis of Liberal Legalism*, 81 YALE L.J. 1032 (1972) (book review).

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

4. *Id.* at 733.

5. *See* RICHARD TARNAS, THE PASSION OF THE WESTERN MIND: UNDERSTANDING THE IDEAS THAT HAVE SHAPED OUR WORLD VIEW (1991) (providing an unparalleled historical exploration of the ideas that led to this state).

6. Arthur Allen Leff, Commentary, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 454 (1974) [hereinafter Leff, *Economic Analysis of Law*].

formed so much of eighteenth-century and nineteenth-century political thought.[7]

Woodard 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 . . . .[8]

A decade later, the Dean of Cornell Law School, Roger Cramton, wrote that legal instrumentalism had become "the 'ordinary religion' of the law school classroom."[9] This "orthodox" wisdom, conveyed by law professors to their students, is "an instrumental approach to law and lawyering," along with "a skeptical attitude toward generalizations," principles, and received wisdom.[10] 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.[11]

Cramton captured the prevailing view that law was an empty vessel, and that lawyers utilized legal rules and processes instrumentally for clients. Students were taught that everything is up for argument, and that legal rules are not binding dictates, but resources to be strategically marshaled and presented with rhetorical agility.

There is a temptation to shrug "so what?" at this instrumental characterization of law, because it is now so routine. Woodard and Cramton found it worthy of comment 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 wor-

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7. *See generally* ROBERT A. NISBET, SOCIAL CHANGE AND HISTORY: ASPECTS OF THE WESTERN THEORY OF DEVELOPMENT (1969).

8. Woodard, *supra* note 3, at 734.

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

10. *Id.* at 248.

11. *Id.* at 257.

ried openly about the unknown implications of the 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 acknowledged gap between the goals of officeholders and those of their constituents, as well as a widespread view that those same officeholders are furthering their own goals while merely paying lip service to their constituents' needs."[12] 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."[13]

"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."[14] Beyond the sharp disagreement over values was the bleak prospect that without access to absolute moral standards, these disputes might never 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."[15] 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.[16] 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 the final, uncontradictable, unexaminable word."[17] His essay memorably left off with the words "God help us."[18] Critical legal theorist Roberto Mangabeira Unger's *Knowledge and Politics*, so influential among the radical left, argued that the modern belief in the subjectivity of values drove deep contradictions into liberal legal systems with no evident

12. G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 295 (1973).

13. *Id.*

14. *Id.* at 296.

15. Leff, *Economic Analysis of Law*, *supra* note 6, at 455.

16. Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229.

17. *Id.* at 1240.

18. *Id.* at 1249.

solution.[19] It ended on a note of despair: "Speak, God."[20] At the time there was a palpable awareness in the air that society and law had been cut adrift from their old moorings—with no new anchorage in sight.

By the mid-1970s, the law was pervasively seen in purely instrumental terms and there was sharp social disagreement over the public good, combined with a loss of faith in the possibility of a resolution. The contemporary dynamic that drives the tension between the rule of law and an instrumental view of law was thus set in place.

III. COLLAPSE OF HIGHER LAW, DETERIORATION OF THE COMMON GOOD

Over the past two hundred years, U.S. 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 lawmaker 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 law, principles of reason, or customs descended from time immemorial.[21] The defining characteristic of the second set of ideals was that law represents the common good and public welfare. This quality made the law of and for the community, deserving of obedience by citizens.

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. This Part will articulate the role and function formerly played by these long-standing ideas and the consequences of the vacuum left by their decline.

A. Collapse of Higher Limits on Law

Natural law, principles of 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 that "[a] law that is unjust seems not to be a law."[22] Thus, he continued: "[E]very human positive law has the nature of law to the extent that it is derived from the Natural Law. If, however, in some

19. ROBERTO MANGABEIRA UNGER, KNOWLEDGE & POLITICS (1975).

20. *Id.* at 295.

21. *See generally* BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004) [hereinafter TAMANAHA, ON THE RULE OF LAW].

22. THOMAS AQUINAS, THE TREATISE ON LAW 327 (R.J. Henle ed., 1993).

point it conflicts with the law of nature it will no longer be law but rather a perversion of law."[23] William Blackstone echoed this position: "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 such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original."[24] The 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.[25]

This view of the primacy of unwritten law over legislation was standard when the colonies were established. The 1677 Charter of Fundamental Laws of West New 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.'"[26] 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,"[27] 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 developing civil institutions was by custom and tradition rather than by legislative or administrative fiat."[28] 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.[29]

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 "[s]everal American courts have asserted the doctrine that the judiciary can disregard a statute which plainly violates the fundamental principles of natural justice, although it may not contravene any particular constitutional provisions."[30] Judges used narrow or defeating constructions to effectively control legislation: "Indeed, one of the

23. *Id.* at 288.

24. DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW 49 (Univ. of Chi. Press 1996) (1941) (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES *41).

25. *See generally* J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY (W.W. Norton & Co. 1967) (1957).

26. LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 7 (1999).

27. DANIEL J. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 20 (1958).

28. *Id.*

29. Charles G. Haines, *Political Theories of the Supreme Court from 1789–1835*, 2 AM. POL. SCI. REV. 221, 222–23 (1908).

30. SIMEON E. BALDWIN, THE AMERICAN JUDICIARY 118 (1905).

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."[31] Roscoe Pound remarked in 1910 that "[j]udges and jurists do not hesitate to assert that there are extraconstitutional limits to legislative power which put fundamental common-law dogmas beyond the reach of statutes."[32]

In the course of the early twentieth century, when the noninstrumental understanding of the common law gave way to the instrumental view, the notion that the common law and natural principles constitute limits on legislation was also swept away. Many factors contributed to undermining old notions of natural principles and the common law: 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 among groups with conflicting economic interests, an increasingly specialized economy with complex regulatory regimes far beyond the ken of common-law concepts, and a general disenchantment with the world in the twentieth century. After this denouement, the only substantive restrictions on legislation were those found in the Constitution.

Constitutional enforcement of substantive limits on lawmaking, 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 lawmakers. 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 . . . ."[33] The Ninth Amendment of the Constitution voiced the same sentiment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[34] A widely shared understanding at the time was that "[c]ommon law and written constitutions expressed and elaborated these notions [of fundamental rights and limits on government], but did not create them."[35] Up through the early twentieth century many judges still thought that the Bill of Rights was "merely declaratory of fundamen-

31. CLYDE E. JACOBS, LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW 10 (Da Capo Press 1973) (1954) (citation omitted).

32. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 27 (1910).

33. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

34. U.S. CONST. amend IX.

35. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 561 (2d ed. 1988).

tal natural rights" and "legislation is to be judged by those rights and not by the constitutional texts in which they are declared."[36]

This view did not survive the twentieth 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 lawmaking. "[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*."[37] The supremacy of the Constitution came to be understood as grounded upon "its rootage in popular will."[38] Every provision of the Constitution can be altered or abolished by amendment, albeit with high 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. Another important difference is that rights were formerly thought of as absolute, whereas the modern approach, consistent with the instrumental view, involved balancing rights against social interests.

B. The Consequence of the Collapse

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 reinterpretation, 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,

36. Pound, *supra* note 32, at 28.

37. Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (pt. 2), 42 HARV. L. REV. 365, 409 (1929).

38. Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (pt. 1), 42 HARV. L. REV. 149, 152 (1928).

and religious persecution may, in principle, conform to the requirements of the rule of law . . . ."[39] 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 and serve any end whatsoever. Legal arguments can even be made to justify torture, as we have seen.[40]

When law was thought to have an inherent and inviolable 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.

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.

C. The Historical Primacy of the "Common Good" Ideal

A constant refrain in the history of the rule of law ideal is that the law should be for the common good. Plato asserted that the laws should be "for the sake of what is common to the whole city."[41] Aristotle wrote that a true government must have just laws, and just laws are oriented towards the "common interest."[42] Aquinas defined law as "a certain dictate of reason for the Common Good."[43] John 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 the society."[44]

This idea has been central to U.S. legal tradition since its inception. It appears in the Mayflower Compact—*the* founding political document of the colonies written two generations before Locke's famous Second Treatise:

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39. JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 211 (1979).

40. *See* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

41. THE LAWS OF PLATO 101 (Thomas L. Pangle trans., 1980).

42. ARISTOTLE, THE POLITICS 86–117 (Carnes Lord trans., 1984).

43. AQUINAS, *supra* note 22, at 145.

44. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 76 (Thomas P. Peardon ed., 1952) (1690).

> [It was a covenant to form] a civill body politick, for our better ordering and preservation . . . to enacte, constitute, and frame such just and equall lawes, ordinances, acts, constitutions, and offices, from time to time, as shall be thought most meete and convenient for the general good of the Colonie, unto which we promise all due submission and obedience.[45]

The very first charge against King George in the Declaration of Independence was his refusal to assent to laws "most wholesome and necessary for the public good."[46]

The negative corollary of the assertion that legal power is legitimate only 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 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."[47] Historian of the American Revolution Bernard Bailyn observed that the founders' 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."[48]

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 and powerful. According to Plato, Thrasymachus declared that justice is the interest of the stronger.[49] In modern times, Karl Marx said much the same. Clear-eyed about law even as a young man, Oliver Wendell Holmes rejected this position:

> This tacit assumption of the solidarity of the interests of society is very common, but seems to us to be false. . . . [I]n 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. . . . [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

45. Corwin, *supra* note 37, at 387 (quoting WILLIAM MACDONALD, DOCUMENTARY SOURCE BOOK OF AMERICAN HISTORY 1606–1926, at 19 (3d ed. 1926)).

46. THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776).

47. MASS. CONST. art. VII.

48. BERNARD BAILYN, TO BEGIN THE WORLD ANEW: THE GENIUS AND AMBIGUITIES OF THE AMERICAN FOUNDERS 117 (Vintage Books 2004) (2003).

49. THE REPUBLIC OF PLATO (Allan Bloom trans., 2d ed. 1991).

> 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.[50]

Legislation, he said, "is necessarily made a means by which a body, having the power, put burdens which are disagreeable to them on the shoulders of somebody else."[51] 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.[52] Accordingly, he said, "[I]t 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."[53]

Awareness that reality often disappoints does not in itself discredit the ideal. Even Holmes thought law could and should promote sound social policy. The underlying point of these accounts 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.

D. 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 U.S. culture, one particular to law, and another related to general social attitudes and understandings. The legal contribution was the stain left by courts that invoked the general welfare or public purpose notion when striking down legislation in the late nineteenth century. Judges in this period scrutinized the legislatively designated purpose of a statute to determine whether, by their own lights, it was real.[54] The Missouri Supreme Court in 1893, for example, invalidated legislation that prohibited mining and manufacturing companies from the abusive practice of paying employees their wages in scrip redeemable only 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.'"[55] 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,

50. Summary of Events, *The Gas-Stokers' Strike*, 7 AM. L. REV. 582, 583 (1873).
51. *Id.* at 584.
52. *Id.* at 583.
53. *Id.* at 584.
54. For an excellent exploration of these decisions, see JACOBS, *supra* note 31.
55. State v. Loomis, 22 S.W. 350, 352 (Mo. 1893).

the courts appeared to 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-1930s, 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. In the *Federalist Papers*, Alexander Hamilton wrote that "the independence of the Judges may be an essential safe-guard" because "[it] 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."[56]

E. Battles to Seize the Law

The growing skepticism about judges was also a product of, and exacerbated by, broader shifts in social circumstances and understandings—particularly the economic clashes that dominated the late nineteenth and early twentieth centuries. Many of the Realists, like others of their time, reposed an inordinate faith in the capacity of social science to help decide 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 1960s and 1970s, many of which continue to this day, changed everything. Fundamental disputes exist over what social justice requires, the proper trade-offs between liberty and equality or between formal and substantive equality, the enforcement of moral and religious norms in the public and private spheres, the rights of women, minorities, and gays and lesbians, the appropriate distribution of resources and opportunities, conditions of employment, the balance between economic development and harm to the environment, and so on. The old faith that the sciences will supply answers to these questions now smacks of naïveté—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. Reflected in the academic phrase "incommensurable paradigms," it is thought that people on opposing

56. THE FEDERALIST No. 78, at 429 (Alexander Hamilton) (E.H. Scott ed., 1898).

sides begin from fundamentally incompatible premises that preclude 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 discourse.

Using every available legal channel, beginning in the 1960s 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 groups confront one another in various legal arenas—in cause litigation, in legislative and administrative lobbying, and in battles over judicial appointments—and routinely claim to be acting in the name of the public good.

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.[57] Finding a balance among competing interests, it should be noted, is not the same as the classical ideal of a shared common good. Bailyn summarized Hamilton's position: "The goal of representation . . . 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."[58] The idea was to find a position that "in the end would benefit all."[59]

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 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 defeated. 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 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 U.S.

57. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).
58. BAILYN, *supra* note 48, at 117–18.
59. *Id.* at 118.

political-legal culture for more than two centuries, they believe it is possible to pursue one's own particular agenda through law and thereby promote the public good. They rely on a number of rationales: 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 and moves society forward;[60] the marketplace 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";[61] 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.

Common to these ideas is that they encourage participants to pursue only their individual or group agendas. 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 decisionmakers are biased or corrupt, that competition or combat is not a proper way to decide what is right, and that winners are the most rapacious or unscrupulous rather than the most deserving. But these complaints have little traction. If there is no way to agree upon a shared common good, if positions cannot somehow 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 agendas. What keeps the losing combatants in line, what convinces them to abide by the rule of law, is not

60. *See generally* RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT (George Braziller, Inc. rev. ed. 1959) (1944).

61. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

the normative obligation generated by the fact that the law represents the common good in which they share. Losers comply because of 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 and take their turn to wield the law.

This is a barren vision. It is the rule of some groups over others *by and through* the law, rather 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.

IV. 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 shift the focus to the idea of legality—to what it means to be governed by a system of rules. The preceding Part asked *why* the law should rule if it has no integrity or built-in right, and does not necessarily represent the common good. This Part asks, in the judicial context, *whether* the law does in fact rule.

The U.S. legal system is in imminent danger of becoming less of a system of law. This assertion will 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. 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 decisionmaking of judges. The legal quality of the system—the reality of the rule of law—hinges upon how these issues are resolved.

A. 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 beforehand—rules which make it possible to foresee with fair certainty how the author-

> ity will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.[62]

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 and serve any end. Lon Fuller remarked that the formal rule of law is "indifferent toward the substantive aims of law and is ready to serve a variety of such aims with equal efficacy."[63] That is precisely how the instrumental approach portrays law.

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 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.[64]

Alexander Hamilton similarly wrote, "To avoid an arbitrary discretion in the 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."[65]

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62. F.A. HAYEK, THE ROAD TO SERFDOM 80 (1994).

63. LON L. FULLER, THE MORALITY OF LAW 153 (rev. ed. 1969).

64. F.A. HAYEK, THE CONSTITUTION OF LIBERTY 153 (1960).

65. THE FEDERALIST No. 78, *supra* note 56, at 430.

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 was manifested in the familiar dilemma between the duty of judges to strictly apply the law, as opposed to ensuring equity in the individual case. Critics of equity complained that it undermines the certain and equal 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 Frederick Schauer, "lies the concept of decisionmaking according to *rule*."[66] What makes a rule a "rule" is that it specifies in general terms, and in advance, a mandate that decisionmakers must follow to the exclusion of any other considerations. The rule provides a sufficient and obligatory reason for the decision. This is true without regard to the purpose behind 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 the 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.[67]

If achieving an 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."[68] 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."[69] Achieving ends swallows up binding rules: "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 consequences is to deny that courts are bound in the slightest degree by statutes or precedent."[70]

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66. Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988) [hereinafter Schauer, *Formalism*]. *See generally* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991).

67. Schauer, *Formalism*, *supra* note 66, at 535 (citation omitted).

68. *Id.*

69. David Lyons, *Legal Formalism and Instrumentalism—A Pathological Study*, 66 CORNELL L. REV. 949 (1981).

70. *Id.* at 967.

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. Legal theorist Duncan Kennedy explained the two approaches:

> Substantive rationality 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. . . . 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.[71]

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 social policy and future consequences—is more complicated, more uncertain, and far less ascertainable than applying legal rules to an existing situation.[72]

There are several reasons why attention to purposes and ends raises complex nonlegal 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 because they are 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. 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, while the judge who avoids the contract will ignore binding legal rules and tread on the legal rights and expectations of a contracting party.

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71. Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 364 (1973).

72. *See* UNGER, *supra* note 19, at 89; *see also* ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 192–200 (1976).

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 considerations of fairness, but other possible considerations include enhancing economic efficiency, preserving the sanctity of promise or agreements, encouraging desirable business practices, protecting vulnerable segments of the populace, and achieving certainty in contractual relations. There is no preestablished hierarchy among alternative values and purposes, and there is no set method for resolving clashes among alternatives. In tort cases, judges routinely weigh such considerations as the deterrence effect, the compensation for injury, the availability of products for consumers at affordable prices, the costs of injuries to society, and so forth. Analysis of these factors relies on political, scientific, and economic considerations—many of which are debatable—and on speculative predictions of future consequences. Judges have no particular expertise in deciding these matters. 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 (and subsequently repealed) South Dakota abortion ban.[73] The facial purpose was to ban abortions, but the immediate purpose, as its legislative proponents candidly admitted, was to provoke litigation that would lead to the overturning of *Roe v. Wade*.[74] 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 intentions in mind, and the common law is the product of innumerable judicial decisions partaking of different streams within the law, identifying *the* purpose

73. Women's Health and Human Life Protection Act, H.B. 1215, 2006 Leg. Sess. (S.D. 2006) (repealed 2006).

74. 410 U.S. 113 (1973).

of a law is invariably a judicial construction.[75] Henry Hart and Albert Sacks of the Legal Process School suggested that the purpose should be discerned by assuming that legislators are "reasonable persons pursuing reasonable purposes reasonably,"[76] a formulation which is clearly an abstraction.

Judges who advocate focusing on purposes and ends concede that this orientation is in tension with being bound to legal rules. One champion of legal pragmatism, Judge Richard Posner, acknowledges that "[p]ragmatic reasons do not sound very lawlike."[77] 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.'"[78] Justice Breyer contrasts this purposive approach with the "textualist" or "literalist" approaches identified with Justice Scalia.[79] Textualists decide cases based upon the plain meaning of the words of the constitutional or legislative provision at the time of enactment without paying attention to purpose or consequences. Justice Breyer concedes that under certain circumstances, his approach "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."[80]

B. The Unstable Combination of Rule-Bound and Purpose-Oriented Judging

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 U.S. legal culture. Professors Philippe Nonet and Philip Selznick wrote in 1978 that judicial decisionmaking was evolving away from an emphasis on formal legality toward utilizing instrumental rationality to achieve policies and purposes.[81] In the same year, legal theorist Patrick Atiyah

75. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 25–34 (1994).

76. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958).

77. Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 32, 98 (2005).

78. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 18 (2005). For a more elaborate account of striving for purposes, see AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW (Sari Bashi trans., 2005).

79. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

80. BREYER, *supra* note 78, at 129, 119.

81. PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW (1978).

commented on the notable shift in judicial decisionmaking toward "pragmatism" and greater judicial attention to achieving ends.[82] Unger commented on the issue in 1975:

> [T]he 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 . . . .[83]

A study that interviewed judges on four state supreme courts in the late 1960s found that judges fell into three categories in their perceptions of their judicial role. About half considered themselves to be strict law appliers, a quarter considered themselves to be lawmakers, and a quarter considered themselves to be pragmatists who engaged in both roles while aiming at just results and sound policy.[84] Although more recent studies are lacking, it is fair to surmise that a greater proportion of contemporary judges are judicial pragmatists, though there is no doubt that 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 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 one direction; theorists have noted a "new formalism" in contract law, for example, which partakes of aspects of both rule formalism and pragmatism.[85] 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.

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, Justice Samuel Alito declared that "[t]he 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

82. P.S. ATIYAH, FROM PRINCIPLES TO PRAGMATISM: CHANGES IN THE FUNCTION OF THE JUDICIAL PROCESS AND THE LAW (1978).

83. UNGER, *supra* note 19, at 99.

84. Kenneth N. Vines, *The Judicial Role in the American States: An Exploration*, *in* FRONTIERS OF JUDICIAL RESEARCH 461, 474–77 (Joel B. Grossman & Joseph Tanenhaus eds., 1969); *see also* John T. Wold, *Political Orientations, Social Backgrounds, and Role Perceptions of State Supreme Court Judges*, 27 W. POL. Q. 239 (1974).

85. *See* Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207, 221–29 (2005).

requires."[86] Justice Alito, who like Justice Scalia has avowed his fidelity to the text, shares 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 in different cases from one philosophy to another. Justice Scalia will respect long-standing precedent even if wrongly decided (as adjudged by original meaning) out of a prudential unwillingness to disrupt settled legal understandings. Justice Scalia concedes that this is a "pragmatic *exception*" to his textualist approach.[87] Thus, even an extremist of the rule-bound ilk may invoke pragmatic considerations.

The result of this mishmash of contrasting orientations is a system of judging suspended in an uncertain and shifting space, with some judges freed of the shackles of being rigidly rule-bound (though 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 different judges exhibit different orientations amongst themselves—and even a single judge can adopt different orientations over time. Legal theorists who have considered the situation agree that it is detrimental to the rule of law.[88]

It is conceivable that judges individually and collectively are able to moderate these tensions 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 the significant consequences that may 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 elevates ends to the detriment of rules.

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86. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong., 2d Sess. 56 (2006).

87. SCALIA, *supra* note 79, at 140.

88. *See generally* TAMANAHA, ON THE RULE OF LAW, *supra* note 21, at 73–90.

If judges have indeed found an ideal combination of being rule-bound while considering purposes and ends, it is surely 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.

C. *Modern Skepticism About Judicial Objectivity*

All of the classic phrases used to capture the rule of law ideal identify the law with the image of the objective judge: "the rule of law, not man; a government of laws, not men; law is reason, man is passion; law is non-discretionary, man is arbitrary will; law is objective, man is subjective."[89] Judges are mere "mouthpieces of the law." Their fidelity is to the law alone. They are unbiased, neutral, evenhanded, and devoid of nonlegal influences. Chief Justice John Marshall insisted that "[c]ourts are the mere instruments of the law, and can will nothing."[90]

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 contemporary legal culture by the spread of postmodern views that background and subjectivity inevitably color perception. A recent book by Lee Epstein and Jeffrey Segal, political scientists who have conducted leading studies of judicial decisionmaking, approvingly quotes pioneer in the field C. Herman Pritchett: "[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."[91] Judge Posner wrote a review of the Rehnquist Court's final term and asserted that "[t]he evidence of the influence of policy judgments, and hence of politics, on constitutional adjudication in the Supreme Court lies everywhere at hand."[92] While Judge Posner's statement is directed at judging on the Supreme Court, he clearly believes that most judges are influenced by their personal ideologies and other nonlegal factors when deciding cases.[93] In a comprehensive study of federal appellate judging, prominent legal

89. *Id.* at 122–26 (internal quotation marks omitted).

90. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824).

91. LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 3 (2005) (quoting C. Herman Pritchett, *Divisions of Opinion Among Justices of the U.S. Supreme Court, 1939–1941*, 35 AM. POL. SCI. REV. 890, 890 (1941)).

92. Posner, *supra* note 77, at 46.

93. *See generally* NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS (2005).

scholars flatly stated that "[n]o reasonable person seriously doubts that ideology, understood as normative commitments of various sorts, helps to explain judicial votes."[94]

This perception has also penetrated the public, exacerbated by the rampant politicization of the judicial appointment 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."[95] Yet, confirming the continuing hold of the objective judge ideal, a poll taken during the Alito hearings found that 69% of the public believes that the personal views of the Justices should not have a role in their decisions.[96]

For the sake of 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, social policy, or 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, political, or natural law principles.[97] Textualists like Justice Scalia and pragmatists like Judge Posner argue that principles approaches are plagued by controversial questions of value.[98] Although proponents of the principles approach think these questions are resolvable on some objective basis, critics insist that value choices are concealed and couched in the terminology of broader principles.[99]

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 ap-

94. Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 352 (2004).

95. Judges and the American Public's View of Them, Results of the Maxwell Poll (Oct. 2005), http://www.maxwell.syr.edu/news/maxwellpoll.pdf.

96. Poll: Americans "Undecided" on Alito, CBS News (Jan. 9, 2006), http://www.cbsnews.com/stories/2006/01/09/opinion/polls/main1192317.shtml?CMP=ILC-searchstories.

97. RONALD DWORKIN, LAW'S EMPIRE (1986).

98. SCALIA, *supra* note 79; Posner, *supra* note 77.

99. *See generally* SCALIA, *supra* note 79; Posner, *supra* note 77.

plication to novel or unanticipated circumstances involves choices, and open-ended standards and principles require judgments.[100] Moreover, even textualist judges make exceptions, which suggests that they have room to maneuver when they so desire.

So whether one is a textualist, 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, interpret Legal Realism and postmodernism to have taught that the fundamental distinction between an objective perspective and a subjective perspective is 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 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 malleable enough to provide judges the leeway to reach desired outcomes much of the time. "The 'law,' and the professional norms associated with it," according to Professor Cornell Clayton, "become mere instruments or barriers that judges must utilize strategically to advance their *a priori* political objectives."[101] The private will of the particular judge is determinative.

This threat is enhanced by the fact that, since the 1960s and 1970s, 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

100. For a development of both sides of the argument, see BREYER, *supra* note 78 and SCALIA, *supra* note 79.

101. 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., Summer 2002, at 69, 83.

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 believe are 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 dispute is a crapshoot whose outcome can be predicted only after the case is assigned and the personal predilections of the individual judge are known. Supreme Court watchers already have this mindset, routinely engaging in vote counting along political lines.[102]

A legal system shot through with subjectively influenced, willful judging would pose a dire threat to the rule of law. A more careful examination, however, reveals 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 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—were it to become pervasive among lawyers, judges, and the public—becomes a self-fulfilling prophecy that precipitates a 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, and instructing judges to render whatever decisions they think are right.

D. 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.[103] Judges arrive at decisions they subjectively prefer, then work backwards, manipulating legal rules to support these predetermined ends. In contrast, 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

102. *See* Molly McDonough, *Pitching to a New Lineup: Supreme Court Practitioners Will Aim Their Arguments at Different Justices*, ABA J. EREPORT, Feb. 7, 2006, http://www.abanet.org/journal/redesign/f3sct.html.

103. JEROME FRANK, LAW AND THE MODERN MIND (1930).

application is a purely mechanical process, and they denied formalist claims 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 because it improperly denies "the relevance of significant, predictable, social determinants that govern the course of judicial decision."[104] He added that "actual experience does reveal a significant body of predictable uniformity in the behavior of courts."[105] Cohen insisted that judicial decisions must be understood as "more than an expression of individual personality";[106] 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 class attitudes, but Cohen also insisted that "judges are craftsmen, with aesthetic ideals, concerned with the aesthetic judgments that the bar and the law schools will pass upon their awkward or skillful, harmonious or unharmonious, anomalous or satisfying, actions and theories."[107] 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 divergent 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*."[108]

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 they follow the precedents, although they may think that they ought not to have been made."[109] Realist hero Justice Holmes once said, "It has given me great pleasure

104. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 843 (1935).

105. *Id.*

106. *Id.*

107. *Id.* at 845 (citation omitted).

108. K.N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 73 (1951).

109. JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 218 (2d ed. 1921).

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."[110] It was his view that, notwithstanding the presence of discretion, judicial decisions can and should conform to the law.[111] Justice Holmes's critique of the majority in the *Lochner* case was precisely that the personal laissez-faire views of the judges were an *improper* basis for a constitutional decision: "I strongly believe," Justice 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."[112] When called upon to make decisions that turn on policy, Justice Holmes felt that the duty of the judge was to find the correct social policy, not to simply enact the judge's own policy preference.[113]

Justice Benjamin Cardozo, another favorite of the Realists, explained as follows:

> 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 despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. None the less, by that abuse of power, they violate the law.[114]

Justice 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."[115] "The judge," Justice Cardozo concluded, "even when he is free, is still not wholly free."[116]

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110. LOUIS MENAND, THE METAPHYSICAL CLUB 67 (2001) (quoting Letter from Oliver Wendell Holmes to John T. Morse (Nov. 28, 1926)).

111. *See* MORRIS R. COHEN, *Justice Holmes and the Nature of Law*, *in* LAW AND THE SOCIAL ORDER: ESSAYS IN LEGAL PHILOSOPHY 198, 213 (Archon Books 1967) (1933).

112. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

113. *See* MORTON G. WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM 208–09 (1949).

114. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 129 (1921).

115. *Id.* at 170.

116. *Id.* at 141.

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

> [T]he judge's *feelings* as to right and wrong must be logically and scientifically trained. The 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 judge as a logical automaton are apt to fall into the opposite error 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.[117]

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 an inevitable surrender. The Realists believed and advocated that judicial decisions should not be entirely the products of judges' personal views and ideologies, and they did not consider this a hopeless demand.

E. Postmodernism and Judicial Objectivity

The Realists did not, of course, have the final say on the matter. 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 legal culture and society. Postmodernism suggests that "[t]he 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."[118] 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, but two quick responses can be given that accept the basic postmodern proposition while denying its skeptical implications.[119] Judges indeed approach the law from the standpoint of their personal views. More immediately, however, they see the law through the lens of the legal tradition into which they have been indoctrinated, and

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117. MORRIS R. COHEN, *The Place of Logic in the Law*, *in* LAW AND THE SOCIAL ORDER, *supra* note 111, at 165, 182–83.

118. TARNAS, *supra* note 5, at 396.

119. *See generally* BRIAN Z. TAMANAHA, REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW (1997) [hereinafter TAMANAHA, REALISTIC SOCIO-LEGAL THEORY] (presenting a comprehensive response to postmodernism).

from within the conventions of legal practice and judging in which they participate. The totality of the legal tradition 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 utilize in any way they desire. Unacceptable interpretations that do not comport with shared understandings of legal rules simply "will not write." Judges who stretch legal rules beyond recognition risk disapproval from colleagues on a panel or an embarrassing rebuke on appellate review. These social and institutional mechanisms perpetuate and enforce 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 such a body of background views, which becomes an integrated aspect of the judge's own perspective.[120] 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 that subjective influences on perception are pervasive and not 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 view that our ideas, beliefs, and actions substantially construct social reality is built upon the causal efficacy of intentional orientations.[121] 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

120. *See generally id.* at 196–244.

121. *See generally* JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY (1995).

with different ideological views.[122] The bulk of empirical studies of judicial decisionmaking suggest that "ideological values play a less prominent role in the lower federal courts."[123] Studies of appellate court decisions have found that, while political considerations have some effect, legal doctrine appears to have an overarching influence.[124] Judges typically follow binding precedent.[125] Although Judge Posner claims that "[t]here is almost no legal outcome that a really skillful legal analyst cannot cover with a professional varnish,"[126] he admits this occurs only "*when the law is uncertain and emotions aroused.*"[127] In many cases, the law is relatively clear and the judges are not emotionally aroused. The comprehensive study by Sunstein, Schkade, and Ellman, cited earlier for the proposition that personal ideology affects judging, demonstrated ideology-correlated differences 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."[128]

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.[129] 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 lower level federal judicial appointments have become more

122. *See* Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1338 (1998); Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 246–47 (1999).

123. Donald R. Songer & Susan Haire, *Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals*, 36 AM. J. POL. SCI. 963, 964 (1992). For a review of political science studies on judicial decisionmaking up through the mid-1990s, see TAMANAHA, REALISTIC SOCIO-LEGAL THEORY, *supra* note 119, at 196–227.

124. *See* Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1462–82 (2003); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2175–76 (1998).

125. Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1496–99 (1998).

126. Posner, *supra* note 77, at 52.

127. *Id.* at 48 (emphasis added).

128. Sunstein, Schkade & Ellman, *supra* note 94, at 336.

129. *See generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

ideologically charged in the past few decades, and the decisions of lower court judges have shown an uptick in partisanship.[130]

F. 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 (the Consciously Bound judge, or 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, or 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 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 nonlegal factors. Note that these conditions accept all of the major points made by the Legal Realists as well as postmodern critics.

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.

130. *See generally* SCHERER, *supra* note 93.

Although the judges' decisions are literally identical in external form and in consequence, a strong argument can be made based upon their differing orientations that 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 requires judgment calls. Too often, however, a leap is made from these points to the conclusion that 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 decisionmaking of judges by reference to a standard that is impossible to achieve. 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.

To be sure, owing to subconscious influences on how the law is seen, the legal decisions of CBs with conservative views would differ somewhat from those of CBs with liberal views, but their legal decisions would also substantially overlap. The decisions of conservative CEOs and liberal CEOs, in contrast, would diverge markedly, with minimal overlap only when the applicable law and legal conventions allow little room to maneuver. As this contrast shows, a system comprised entirely of CBs would be rule-bound and largely predictable based upon the strength of legal considerations.

Now imagine a system filled entirely with CEOs. 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 CBs. 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 and the fundamental difference between a system populated by CBs and one populated by CEOs.

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 nonlegal 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.[131] 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 (Chief Justice William Rehnquist and Justice William Douglas in certain classes of cases had correlations above 90%),[132] it is fair to surmise that their conscious orientation is less rule-bound in comparison to their colleagues. From the standpoint of the rule of law, they can be condemned for this reason.

G. A Closer Look at a Pragmatic Judge

A pragmatic judge who focuses on outcomes is more like a CEO than a CB. "The way I approach a case as a judge," 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."[133] This is not "decisionmaking *according to* rule," which is what being rule-bound requires, but decisionmaking according to the judge's sense of what is right, all things considered, unless prohibited by the law.

This is not an abstract point. Judge Posner offered his description of judging in a debate over the legality of the Bush Administration's warrantless surveillance program to combat terrorism. Security experts and the public are sharply divided over the value, necessity, and consequences of the program. 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 position by a judge reasoning pragmatically, because the weaker argument cannot be ruled out. Under this approach, the indi-

131. *See generally id.* (presenting a collection of such studies for lower federal courts).

132. *See* TAMANAHA, REALISTIC SOCIO-LEGAL THEORY, *supra* note 119, at 196–227.

133. Richard A. Posner & Philip B. Heymann, *A TNR Online Debate: Tap Dancing*, NEW REPUBLIC ONLINE, Jan. 31, 2006, https://ssl.tnr.com/p/docsub.mhtml?i=w0601308&s=heymannposner013106.

vidual who happens to be the judge will dictate the outcome—and 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 Judge Posner's pragmatist judge, who resembles a CEO 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 CEOs, undercutting the rule-bound nature of the system.

H. 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 adhere 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 a solemn obligation to render legally bound and determined decisions. Living up to this obligation is the particular virtue of judging.

V. CONCLUSION

Taken together, the four themes covered in this Article 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 becomes 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 pursuing their own vision and interests—dominate the legal landscape, showing up in battles over judicial appointments, legislation, and administrative and executive actions. These battles leave the losers, and those excluded from the contest entirely, in the position of seeing the law as a weapon wielded against them rather than as a public product that protects the public welfare and generates an obligation of obedience. The apparent shift begun in the 1960s and 1970s 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, in turn, encourage the politicization of judicial selections, with a resultant politicization of judicial decisions.

The rule of law tradition in 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 heretofore achieved the rule of law has ever witnessed its complete demise, a fact which offers considerable 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. This is not, however, a reason to take it for granted. If the rule of law in the United States does significantly deteriorate, more so than has already occurred, the factors spelled out in this Article will have contributed.