

Real and Imagined Threats to the Rule of Law: On Brian Tamanaha's *Law As A Means To An End*.[†]

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Brian Tamanaha's *Law as a Means to an End: Threat to the Rule of Law* is a book about an allegedly dangerous transformation of legal consciousness – from a “non-instrumental” to an “instrumental” view of the law.¹ The book – which gathered rave peer reviews and was selected in 2007 for special honor by the Association of American Publishers² – borrows the first half of its title from Rudolf von Jhering's celebrated 1877 manuscript, in which Jhering advocated the view (which today may appear self-evident) that the law should be understood and interpreted as a means to the achievement of social ends.³ But what may seem obvious today was not always so: Tamanaha argues that Jhering's thesis signaled a radical change in legal consciousness, from a “non-instrumental” to an “instrumental” view of the law; and that change, he says, poses a serious threat to our Rule of Law.

What is an “instrumental” view of the law? “An instrumental view,” reads the opening paragraph of Tamanaha's book, is the belief that

law is a means to an end [A]n instrument of power to advance [people's] personal interests or the interests or policies of the individuals or groups they support. Today, law is widely viewed as an empty vessel to be filled as desired, and to be manipulated, invoked, and utilized in the furtherance of ends.⁴

[†] BRIAN TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* (2006).

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¹ BRIAN TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* (2006).

² The peer appraisals sported on the dust jacket call the book “THE important book of legal theory for this decade,” and a book with “the potential to change thinking about the law in fundamental ways”.

³ Jhering's book was published in the United States under this title in 1913. RUDOLF VON JHERING, *LAW AS A MEANS TO AN END* (Isaac Husik trans., Boston Book Co. 1913).

⁴ TAMANAHA, *supra* note 1, at 1.

Previous generations, by contrast, thought of the law differently: they believed that the content of our laws was determined by factors that were beyond our control. This idea is most evident in the theory of “natural law,” which dominated legal minds for millennia, and which maintained that human laws were determined by the very nature of our universe: “True law,” said Cicero in the first century B.C.,

is right reason in agreement with nature; it is of universal application, unchanging and everlasting It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people⁵

Thirteen centuries later, Thomas Aquinas echoed this view when he said: “[E]very human law has just so much of the nature of law as is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law.”⁶ A similar conception figured in the claims of the Eighteenth Century judges and lawyers who resisted legislative tinkering with the English common law: the common law – declared a celebrated treatise of the time – was a collection of “rules and maxims of immutable truth and justice,” a “perfection of reason” that should not be tampered with or overridden by positive legislation.⁷

But these “non-instrumental” conceptions have by and large passed from the world. We have come to reject the idea that the content of the law is somehow fixed by a divine arrangement or “incontrovertible reason” discovered by priests or jurists: we feel free to mold our law as we see fit, largely emancipated from the shackles of religious authority and tradition. Hence our “instrumental” conception of law – our belief that the law is for us to shape in the pursuit of our chosen goals and interests. As Tamanaha puts it, we see “law as a means to an

⁵ MARCUS CICERO, *THE REPUBLIC AND THE LAWS*, III, 22 (Jonathan Powell ed., Niall Rudd trans., Oxford Univ. Press, 1998).

⁶ THOMAS AQUINAS, *SUMMA THEOLOGIAE*, I-II, Q.95, A.II (Thomas Gilby ed., Cambridge Univ. Press 2006).

⁷ Jesse Root, “The Origin of Government and Laws in Connecticut,” 1 Root’s Reports (1798). This source is cited in TAMANAHA, *supra* note 1, at 14.

end.”⁸ But this view, says Tamanaha, is responsible for the “progressive deterioration of ideals fundamental to the system of law and government.”⁹

The signs of this deterioration are, for Tamanaha, everywhere: his list includes Franklin Roosevelt’s 1937 court-packing plan;¹⁰ the ensuing repudiation of the *Lochner* doctrine – the “switch in time that saved the nine” (not so much for its doctrinal substance as for what it said about constitutional adjudication);¹¹ the Warren Court, which “took as its mission to issue rulings that prompted social change” – of which *Brown v. Board of Education* (1954) is a paradigmatic example;¹² the continuing “judicial activism” of the Burger and Rehnquist Courts;¹³ and the prevalence of “cause litigation,” which turns our legal system into a vehicle for the advancement of often parochial interests.¹⁴ The instrumental conception of law, says Tamanaha, is also responsible for rife lawyer misconduct – including the big accounting, tax, and corporate scandals of the past decade¹⁵ – and is a big factor in the increasing politicization of Supreme Court appointments,¹⁶ the rising politicization of judicial election campaigns,¹⁷ and even the huge sums spent on lobbying Congress and their injurious effect on our legislative process.¹⁸

Tamanaha’s list is a long one, and while some of its items are clearly harmful (lawyers’ criminal conduct, or the excessive influence of money on our legislative process), others are not clearly so (the proliferation of cause litigation, or the Warren Court). But Tamanaha insists that

⁸ TAMANAHA, *supra* note 1, at 1.

⁹ *Id.* at 249.

¹⁰ *Id.* at 77.

¹¹ *Id.* at 80.

¹² *Id.* at 84.

¹³ *Id.* at 88, 90-91.

¹⁴ *Id.* at 156.

¹⁵ *Id.* at 146-47.

¹⁶ *Id.* at 175-76.

¹⁷ *Id.* at 185-88.

¹⁸ *Id.* at 195, 197-98.

all are manifestations of a dangerous instrumental ideology that poses a serious threat to the Rule of Law.¹⁹

To this strong thesis Tamanaha adds two qualifications: first, he is “not advocating a return to former non-instrumental understandings of law, which appears impossible”;²⁰ and second, he does not think that the damage to our Rule of Law is irreversible: instrumentalism may inflict such damage, and indeed tends to do so, but history may ultimately show we have managed to contain it – the final impact of instrumentalism is yet to be seen.²¹ These are substantial qualifications, but Tamanaha’s thesis still stands: legal consciousness underwent a profound shift from a non-instrumental to an instrumental conception of law, and that shift is threatening the Rule of Law in its manifold manifestations – from legislation, to the conduct of the professional Bar, to the decision-making of judges.

What is the nature of that threat? Tamanaha claims – in fact this is more an assumption than a claim, since Tamanaha never seeks to defend it – that the Rule of Law requires that the law aim exclusively at the “common good.” The instrumental conception of law, says Tamanaha, weakens this important principle – with the result that statutes aimed at benefiting factional but powerful interests (rather than society as a whole) are proliferating, while more and more lawyers are willing to engage in specious arguments and even in criminal fraud on their clients’ behalf. Moreover, the instrumental conception of law encourages a form of legal interpretation that shows little respect for the binding nature of legal rules, and that therefore undermines the certainty and objectivity required by the Rule of Law.

As we shall soon see, there are serious flaws in this thesis. The following analysis is divided into three sections discussing legislation, legal advocacy, and adjudication. A fourth

¹⁹ *Id.* at 249.

²⁰ *Id.* at 246.

²¹ *Id.* at 250.

section examines Tamanaha's dispute with his alleged chief ideological nemesis – Richard Posner's brand of legal pragmatism.

I

LEGISLATION

The instrumentalist conception of law, says Tamanaha, produces improper legislative outcomes.²² The “critical difference” between the non-instrumental take on legislation and the instrumental one involves “shifts in views about ‘public interest.’”²³ Thinkers as diverse as Plato, Thomas Aquinas, John Locke, and the Founding Fathers all believed that any legitimate law must aim at advancing the “common good,” rather than the interests of any narrow faction.²⁴ Indeed fears that powerful factions would control the legislative agenda were a constant theme in early American political thought, and some early American courts went so far as invalidating legislation for failing to promote “the general welfare of the people.”²⁵ By contrast, says Tamanaha, the instrumentalist conception of law snubs this important principle, with the result that legislation benefiting special interests is proliferating.²⁶

Tamanaha recognizes that insisting on the “common good” as the only proper aim of the law may have sounded more reasonable in the distant and far more homogeneous societies of Plato, John Locke, or Thomas Jefferson.²⁷ And he also concedes that even then – perhaps

²² BRIAN TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 203-04 (2006).

²³ *Id.* at 191.

²⁴ *Id.* at 200, 219-20.

²⁵ Tamanaha cites a Missouri Supreme Court decision invalidating a statute forbidding mining companies from paying their workers' salaries in coupons redeemable only in company stores, for failure “to promote the general welfare of the people.” *See State v. Loomis*, 115 Mo. 307, 316 (1893). This source is cited in TAMANAHA, *supra* note 22, at 222.

²⁶ TAMANAHA, *supra* note 22, at 203-04.

²⁷ *Id.* at 222.

especially then – the idea has often been misused: “Two centuries ago and before,” says Tamanaha, “law inured to the benefit of the powerful and was often draconian and intolerant of dissent [T]his was to some degree a result of enforced homogeneity in the socio-legal order which suppressed or eliminated contrary groups, granting them little or no recognition within the law.”²⁸

The aptness of Tamanaha’s concession is confirmed by a quick reflection on the legal status of, say, women and minorities during those periods. Indeed it is worth remembering that the U.S. Supreme Court’s *Plessy v. Ferguson*, which upheld the criminal conviction of a black man for sitting in a “whites only” train coach, explained its decision by stating that the relevant statute was “enacted in good faith for the promotion of the public good.”²⁹ That the “common good” is the only proper end of the law is a vacuous principle if those who make the law also believe, like Louis XIV, that “L’Etat – c’est moi” so that the “common good” is what’s good for them. And if the only proper object of the law is a “common good” it may become difficult to advance the legal interests of under-represented or heretical groups – and easy to trample them.

On a more philosophical level, the claim that we all share a “common good” – a Rousseauian “general will” to which we all do, or should, subscribe – has been the subject of growing skepticism from two related directions. First, some have turned skeptical as to whether there is in fact a single “common good” of which we can all speak, rather than many competing and potentially contradictory ones.³⁰ (This is not to say that *no* law serves everyone’s interests and values, only that many laws do not.) Second, even those who believe that the “common

²⁸ *Id.* at 246. *See also id.* at 5.

²⁹ *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896).

³⁰ Indeed some scholars see a clear tension between the political theory of liberalism, which reigns supreme in most Western democracies, and a robust idea of a “common good.” *See, e.g.*, MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988); ROBERT PAUL WOLFF, *THE POVERTY OF LIBERALISM* 159 (1968).

“good” remains a viable concept have become suspicious of authoritative claims as to what the “common good” entails, and have consequently come to accept the legitimacy of a wide and indeed conflicting spectrum of opinions on that matter – a spectrum we expect our laws to reflect.

Accordingly, we have developed theories of legislation – “interest group pluralism,” for example – that explain and justify legislative action in a world controlled by opposing groups advancing distinct and often contradictory interests and values (that is, in a legislative environment wholly skeptical of the very notion of the “common good”).³¹ Legislation, says “interest group pluralism,” is the outcome of the bargains and compromises struck among those representing competing groups. Legislators who advance rural interests, or pro-union interests, or retirees’ interests, bargain and compromise with fellow legislators who advance urban interests, or pro-business interests, or junior employees’ interests. These legislators do nothing wrong by seeking to advance the interests of small interest groups: this is precisely how the legislative process works in a modern pluralistic society like ours. Legislation is legitimate not because it is aimed at some elusive “common good” but because it expresses the different interests and values of the different constituencies making up the general population.³² These changed attitudes are also expressed in our changed constitutional doctrine: while earlier courts may have been in the business of invalidating legislation for catering to “special interests,”

³¹ See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956). This source is cited in TAMAHANA, *supra* note 22, at 191.

³² Surprisingly, Tamanaha describes interest group pluralism as a theory subscribing to the ideal of a “common good” and thus perfectly harmonious with his claims. See TAMAHANA, *supra* note 22, at 192. One can sympathize with Tamanaha’s wish to portray interest group pluralism as a friend rather than a foe of his thesis: the claim that interest group pluralism is incompatible with the Rule of Law may strike many as odd. But the attempt is inconsistent with Tamanaha’s own assertions: interest group pluralism manifests clear skepticism of the very idea of the “common good,” and has been described by prominent scholars advocating an emphasis on the “common good” in constitutional interpretation as diametrically opposed to their claim. See Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1507-08 (1988); Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 48-49 (1985).

today's legislative determinations of the "public welfare" receive great judicial deference.

Putting aside special constitutional protections, courts examining the constitutionality of statutes merely ask that the statute bear "a reasonable relation to a legitimate state interest"³³ – a test that accommodates a large range of potentially contradictory positions on the "common good."³⁴ Accordingly, we think there is nothing wrong, insofar as the Rule of Law is concerned, with legislation aimed at benefiting union workers, or corporations, or the homeless, or farmers, or stock owners – either because we believe there is nothing wrong with benefiting one group at a time, or because we think it legitimate to believe – even if we personally do not – that such measures benefit the "common good."

Take Tamanaha's own illustration of legislation violative of the "common good" principle – the 2003 Prescription Drug, Improvement and Modernization Act. The Act, which was passed with the active encouragement (financial and otherwise) of PhRMA – Pharmaceutical Research and Manufacturers of America, the trade association of the pharmaceutical industry – specifically prohibited the federal government from negotiating reduced prices for bulk drug purchases. For Tamanaha, this was a blunt preference of narrow corporate interests over proper Rule of Law principles: since fidelity to the Rule of Law requires that any law be "truly in the public interest," the Act's 'bulk purchases' provision was not simply bad policy or an outrageous example of inordinate corporate power, but a veritable breach of the Rule of Law.

³³ See *Washington v. Glucksberg*, 521 U.S. 702, 720-22 (1997).

³⁴ To be sure, there remains the constitutional prohibition on *illegitimate* interests; but these have little to do with failures to promote the "common good" but rather with legislative efforts to harm unpopular groups – two perfectly distinct concerns. See, e.g., *Romer v. Evans*, 517 U.S. 620, 623-24 (1996) (invalidating Colorado constitutional amendment prohibiting all legislative, executive, or judicial action designed to protect homosexuals from discrimination).

But to modern eyes the Act seems like a perfectly legitimate – if possibly wrongheaded – legislative outcome. Indeed the Act not only benefited the interests of the pharmaceutical industry (a legitimate thing in its own right), but also the interests of a group with often diametrically opposed concerns – indigent Medicare beneficiaries, whose drug benefits were widely expanded under the Act. The Act was therefore a veritable paradigm of the legislative give-and-take among competing interest groups that, for “interest group pluralism,” constitutes the heart of a legitimate legislative outcome.

There is another problem with Tamanaha’s thesis. Tamanaha may not be alone in claiming that laws must aim exclusively at the “common good,” and that the modern age has seen a weakening of this principle (although, as already mentioned, he does not defend that position);³⁵ but his claim that this has been the result of a shift from a non-instrumental to an instrumental conception of law is quite novel. Yet, why would a shift to an instrumental conception of law (that sees law as a means to an end) weaken the belief that the “common good” is the only proper end of the law? Tamanaha never says why. But in fact, the most natural reading of the relation between the two is precisely the reverse: skepticism towards the “common good” ideal seemed to have led to the shift from a non-instrumental to an instrumental conception of law. When belief in social and moral universal truths collapsed, casting doubt on the notion of an authoritative “common good,” it became impossible to hold on to the view that the law was an immutable embodiment of divine justice. (Natural law theory – the paradigmatic non-instrumental conception of law – began to die when belief in universal moral truths collapsed.³⁶) The next obvious step would be to view the law as a means to ever-changing ends.

³⁵ See *supra* note 32.

³⁶ Natural law theory may still have its academic defenders (mostly found in Catholic institutions); but the theory has been by and large repudiated, by both contemporary scholars and courts, as an acceptable mode of legal interpretation. The U.S. Supreme Court, to give but one example, has on various occasions explicitly distanced

Thus, Tamanaha's alleged threat to the Rule of Law – i.e., the decline in the legal ideal of the “common good” – lies deeper than, and prior to, any shift in legal consciousness – in the shift to the spirit of modernity itself;³⁷ which means, in turn, that Tamanaha's quarrel is not with this or that conception of law but with a cultural and intellectual development much broader and deeper in scope. But this leaves Tamanaha's essential thesis (that an instrumental conception of law poses a threat to the Rule of Law) entirely out of the picture: the non-instrumental view is not a threat to our Rule of Law but, instead, an independent consequence of that threat.

II

LAWYERS

Tamanaha dedicates several chapters to the criticism of instrumentalism among practicing lawyers. As with legislators, one feels bound to ask: what does a “non-instrumental” lawyer look like? Aren't lawyers “instrumental” by definition? As Tamanaha himself notes, the ABA's Model Code of Professional Responsibility practically defines a lawyer's role in terms of fidelity to clients' interests; and the free market in legal services makes that same point even more effectively (by making lawyers' income depend on their success in serving those interests).³⁸ So how can a lawyer obligated to the zealous representation of her client's interests – whose livelihood comes from that client – *not* approach the law as “an instrument ... to

itself from natural law theory, and the accusation of dabbling in natural law is treated as a serious charge by the justices. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 734, 758 (1999); *Alden v. Maine*, 527 U.S. 706, 763-64 (1999) (Souter, J, dissenting); *Adamson v. California*, 332 U.S. 46, 69-70 (1947) (Black, J., dissenting).

³⁷ Tamanaha appears to recognize that point, see TAMANAHA, *supra* note 22, at 222-23, but makes little effort to reconcile it with his thesis.

³⁸ BRIAN TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 133 (2006).

advance [her client's] interests or the interests or policies of the individuals or groups they support"? What could a "non-instrumental" lawyer's perspective of the law be?

Tamanaha's answer, as in the case of legislation, has to do with the idea of the "common good." "Non-instrumental" lawyers, says Tamanaha, recognize the "dualistic ideal of the legal profession," which has always been concerned with both "the client's interests and the public good."³⁹

Law is essential to social order and justice: it requires specialized knowledge that only lawyers possess; the public needs lawyers to facilitate their intercourse with one another, and to protect them from harm by others and from government; lawyers have a special role in the state as guardians of the legal order.⁴⁰

A "non-instrumental" lawyer is a lawyer fully cognizant of her public role and the duties attached to it.

Tamanaha believes that this vision, and its attendant ethical obligations, is being torn to pieces by the "instrumental" conception of law: whereas the "version of the lawyer ideal as promoter of the common good once had salience within the legal profession," today "many would disavow it as improper."⁴¹ The result, he says are

manifold indications that the legal profession today is in a dire state.... [There are] [r]ampant fraudulent billing practices in law firms.... Lawyers were key facilitators in the massive corporate frauds that transpired in Enron, and in other corporate scandals. Lawyers ... created and marketed illegal tax shelters. Lawyers at the respected Department of Justice's Office of Legal Counsel wrote the infamous 'torture memo,' twisting applicable law in an effort to authorize torture.⁴²

Tamanaha is also harshly critical of "cause litigation," which "involves lawyers instigating legal actions to obtain decisions that further the particular agenda they support."⁴³

Lawyers at the Sierra Club Legal Defense Fund, Ralph Nader's consumer advocacy litigation

³⁹ *Id.* At 138.

⁴⁰ *Id.* at 140.

⁴¹ *Id.* at 249.

⁴² *Id.* at 134.

⁴³ *Id.* at 156.

group, the Children's Defense Fund, or Pat Robertson's American Center for Law and Justice all manifest the corrupting influence of an instrumental conception of law free from the ethical constraints that lawyers owe to the public.⁴⁴ These litigation groups, says Tamanaha, threaten "to debase the notion of 'public interest'" since they "convey the impression that 'public interest' is whatever any particular group says it is."⁴⁵

There is a certain ambiguity in Tamanaha's articulation of lawyers' ethical obligations: does he think that lawyers, being "'officers of the court' or 'handmaidens of the law,'"⁴⁶ owe a duty of fidelity to the law, *whatever the law says*; or does he think that they owe a duty to the "common good" (or the "public interest"), no matter what the law says? If the latter, Tamanaha's complaint runs into the same difficulties that his complaint against legislators did: we have become skeptical of the very idea of the "common good," or, alternatively, have come to accept the legitimacy of a wide range of opinions regarding what the "common good" entails. We thus believe that our laws may legitimately advance, and lawyers may legitimately represent, what Tamanaha perceives as merely factional interests.

Indeed, in such a cultural setting it seems natural that rules of professional conduct give priority to lawyers' duties to their clients' interests over their own ethical beliefs. (Even the rule in the ABA's *Model Rules of Professional Conduct* that allows a lawyer to refuse appointment by a tribunal for representation she finds "repugnant" does so only where "the client or the cause is so repugnant to the lawyer as to be *likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.*"⁴⁷) The operating principle here is not that lawyers do

⁴⁴ *Id.* at 160.

⁴⁵ *Id.* at 170.

⁴⁶ *Id.* at 139.

⁴⁷ MODEL RULES OF PROF'L CONDUCT (2004) (emphasis added). The entire rule reads as follows:

Rule 6.2 Accepting Appointments

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

not owe a duty to the “public interest,” but rather that unpopular or even ostracized views of the “public interest” have a right to be heard. A professional bar protective of the “common good” may easily shut out of the legal system a variety of voices that should receive effective representation. This is especially true where, as in the case of the legal profession, members of the professional bar are primarily drawn from a socio-economic elite. Lawyers’ fidelity to their clients’ interests – rather than to their own opinions of where society’s interests lie – is an expression of the wish to open the legal system to a variety of interests and opinions. Sure enough, not all opinions or interests are legitimate, but which are and which aren’t should be decided only *after* effective representation has been rendered – not before. Today’s lawyers may be less committed to the idea of a “common good” not because they are indoctrinated into an instrumental view of the law (as we saw above, that description has things backward), but because they live in openly pluralistic societies.

On the other hand, if Tamanaha’s claim is that lawyers owe a duty not to the “common good” but to *the law*, whatever it says, and that instrumentalism undermines that duty, then his thesis runs into a different, and a more interesting, problem – indeed a problem that afflicts much jurisprudential writing. The question here becomes: why would an instrumental conception of law produce more lawyers presumably willing to distort the law and advance specious legal arguments, and more lawyers willing to transgress the law and collude in criminal fraud? Tamanaha’s answer, as I understand it, is essentially this: if the law is viewed not as an immutable essence of reason and justice but as mere means to the fulfillment of manifold

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- (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
 - (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
 - (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

interests and ends, then legal requirements become uncertain and easily manipulable. And the more uncertain and manipulable legal requirements become, the more uncertain and manipulable becomes the line between honest lawyering and criminal or unscrupulous conduct – with the result that more and more lawyers find themselves on the wrong side of the divide. Indeed Tamanaha goes so far as to contrast an attitude that “treats legal rules and processes in an unreservedly instrumental manner” with one that “accepts that law has binding content...that must be respected.”⁴⁸ “In the practice of law,” says Tamanaha, “there are [sic] a range of attitudes that shade from seeing the law as a set of binding dictates to be complied with to seeing law as a toll to be manipulated to achieve ends.”⁴⁹ (Legal education, he adds, actually instructs students to “ignore the binding quality of law” by teaching them “to see both sides of a case” and argue accordingly: “Law is all about making arguments, is the message, and there is always some argument to be made.”⁵⁰) Since an instrumental conception of law simply fails to respect the *binding quality of the law*, it is no surprise that it results in lawyers recommending illegal tax schemes, colluding in unlawful corporate transactions, and writing memos sanctioning torture.⁵¹

But why would an “instrumental” conception of law, as compared with a “non-instrumental” one, entail a less-certain and indeed a less-binding law? The answer has to do with Tamanaha’s understanding of legal interpretation – the way in which lawyers and judges go about determining what the law requires in particular cases.

⁴⁸TAMANAHA, *supra* note 38, at 145.

⁴⁹ *Id.* at 148.

⁵⁰ *Id.* at 145-46.

⁵¹ *See id.* at 134.

III JUDGES

Tamanaha believes that if the law is perceived as a means to an end, as a mere tool for obtaining certain desirable results, then lawyers and judges consider these ends of paramount importance when making legal determinations or deciding cases; and that, says Tamanaha, is in tension with the very idea of a binding Rule of Law:

Proponents of an instrumental approach to law ... have urged that judges ... strive to achieve legislative purposes.... Sensible as this might be, this approach has detrimental consequences for the rule-bound nature of the system.... The fundamental tension between following rules and striving for purposes or ends cannot be eradicated because it strikes at the very meaning of a legal rule.... What makes a rule a “rule” is that it specifies in general terms in advance a mandate that decision-makers must follow to the exclusion of – screening out – any other considerations. This is so without regard to the purpose behind the rule or the consequences of the [sic] applying the rule.⁵²

The Rule of Law, says Tamanaha, quoting Friedrich Hayek, means that the government “is bound by rules fixed and announced before-hand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances.”⁵³ Taking into consideration the purposes behind legal rules conflicts with this ideal. He explains:

[T]here is no doubt that the task of achieving purposes or ends – which requires a judge to grapple with hard issues of value and social policy, and to determine likely future consequences – is more complicated, far more uncertain, and far less ascertainable than strictly applying legal rules to an existing situation.⁵⁴

⁵² *Id.* at 228.

⁵³ *Id.* at 227 (citing FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 80 (Univ. of Chicago Press 1994)).

⁵⁴ BRIAN TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 229 (2006).

Thus if law is viewed as a means to an end, legal practitioners tend to be guided by purposes and ends when they apply the law, and that emphasis injects into legal decision-making an element of uncertainty and, indeed, manipulability, that is incompatible with our ideal of the Rule of Law.

Now the problem with Tamanaha's thesis is that taking the purposes of legal rules into consideration when deciding cases is not an option for judges or lawyers: like it or not, it is the heart of legal interpretation. Indeed this was the lesson of the most famous debate in modern legal theory – the celebrated 1958 Hart-Fuller debate, which ended with such a decisive knockout in favor of Lon Fuller that legal positivism (represented by Hart) soon withdrew all its claims regarding legal interpretation.⁵⁵

In this famous exchange, Hart prefaced his attack on Fuller by stating that “No one has done more than Professor Lon Fuller” to advance the view that the application of legal rules revolves around “implementing [their] ‘purpose’.”⁵⁶ Hart then proposed a major qualification to Fuller's thesis.

Fuller's position (that the application of legal rules revolves around implementing their purpose), said Hart, does not apply to those rules “the meanings of which are clear and excite no debate,” but only to those where, given a particular factual scenario, “doubts are initially felt and arguments develop about their meaning.”⁵⁷ Only in these latter cases, said Hart, do judges consult the purposes of legal rules in resolving legal disputes. Hart gave an example: imagine, he said, a legal rule forbidding taking “vehicles” into a public park. “[T]he general words we use – like ‘vehicle’ in the case I consider – must have some standard instance in which no doubts are

⁵⁵ Some contemporary scholars identified as legal positivists do write on the topic of legal interpretation, but these writings have little to do with legal positivism's essential claim – namely, that the legal validity of a rule is in principle distinct from its morality. *But see, e.g.,* Jules Coleman, *Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence*, 27 OXFORD J. LEGAL STUD. 581 (2007).

⁵⁶ H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 627 (1958).

⁵⁷ *Id.* at 627.

felt about its application.”⁵⁸ One such standard instance is an “automobile”: an “automobile” is an instance to which the term “vehicles” clearly applies. Now since automobiles are clearly vehicles, the legal rule in question “[p]lainly...forbids an automobile” from entering the park, and a judge faced with the case of an automobile need not engage in conjectures regarding the purpose of the rule when applying it.⁵⁹ The situation, said Hart, is quite different in the case of bicycles or roller-skates, which are not clearly “vehicles” but instead constitute “a penumbra of debatable cases in which [the term ‘vehicle’ is] neither obviously applicable nor obviously ruled out.”⁶⁰ In such cases, the judge must decide whether the term “vehicles” should or should not be read to include bicycles or roller-skates, and that decision may very well call for a consideration of the rule’s purpose (did the rule seek to promote children’s safety? Prevent pollution? Secure tranquility?). But, to repeat, the consideration of these purposes becomes necessary only in borderline cases, where the applicability of a term is in doubt, and not in those cases where there is no doubt as to whether the case falls within or without the relevant classification.

Fuller’s response to Hart made it amply clear that judges and lawyers are *always* guided by the purposes of rules in deciding cases, whether the case falls clearly within the “core of settled meaning” of a rule’s text or not.⁶¹ Take Hart’s example, said Fuller, of a legal rule forbidding bringing “vehicles” into a public park.⁶² Now imagine that “some local patriots wanted to mount on a pedestal in the park a truck [in perfect working condition] used in World War II, while other citizens, regarding the proposed memorial as an eye-sore, support their stand by the ‘no vehicles’ rule.”⁶³ That latter position would fail in a court of law, despite the fact that

⁵⁸ *Id.* at 607.

⁵⁹ *Id.* at 607.

⁶⁰ *Id.* at 607.

⁶¹ Lon Fuller, *Positivism and Fidelity to Law - A Reply to Professor Hart*, 71 HARV. L. REV. 630, 663 (1958).

⁶² *Id.*

⁶³ *Id.*

“trucks” clearly fall within the “core meaning” of the term “vehicles.” The legal resolution of the case does not revolve around that “core meaning,” but around the rule’s purpose.

Mark Twain famously said that few things were harder to put up with than a good example. Hart must have felt the full force of this aphorism: Fuller’s example struck right at the heart of his textualist thesis. As it came out, Hart chose to ignore this short but devastating critique, proceeding to publish his theory essentially unchanged in the much-celebrated *The Concept of Law* (1961).⁶⁴ But some of Hart’s most prominent successors ultimately felt obliged to respond. To insist on Hart’s textualist thesis did not seem promising: the claim that a legal rule forbidding vehicles from entering a park also forbids the erection of a Second World War truck monument appears preposterous. Not only does it conflict with the intuition of both legal professionals and laymen, it also appears to conflict with too much judicial practice. The positivists’ solution was to take the practical bite out of their theory while insisting on its theoretical purity: they continued to assert that the law requires simply what its literal text requires, but qualified that statement by saying that *adjudication* involves much more than merely following the law.⁶⁵ Judges, said the positivists, habitually and legitimately take into account non-legal considerations – including the purposes of legal rules – when they decide cases.⁶⁶ The business of adjudication is not limited, strictly speaking, to applying the law: while

⁶⁴ H.L.A. HART, *THE CONCEPT OF LAW* (1961).

⁶⁵ For some prominent positivists articulating this position see MATTHEW H. KRAMER, *IN DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMINGS* 149-150 (Oxford Univ. Press 1999); ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* 105 (2005); John Gardner, *Legal positivism: 5 ½ Myths*, 46 *AM. J. JURIS.* 199, 211-214 (2001); Leslie Green, *Philosophy and Law: The Concept of Law Revisited*, 94 *MICH. L. REV.* 1687, 1712 (1996); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 *TEX. L. REV.* 267, 303 n.158 (1997); Joseph Raz, *Dworkin: A New Link in the Chain*, 74 *CAL. L. REV.* 1103, 1107 (1986).; Joseph Raz, *Legal Principles and the Limits of Law*, 81 *YALE L.J.* 823, 843 (1972); Frederick Schauer, *Positivism as Pariah*, in *THE AUTONOMY OF LAW* 31 (Robert P. George ed., 1996);

⁶⁶ Some positivists seek to distance themselves from Hart’s explicit textualism, though they remain committed to principles whose practical implications boil down to textualism. Joseph Raz, for example, insists that proper legal interpretation “requires one to understand the legislation as meaning what the legislator said”; and “What the legislator said is what his words mean, given the circumstances of the promulgation of the legislation, and the conventions of interpretation prevailing at the time.” Joseph Raz, *Intention in Interpretation*, in *THE AUTONOMY OF*

the law looms large in judicial determinations, it is by no means the only factor. In other words, legal positivism, which deals with the question of how to establish what the law requires – declared the legal positivists – has little to say about how legal decisions are reached in actual cases (since, to repeat, these decisions are not limited by what the law requires). In this way the positivists, seeking to defend their theory, retracted its implications to legal interpretation – and in the process made their theory an irrelevant academic peculiarity.

As for Tamanaha, his thesis is based on this by-and-large abandoned Hartian theory of legal interpretation. Tamanaha contrasts a “textualist” theory of legal interpretation with a “purpose-oriented” one (which he identifies with instrumentalism⁶⁷).⁶⁸ And he then claims that, unlike the purpose-oriented theory, the “textualist” theory actually respects the “bindingness” of legal rules (“a rule’s ... rigidity,” writes Tamanaha, “derives from the language of the rule’s formulation,” and “what makes a rule a ‘rule’ is that it specifies in general terms in advance a mandate that decision-makers must follow to the exclusion of – screening out – any other considerations”).⁶⁹

Tamanaha adds that the choice between following legal rules and effecting their purposes is a “perennial one,” a choice that judges always had to face and presumably always will (so that judges who decide to go with a rule’s purposes rather than its text may not necessarily violate

LAW 249, 271 (Robert P. George ed., 1999). One may wonder what “conventions of interpretation” other than textualism (which would clearly qualify) might satisfy such a thesis. John Gardner of Oxford University, elaborating on Raz’s thesis, thinks that the possibilities are endless: “So long as one can work out more or less how the relevant others will read what one says or does, one can also adapt what one says or does to anticipate their readings. If one can work out that the relevant others are perverse types who will always read ‘cat’ to mean ‘dog,’ one can make the dog-regulating laws one means to make by passing a Cat Regulation Act. By this feedback route, one has the power intentionally to determine what law one makes even though the norm for interpreting that law... gives one’s text a quirky meaning (i.e. is not textualist).” John Gardner, *Legal Positivism: 5 1/2 Myths*, 46 AM. J. JURIS. 199, 219 (2001). So “perverse positivists” need not be textualist; but, so far as I can tell, textualism is the only practical alternative for reasonable ones.

⁶⁷TAMANAHA, *supra* note 39, at 228 (“Proponents of an instrumental approach to law...have urged that judges...strive to achieve legislative purposes”).

⁶⁸*Id.* at 235.

⁶⁹*Id.* at 228 (citing FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE BASED DECISION MAKING IN LAW AND LIFE* (1991)).

their judicial duties).⁷⁰ Indeed he suggests that judges properly opt to respect a rule's purpose at its language's expense in those cases where the text calls for an outcome that is "absolutely absurd or impossibly outrageous (a high threshold rarely met)."⁷¹ (A similar concession is made by almost all advocates of textualism.⁷²) But he seems to think that, under the influence of the non-instrumental view of the law, the pendulum has swung too far in the direction of purposes: whereas in the past it was understood that "rules control, unless the outcome is absolutely absurd or impossibly outrageous (a high threshold rarely met)," today purposes are allowed to win over clear textual dictates in too many cases.⁷³

All this implies that Tamanaha did not internalize the lessons of the Hart-Fuller debate. Fuller demonstrated that Hart's juxtaposition of a textualist form of legal interpretation against legal interpretation guided by the purposes of legal rules is false: considering the purposes of rules in deciding cases is not, as Hart thought, a supplementary method of legal interpretation employed only where textual dictates are unclear – or, as Tamanaha conceives of it, an interpretive theory competing with textualism; rather, it is a necessary part (be it explicit or implicit) of *any* proper application of a legal rule – whether the resolution comports with the text or doesn't. And Tamanaha is flat wrong in thinking that texts are properly ignored only where the *results* they dictate are "absolutely absurd or impossibly outrageous." There is nothing "absolutely absurd or impossibly outrageous" about prohibiting the placement of a W.W.II truck as a monument in the park; what makes the claim that the "no vehicles" rule forbids the erection of a truck monument so "absurd and outrageous" is the claim's total mismatch with the rule's

⁷⁰ *Id.* at 233.

⁷¹ *Id.*

⁷² See, e.g., *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in the judgment). See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 115 (2001) ("In narrow circumstances, textualists are willing to apply something other than the most natural meaning of a statute if necessary to avoid 'a patent absurdity.'").

⁷³ TAMANAHA, *supra* note 54, at 233.

purpose. It is only when one stops to contemplate the purpose of the “no vehicles in the park” rule that following its textual dictates becomes absurd.

It is somewhat discouraging that the thrust of jurisprudence’s most famous debate goes so unheeded. But Tamanaha is certainly not alone. In the recent two decades, textualism has been enjoying something of a renaissance among American judges and scholars;⁷⁴ and while Hart’s immediate successors felt obligated to respond to Fuller (and indeed ended up retracting their theory in doing so), these new textualists appear blissfully oblivious to Fuller’s argument. Indeed at times they seem completely unaware of the very nature of his claim. John F. Manning, a textualist teaching at Harvard Law School, has published an article in which he cites to Fuller’s discussion of Hart’s “no vehicles in the park example” in support of his claim that “a statute barring ‘vehicles’ from the [] park would apply to ambulances, even though one might reasonably suppose that the statute’s purpose was to address routine traffic, rather than a sporadic, life-saving occurrence.”⁷⁵ Fuller must be doing somersaults in his grave.

To sum up, Tamanaha’s thesis assumes a method of legal interpretation that disregards rules’ purposes when applying them, and therefore a method that never governed actual judicial practice – as the positivists, who floated such a thesis in the 1950’s, have realized long ago. Taking the purposes of legal rules into account when applying them, often to the effect of ignoring textual dictates, is what judges do and always did, be they operating under the influence of a “non-instrumental” or an “instrumental” view of the law. Indeed privileging “legislative intent” over clear textual dictates has been shown to be common judicial practice at least as far

⁷⁴ See, e.g., Justice Scalia of the Supreme Court, Judge Easterbrook of the Eighth Circuit, or the Michigan Supreme Court, whose textualist opinions have reached new heights of absurdity – indeed explicitly disavowing the “absurdity doctrine.”

⁷⁵ John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 134 n.51 (2001).

back as the Fourteenth Century – that is, when the non-instrumental conception of law stood unchallenged.⁷⁶

As a matter of fact, Tamanaha’s entire association of a “non-instrumental” conception of law (which regards the content of law as fixed by forces beyond immediate human control) with a method of legal interpretation that disregards rules’ purposes when applying them, is way too quick. After all, natural law theory (the paradigmatic non-instrumental conception) was deeply preoccupied with what it saw as the law’s purposes (principally justice and virtue) – only it thought, unlike the instrumental conception, that those purposes descended from heaven.⁷⁷ Quite simply, Tamanaha presents a false dichotomy when he contrasts a conception of law that regards the content of law as “given or predetermined” and “not entirely subjected to our individual or group whims or will” with one that regards law as a “means to an end.”

IV

LEGAL PRAGMATISM

Having argued that Tamanaha’s thesis is misconceived, it should be interesting to examine Tamanaha’s principal nemesis – Richard Posner’s brand of legal pragmatism, which, for Tamanaha, stands as the definitive instrumental theory threatening our Rule of Law.⁷⁸ As we

⁷⁶ See THEODORE F.T. PLUCKNETT, STATUTES AND THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY 57-65, 72-81 (1980); Thomas Lund, *Activist Judges of the Early Fourteenth Century*, 2007 Utah Law Review 469 (2007).

⁷⁷ See JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 232 (1998) (explaining that according to Thomas Aquinas “[t]he proper function of the state's law and government is...to maintain peace and justice in interpersonal relationships”). See also JOHN FINNIS, ABORTION, NATURAL LAW AND PUBLIC REASON, IN NATURAL LAW AND PUBLIC REASON 77 (Robert P. George & Christopher Wolfe eds., 2000) (“[M]any texts, in many parts of Aquinas' work...say that law and state have amongst their essential purposes and characteristics the inculcation of virtue.”).

⁷⁸ BRIAN TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW (2006).

shall soon see, Posner's theory is in fact no different than Tamanaha's: the two subscribe to practically identical understandings of law and legal interpretation.

Posner's thesis is that judges should decide cases *pragmatically*.⁷⁹ What does he mean by that? "A pragmatic judge," says Posner, "will be guided in his decision-making process by the goal of making the choice that will produce the best results. To do this the judge will have to do more than consult cases, statutes, regulations, constitutions, legal treatises, and other orthodox legal materials" – which the pragmatist judge regards "as [only] limited constraints on his freedom of decision."⁸⁰ The pragmatist judge will go beyond these "orthodox legal materials" to consider, *inter alia*, rules' purposes, social policies, and possible consequences.⁸¹ Posner also asserts that "there isn't too much more to say to the pragmatic judge than make the most reasonable decision you can, all things considered."⁸²

This may sound very different than Tamanaha's preferred method of legal interpretation; but one must remember that Posner is a polemicist, and his points are often made in a hyperbolic style that may not stand up to close scrutiny. In fact, Posner's own clarifications and qualifications to the statements above place him firmly within Tamanaha's camp. "A good pragmatic judge," elaborates Posner, "will try to weigh the good consequences of steady adherence to the rule-of-law virtues, which tug in favor of standing pat, against the bad consequences of failing to innovate when faced with disputes that the canonical texts and precedents are not well adopted to resolve."⁸³ He continues:

A systemic value that requires particular emphasis is the importance of preserving language as an effective medium of communication. If judges did not generally

⁷⁹ Posner believes that pragmatic judicial decisionmaking is both how American judges *in fact* operate and how they *should* operate. See, e.g. RICHARD POSNER, LAW, PRAGMATISM, AND DEMOCRACY 57-85 (2003).

⁸⁰ RICHARD POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 242, 248-49 (1999).

⁸¹ RICHARD POSNER, LAW, PRAGMATISM, AND DEMOCRACY 67 (2003).

⁸² See *id.* at 62.

⁸³ *Id.* at 63-64.

interpret...statutes in accordance with the ordinary meaning of the sentences appearing in those texts, certainty of legal obligation would be seriously undermined. For judges in the run-of-the-mill ... cases to subordinate this consideration to a weighing of case-specific consequences would therefore be unpragmatic⁸⁴

More specifically, “When the consequences are not catastrophic or absurd, it is usually sensible to go with the plain meaning of a statute or contract in order to protect expectations and preserve ordinary language as an effective medium of legal communication.”⁸⁵ Indeed, although judges should strive to achieve the best results, “only in the extreme case would a judge be justified in disregarding the legislative judgment [as to what these best results are].”⁸⁶

In short, Posner’s pragmatism is nothing more than a melodramatic rejection of strict textualism: all that Posner says, in his characteristically provocative manner, is that judges (and lawyers) do not and should not consider themselves *strictly* bound by the texts of legal rules, and that they do and should consult purposes, consequences, and all other relevant considerations when making legal determinations. But Posner clearly believes that, usually speaking, judges do and should play down these considerations and instead decide cases by relying solely on the text.

There is nothing in these propositions that Tamanaha should find hard to accept. As we saw above, like Posner, Tamanaha believes that the potential opposition between following the text of legal rules and giving priority to purposes or consequences is a “perennial” problem for judges; and, like Posner, he also believes that the text must ordinarily win *unless* legal rules call for “absolutely absurd or impossibly outrageous” results.⁸⁷

⁸⁴ *Id.* at 62.

⁸⁵ *Id.* at 82.

⁸⁶ *Id.* at 71.

⁸⁷ TAMANAHA, *supra* note 79, at 233.

So where is the alleged dispute between Tamanaha and Posner? It seems to be located in what Tamanaha himself calls a “slight shift in orientation.”⁸⁸ Tamanaha explains:

Judges formerly were explicitly oriented toward strictly following the law, but they were never completely blind to ends. With the rise of instrumentalism [Posner’s included], judges are encouraged to strive to achieve purposes or ends, while paying attention to the legal rules. Both orientations consider rules and ends. The former approach makes it clear, however, that the rules control, unless the outcome is absolutely absurd or impossibly outrageous (a high threshold rarely met). The latter approach makes consideration of ends a routine matter, and thus always a threat to affect the application of the legal rules.⁸⁹

Now it is true that Posner makes the contemplation of non-textual considerations “a routine matter,” and yet Posner also believes that legal interpretation ordinarily follows authoritative texts. Moreover, Tamanaha, although he believes that legal interpretation should follow authoritative texts, also believes that it should not do so in extraordinary cases – which means that non-textual considerations need be examined in order to establish whether the case at hand is extraordinary. The disagreement between the two is slight indeed: at most, it is a dispute about the relative importance of going beyond textual requirements. For Tamanaha it is rarely necessary and a potential threat to our cherished values, while for Posner it is also rarely necessary but the only practical way with which to make legal decisions. This is certainly no major theoretical disagreement.

One more fundamental assumption unites Posner and Tamanaha: both believe that textual constraints are the only real constraints on judicial discretion; in their absence there is only naked judicial power that is no different than the power of legislators. For Tamanaha, as we saw, adjudication that is not text-bound is uncertain, unascertainable, and a threat to the Rule of Law.⁹⁰ Posner agrees. Explaining the workings of pragmatic adjudication, he says: “There is no

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 229.

algorithm for striking the right balance between rule-of-law” (which, as we saw, Posner identifies with textualism) “and case-specific consequences. . .” – which is why, he adds, “there isn’t too much more to say to the would-be pragmatic judge than make the most reasonable decision you can, all things considered.”⁹¹ Thus Posner thinks that “judges make up much of the law that they are purporting to be merely applying,” and that “while the judiciary is institutionally and procedurally distinct from the other branches of government, it shares lawmaking power with the legislative branch.”⁹² Posner also readily concedes that “Pragmatism may tend to dissolve law into policy analysis,”⁹³ and he thinks that

there is no intrinsic or fundamental difference between how a judge approaches a legal problem and how a businessman approaches a problem of production or marketing... the list of considerations proper for judges to take into account in making decisions is not completely open-ended; but the same is true for businessmen. The same is true, for that matter, for politicians...⁹⁴

Both Tamanaha and Posner believe that when it comes down to limiting judicial discretion, in a way that prevents judges from acting as legislators and that respects the Rule of Law, only textualist adjudication can provide the goods: everything else boils down to judicial legislation – to the continuation of politics by other means.

The problem with this view – and also the *real* (rather than the imagined) problem with Posner’s pragmatism – is that it stops just where serious legal theory begins. Posner rightly rejects strict textualism (very few people don’t), but he wrongly believes that non-textualist legal interpretation conflicts with the values of the Rule of Law, and that its decision-making process is no different than that of politicians or business executives. In truth, legal interpretation

⁹¹ POSNER, *supra* note 81, at 64.

⁹² *Id.* at 61.

⁹³ *Id.* at 63.

⁹⁴ *Id.* at 73.

employs a methodology of reasoned and principled decision-making that greatly limits the sort of considerations that legal interpreters use.

Here is a small example, taken from constitutional adjudication – that is, from the area where legal interpretation is presumably the closest to political decision-making. As we shall soon see, the differences between the two are enormous.

In 1977, the members of a Neo-Nazi group sought to march through the Chicago suburb of Skokie. More than half of Skokie's 70,000 residents were Jewish, and many were survivors, or family members of victims and survivors, of Hitler's death camps.⁹⁵ The city sought to ban the Nazi march, passing some ordinances to that effect, and the matter ultimately landed in a federal district court.⁹⁶ Despite a clear declaration that the ideas sought to be propagated were “completely unacceptable to civilized society,”⁹⁷ the court refused to allow the City to prohibit the march, finding that the ordinances – including one prohibiting the “dissemination of any materials...which promotes and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so” – were unconstitutional under the First Amendment.⁹⁸ The decision was affirmed by the 7th Circuit – the very court on which Posner sits today.⁹⁹

The case is a neat demonstration of the profound differences between the decision-making of politicians or business leaders and that of judges. Simply put, the court decided as it did because it could identify no proper *legal* consideration that could justify a contrary result. Unlike the considerations of politicians or business executives, legal considerations – the reasons

⁹⁵ Between 5,000 and 7,000 of Skokie's residents were survivors of the Nazi death camps. See 2 JOEL FEINBERG, *Offense to Others*, in *THE MORAL LIMITS OF THE CRIMINAL LAW* 86 (Oxford Univ. Press 1988).

⁹⁶ *Collin v. Smith*, 447 F. Supp. 676 (D. Ill. 1978), *aff'd*, 578 F.2d 1197 (7th Cir. 1978).

⁹⁷ *Id.* at 687.

⁹⁸ *Id.* at 686-87.

⁹⁹ *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

for which a case is resolved as it is – need be principled, publically articulated, sufficiently concrete so as to explain their resolution, consistently applied, and they must respect the purpose of the applicable legal rule.

Legal interpretation must settle on the considerations it deems dispositive. Cases which are identical in all relevant respects cannot be resolved differently using different considerations: a legal interpreter may not decide in one case that speech deemed harmful and false should nevertheless be protected by the First Amendment, and then, in another case, deny First Amendment protection to speech because it is deemed harmful and false. To be sure, legal interpreters may, and do, change course: a court may decide that, despite earlier decisions to the contrary, harmfulness and falseness do remove First Amendment protections. But such reversals must be done consciously, explicitly, and with the recognition that the reversal is, in principle, applicable to all – past, present, and future – similar cases.

Thus, if the court were to find the Nazi march unprotected by the First Amendment, it had either to articulate a principle distinguishing Nazi speech from, say, speech advocating communism in the 1920's or civil rights in the 1950's – both forms of speech that, under similar circumstances, would be protected under standing precedent;¹⁰⁰ or else announce a change of direction (assuming institutional competence to do so).

If the court opted to distinguish the case (rather than wholly revise standing doctrine), its distinguishing principle had to comply with certain criteria. First, the principle could not be excessively vague: since it accepted the authority of the precedents and did not seek to replace them (even as it limited their reach), its qualification to those precedents could not threaten to sweep their holdings within its ambit. (For example, it would not do to try and distinguish Nazi

¹⁰⁰ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (the mere advocacy of ideas - including those calling for unlawful action - is protected under the First Amendment in the absence of incitement for, or production of, imminent lawless action).

speech as “particularly reprehensible.”) The principle also had to harmonize with the First Amendment – the constitutional provision it purported to elaborate. That Amendment embodies a policy decision which must not be contradicted by the principles governing its application. For example, the claim that Nazi speech should not be protected by the First Amendment because it is “deemed dangerous by the government” would fly in the face of the very purpose of the First Amendment, and therefore would not be a viable distinguishing principle.

So in order to allow the banning of Skokie’s Nazi march the judges had to find that civil rights marchers in Alabama in 1950 could also be banned; or else they had to articulate a general principle distinguishing such protected speech from Nazi speech with sufficient clarity so as to leave the former reasonably protected, while also respecting the policy decision embodied in the First Amendment. This apparently they could not do.¹⁰¹ Instead, the court held its nose and struck down the ordinance, giving the go-ahead to a march by vicious and detestable provocateurs. What politician or business executive would have reached a similar decision (unless, that is, she thinks like a constitutional lawyer)? Skokie’s politicians and business leaders certainly didn’t: they voted overwhelmingly to ban the march. This is unsurprising, since none of the constraints delineated above applies to the decision-making of politicians and business executives. First, politicians and business executives need not make principled decisions: they may decide matters without grounding them in any general principle. (Banning a neo-Nazi march would be a rather simple decision in that case.) The decisions of politicians and business executives, even if principled, need not be equally applicable to all similar cases: they may decide, for example, that falseness is sufficient ground for banning Nazi propaganda but not for banning Creationism (politicians and business executives can and do decide matters on a case-by-case basis, usually by reference to pragmatic and expedient considerations). Politicians and

¹⁰¹ Collin v. Smith, 447 F. Supp. 676, 689-93 (D. Ill. 1978), *aff’d*, 578 F.2d 1197 (7th Cir. 1978).

business executives need not even acquaint themselves with any of the considerations previously used by their own institutions in resolving similar issues (an obligation that is imposed on judges). Politicians and business executives need not publicize the reasons for their decisions (they may not want to expose those to public scrutiny); in fact, they need not articulate any reason at all for the decisions they make – and need not even have one: they may properly rely on intuitions, hunches, prejudices – whatever floats their boat.

Politicians and business executives make decisions in a way that is fundamentally different than that of judges, who are far more constrained in the considerations they use; and it is therefore unsurprising that judges often reach different results than politicians and business executives. The constraints delineated above are merely the most uncontroversial and elementary, but they are enough to show the patent absurdity of Posner’s claims, and the half-baked nature of his theory.

It is impossible to accuse a man who published dozens of books and hundreds of articles of intellectual laziness, but what else can be said of a theory resting content with the claim that “there isn’t too much more to say [about legal decision-making] ... than make the most reasonable decision”?¹⁰² There is a lot to say about the peculiar form of legal decision-making, and its distinction from other institutional and non-institutional forms of decision-making; and saying it is the task of legal theory – a task that the true giants of the discipline, people like Lon Fuller and Ronald Dworkin, understood and tried to tackle.

¹⁰² POSNER, *supra* note 81, at 64.

CONCLUSION

There has been a shift, says Tamanaha, from a “non-instrumental” conception of law (one that views the law as the immanent manifestation of some natural order) to an “instrumental” one (one that views the law as a tool to be shaped at will), and that shift threatens to turn our law into “a pure instrument of coercive power”¹⁰³ as in those “blighted societies in which power has its way with scant restraint, and the powerless have little protection.”¹⁰⁴

I doubt that the blighted societies to which Tamanaha alludes owe their misfortune to this or that conception of law (power usually has its way in these societies despite the law, not because of it); but at any event, Tamanaha’s thesis is based on an anachronistic understanding of the “common good,” and on a false and by-now abandoned theory of legal interpretation that insists that lawyers and judges must blindly follow legal rules without considering their underlying purposes or consequences. But legal interpretation is all about argument and debate and purposes and consequences – and has always been so, either openly, or behind formalistic shenanigans. This does not mean that legal rules are not “binding”: they certainly are, but their “bindingness” consists in something far more complex than simply following their textual dictates.

The perseverance of textualist theories of legal interpretation is due both to their simplicity, and to their purported solution to the most vexing problem of modern legal theory – that of judicial discretion (or “judicial objectivity,” as Tamanaha puts it¹⁰⁵). If legal interpretation consists in merely following textual dictates, then at least in those cases where the

¹⁰³ TAMANAHA, *supra* note 79, at 248.

¹⁰⁴ *Id.* at 242-47.

¹⁰⁵ *Id.* at 237.

language of a legal rule is clear and unambiguous (those falling within the “core meaning” of a legal rule, as H.L.A Hart expounded that thesis), the law is perfectly determinate and judicial objectivity assured. (“The life of the law,” said Hart reassuringly, “consists to a very large extent in the guidance both of officials and private individuals by determinate rules which . . . do not require from them a fresh judgment from case to case.”)¹⁰⁶ But unfortunately for Hart’s theory (and fortunately for our legal system), following textual dictates is not what legal interpretation is about.

And yet rejecting the textualist thesis, and insisting that legal interpretation is about implementing legislative purposes – and thus about the best argument identifying and effecting those – is certainly not to give up the ideal of judicial objectivity. “[T]here is *always* some argument to be made,” objects Tamanaha;¹⁰⁷ but arguments are not born equal: some are good, some are excellent, and then again some are lousy and disingenuous. Tamanaha himself provides us with an example of a lousy one. He mentions the infamous Department of Justice’s Office of Legal Counsel’s “torture memo,” which concluded that the infliction of pain falling short of that “associated with . . . death, organ failure, or serious impairment of bodily function” is not torture under international and U.S. law.¹⁰⁸ Tamanaha properly characterizes the memo’s reasoning as a manipulative lawyerly exploitation, an “exercise in selective reading” aimed at satisfying the White House rather than offering a sound reading of the law.¹⁰⁹ He joins a chorus of legal experts, spanning the political spectrum, who found the proffered legal analysis deficient.¹¹⁰

¹⁰⁶ H.L.A. HART, *THE CONCEPT OF LAW* 135 (1994) (1961).

¹⁰⁷ *LAW AS A MEANS TO AN END*, *supra* note 79, at 146.

¹⁰⁸ *Id.* at 148 (quoting Memorandum from Jay S. Bybee, Assistant Attorney Gen., to White House Counsel Judge Alberto Gonzales (Aug. 1, 2002) at 6).

¹⁰⁹ *Id.* at 148-49.

¹¹⁰ See Edward Alden, *US Interrogation Debate*, *FIN. TIMES*, June 10, 2004, at 7 (quoting Harold Koh’s criticism of the memoranda as setting forth “erroneous legal analysis”); Lincoln Caplan, *Lawyers’ Standards in Free Fall*, *L.A.*

What is worth noting here is not only the near consensus regarding the inferior legal analysis of intelligent and informed lawyers, but also the fact that the memo arrived at its untenable conclusion by employing a textualist analysis – exploring the definition of the term “severe” in the phrase “severe physical or mental pain or suffering” which appeared in a federal statute criminalizing torture.¹¹¹ The text of the statute, said the memo, “provides that pain or suffering must be ‘severe’ [in order to constitute torture]. The statute does not, however, define the term ‘severe.’”¹¹² The authors therefore embarked on a search for a definition. They first looked at the Webster New International Dictionary, and then – apparently dissatisfied with the dictionary’s proposals – turned (oddly enough) to a statute defining emergency medical conditions for purposes of health coverage.¹¹³ It was there, in a statute dealing with an utterly unrelated matter, that the authors found their extraordinarily narrow definition.

What allowed the analysis to reach this level of frivolity was the fact that it floated free from any contextual constraints, at liberty to pick and choose its favored definition and thus its preferred result. In other words, the “torture memo” was legal interpretation at its worst because it followed a textualist reading “to the exclusion of – screening out – any other considerations [and] . . . without regard to the purpose behind the rule or the consequences [of applying it]” – to borrow Tamanaha’s words.¹¹⁴

TIMES, July 20, 2004, at B13; Kathleen Clark & Julie Mertus, *Torturing the Law: The Justice Department’s Legal Contortions on Interrogation*, WASH. POST, June 20, 2004, at B3 (accusing the OLC’s Jay Bybee of “distorting the law”); Adam Liptak, *Legal Scholars Criticize Memos on Torture*, N.Y. TIMES, June 25, 2004, at A14 (“Legal scholars asked to assess the recently released Justice Department memorandums [sic] concerning torture all but unanimously agreed that the quality of the legal work in them is poor.”); R. Jeffrey Smith, *Slim Legal Grounds for Torture Memos: Most Scholars Reject Broad View of Executive’s Power*, WASH. POST, July 4, 2004, at A12 Each of these sources is quoted in Robert Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225, 226-27 (2006).

¹¹¹ 18 U.S.C. § 2340. The memorandum argued that the statute also defined U.S. obligations under the Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment.

¹¹² Memorandum from Jay S. Bybee, Assistant Attorney Gen., to White House Counsel Judge Alberto Gonzales (Aug. 1, 2002) at 5. This memorandum is discussed in TAMANAHA, *supra* note 79, at 148.

¹¹³ *Id.*

¹¹⁴ TAMANAHA, *supra* note 79, at 228.

A final word: to reject the thesis of *Law as a Means to an End* is not to reject the book. Unlike so many other jurisprudential writings, Tamanaha proposes a strong and provocative thesis, and his book is an ambitious and indeed erudite work of legal scholarship. To be sure, one often learns more from those with whom one disagrees than from those with whom one concurs, and in Tamanaha's book there is therefore plenty from which to learn.