# UNMOORED FROM ITS FOUNDATION

LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW. Law in Context Series. By Brian Z. Tamanaha. Cambridge University Press. 2006. Pp. 268. $29.99.

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> You must not abandon the ship in a storm because you cannot control the winds.[1]
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> ~St. Thomas More

The view that law is merely a means to an end is now prevalent in American legal culture. From the academy to the practice, the law has come to be viewed in purely instrumental terms and has been relegated to the status of a tool suitable for manipulation by those who have the power to make or interpret it. The daunting task of tracing the demise of an objective understanding of law has been taken up by Professor Brian Z. Tamanaha in his work, *Law as a Means to an End*. Tamanaha delivers a thoughtful and thorough analysis of where the law began, where it has gone, and where it is headed. Like a good physician diagnosing a troubled patient, Tamanaha meticulously retraces the history of American legal culture, identifies the cause of its symptoms, and offers a diagnosis for going forward.

Tamanaha's analysis proceeds in three parts. In the first part, he traces the devolution of modern jurisprudence from the traditional understanding of law—as a participation in universal norms and the objective character that it derived from this foundation—to the rise of characterizing law in instrumental terms. The second part surveys the contemporary state of the law and the forms of legal practice that have developed from the prevalent understanding of law in instrumental terms. Part three demonstrates the manner in which

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1. ST. THOMAS MORE, UTOPIA 49–50 (Edward Surtz, S.J. ed., Yale Univ. Press 1964) (1516).

viewing law as a means to an end threatens the rule of law and delivers a diagnosis of the current state of the American legal culture as well as a prescription to assuage this threat.

The instrumental view of law, simply stated, consists of the view that the law is simply a means to an end.[2] The fundamental characteristic of this approach is that the law lacks essential content and ordered disposition.[3] It is aptly likened by the author to an empty vessel that can be filled with any content whatsoever.[4] In the instrumental theory of law, there are practically no limits to the possible ends to which the law can be directed.[5] Consequently, under this theory, the law becomes a mere instrument that can be manipulated or shaped to pursue the objectives of those who have the authority to make it.[6]

In contrast to this concept is what Tamanaha refers to as the non-instrumental view of law. The fundamental characteristics of law within this view are objectivity and universality.[7] This theory understands the law as having been given: for medieval Europe, given in the form of natural and divine law as well as customary law; and for Great Britain, given by the learned experience of its ancestors and passed down to subsequent generations through the common law.[8] Law, under this theory, possesses a certain autonomy and internal integrity that the instrumental view does not offer.[9] For non-instrumentalists, law is discovered, rather than created, by those in authority.[10]

The story of contemporary legal culture is conveyed through the historical analysis of the last two hundred years. Tamanaha recounts the gradual disintegration of America's inherited non-instrumental understanding of law, coalescing with a loss of belief in the common good of society. At the same time, the narrative traces the collapse of the non-instrumental theory of the nature of law and assesses the consequential rise of the instrumental theory of law.[11] He concludes

2. By "law," Tamanaha also means "legal rules, legal institutions, and legal processes." BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 1, 6 (2006).

3. *Id.* at 1.

4. *Id.* at 35.

5. *Id.* at 6.

6. *Id.* at 4.

7. *Id.* at 11.

8. *Id.*

9. *See id.* at 16.

10. *Id.* at 11.

11. *Id.* at 7.

that the present situation is one that threatens the rule of law in America today.

At its inception, American jurisprudence was imbued with a fundamentally non-instrumental understanding of the law. The common law system, the inherited patrimony, described the law in fundamentally non-instrumental terms.[12] At the same time, the common law was largely considered to be the embodiment of natural rights and natural principles.[13] In this manner, the medieval notion of law as a divine inheritance continued through the middle of the nineteenth century.[14] Overlapping in the nineteenth century and in the early part of the twentieth century was a movement that focused on the law as a science.[15] This entailed characterizing the law as a proper object of systematized study, which lent itself to inductive, deductive, and analytic analysis.[16] The scientific approach to the law was applied to the preexisting non-instrumental understanding of the law, and the non-instrumental view of law as a science survived into the first third of the twentieth century.[17] The analytical approach to the law began to focus on the normative quality of the law and eventually arrived at the conclusion that the essential function or purpose of the law was simply to produce social order.[18]

The Enlightenment project wreaked havoc on the non-instrumental understanding of the common law. In particular, Tamanaha insightfully offers three principle intellectual tenets that effectively undercut the traditional notion of law. First, the Enlightenment experiment purported to provide objective principles of law and society but failed to deliver. Second, Enlightenment thought concluded that human nature is essentially base and therefore unable to provide the foundation for deriving higher principles. Third, the Enlightenment allowed for reason's ability to derive particular means in achieving particular ends, but it precluded the possibility of reason identifying the proper ends to be desired.[19] As Tamanaha describes it, the "bedeviling legacy of the Enlightenment" is that it severed law from its belief in divine and

12. *See id.* at 14–15.
13. *Id.* at 14.
14. *Id.* at 12.
15. *Id.* at 12, 16.
16. *See id.* at 16.
17. *Id.* at 21.
18. *Id.*
19. *Id.* at 22.

natural law as well as from the customs of the people, leaving it dismembered from any particular end.[20]

The non-instrumental understanding of the common law predominated throughout the eighteenth century, and the instrumental view of law began to take hold in the twentieth century.[21] Although the issue is still open to debate, the author argues that the non-instrumental understanding of the common law prevailed throughout the nineteenth century even though the period witnessed currents of the instrumental theory coming to tide.[22] Legislation, on the other hand, was largely considered in instrumental terms by the middle of the nineteenth century.[23] At that point, however, the general understanding of the role of the legislation was limited to declaring preexisting common law rather than creating new laws and new rights.[24] The debate over codification of the common law, which transpired during the latter part of the nineteenth century and into the first part of the twentieth century, illustrated the larger debate over the source and nature of the law in general that was going on at the time.

Legal interpretive theories also underwent a period of significant change. The formalist movement in its rule and conceptual forms[25] was countered with the trend toward a more pragmatic philosophy and with the Legal Realists in the 1920s and 1930s who, in response to judicial formalism, argued that law lacked essential content and was subject to the conflicts of interest within society.[26] Oliver Wendell Holmes and Roscoe Pound, with their skepticism of formalism, became the intellectual progenitors of a purely instrumental theory of law—devoid of any objective content—that eventually swept throughout the legal culture.[27] This view of the law transformed judging and the legal practice into essentially ends-oriented analyses that, combined with the political battles that assailed the Supreme Court during this time, fueled the public's perception of the judges and of the law in instrumental terms.

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20. *Id.* at 23.
21. *Id.* at 30.
22. *Id.* at 35.
23. *Id.* at 41.
24. *Id.*
25. *Id.* at 48.
26. *Id.* at 67–68.
27. *Id.* at 70–72.

Through a series of landmark events, the Supreme Court came to be viewed as a pivotal player in this instrumental view of law. In particular, Tamanaha points to the political pressure and activism that the Court has become involved in: the power struggle that transpired between the Court and the Roosevelt Administration that culminated in the court-packing plan and the Court's response,[28] the overruling of one-hundred-year-old precedent in its *Erie Railroad v. Tompkins* decision,[29] the Warren Court's ambition to reform not only the law but also society,[30] and the continuation of this ambition by the Burger and Rehnquist Courts.[31] Tamanaha argues that judicial activism has steadily increased since the time of the Warren Court. In support of this, he cites each Court's respective rates of overturning prior precedent and striking down legislation. While the Warren Court's rate of overturning precedent and striking down legislation was hitherto unseen (overturning forty-five established precedents and striking down twenty-three federal statutes and 186 state statutes),[32] the Burger Court continued with this trend (striking down thirty-two federal statutes and 309 state statutes),[33] and the Rehnquist Court surpassed each of the prior courts by striking down an unprecedented forty-seven federal statutes and 132 state statutes.[34] The highest court in the land has steadily increased the frequency with which it has overturned settled law.

Tamanaha identifies five primary ways in which the instrumental view of law typically manifests itself in the legal culture. The first is in the belief that the Court has the legitimate power to direct social change through its decisions.[35] The second is the extent to which the laws are considered as means to social ends—with their constitutionality depending on how important the laws' ends are and how effective and necessary the laws are as means to achieving those ends.[36] The third manifests itself in an approach consisting of balancing particular factors rather than applying black letter rules.[37]

28. *Id.* at 77.

29. *Id.* at 81 (referring to the landmark case that held federal courts in diversity cases must apply state law, Erie Railroad v. Tompkins, 304 U.S. 64, 78–79 (1938)).

30. *Id.* at 84–87.

31. *Id.* at 87–95.

32. *Id.* at 86, 88.

33. *Id.* at 88.

34. *Id.* at 90–91.

35. *Id.* at 95.

36. *Id.* at 96.

37. *Id.*

The fourth is in the assumption that Justices dress up personally favored outcomes and that their decisions are, in reality, political ones.[38] And the fifth is in viewing judgeships as instrumental for political purposes.[39] Each of these forms has been present at different times in different degrees and proportions, but all are fruits of the same tree.

The ascent of instrumentalism in the legal academy is marked by the rise of the legal process theory, converging with the general rise in relativism that became more prominent in academia during the 1960s and 1970s.[40] Legal process theory essentially argued that good procedures, rather than good legal principles, render laws good.[41] This movement also prioritized the legislature and viewed the courts only as important collaborators in affecting legislative purposes.[42] By the end of the 1970s, the view that law was merely an instrumentality had completely prevailed.[43] At the same time, there was a total loss of belief in any objective standards that could be used to resolve disputes over moral values or the public good.[44]

This is the soil from which contemporary legal theories grew. Tamanaha observes that nearly every major theoretical and empirical perspective of the law existing today emerged during, or has its roots in, this period.[45] Consequently, each of these theories—in particular economic analyses,[46] critical approaches to the law,[47] the law and society movement,[48] legal pragmatism,[49] and the formal rule of law[50]—characterizes law in fundamentally instrumental terms.[51] Perhaps even more important, the lawyers who are practicing law today in varying capacities were trained to view the law in essentially

38. *Id.* at 96–97.
39. *Id.* at 97.
40. *Id.* at 116.
41. *Id.* at 108.
42. *Id.* at 104.
43. *Id.* at 116.
44. *Id.*
45. *Id.* at 118.
46. *Id.* at 118–20.
47. *Id.* at 120–23.
48. *Id.* at 123–26.
49. *Id.* at 126–30.
50. *Id.* at 130.
51. *Id.*

instrumental terms or as an empty vessel to be utilized to achieve individual preferred ends.[52]

The academic movement to view law as merely a means to an end has had a profound impact on contemporary practice. Specifically, Tamanaha explores the rampant instrumentalism in the contexts of legal education, legal theory, legal practice, cause litigation,[53] judging and judicial appointments,[54] legislation, and administrative law.[55] Permeating the legal landscape in this way, the instrumentalist view has bred protagonists who perpetuate this understanding. The practical effect of their legal training is that they believe the nature of the law to be purely instrumental, and they approach the law with this perspective. As a result, they treat the practice of law as simply the means to financial gain, serving instrumentally as advocates for their clients, and engaging in the tasks of marshalling, interpreting, and arguing legal rules in an inherently instrumental manner.[56]

The fundamental effect of the instrumentalist view is that it presents no internal limitation that would require the law to conform to objective reality. Similarly, it leads to the continued deterioration of the belief in a common good, reduces the binding quality of legal rules, and spreads doubts about judicial objectivity.[57] The author's prognosis is that our contemporary system of law "is in danger of becoming less of a system of law."[58] Rule-bound judging and a focus on purposes and ends cannot in principle be combined as they are attempted today.[59] The problem in the judiciary lies with judges who do not believe that objective judging can be done or who believe that fellow judges are simply not doing it.[60] Likewise, the problem in the greater legal world lies with legal actors and the citizenry who view legal rules and processes as tools to be manipulated in order to achieve preferred ends rather than the common good.[61]

In his final assessment, Tamanaha believes that it is impossible to return to a non-instrumental understanding of the law due to changes

52. *Id.* at 211.
53. *Id.* at 156–71.
54. *Id.* at 172–89.
55. *Id.* at 190–211.
56. *Id.* at 55.
57. *Id.* at 236.
58. *Id.* at 227.
59. *Id.* at 231.
60. *Id.* at 236–37.
61. *See id.* at 248.

in the economy, politics, and culture.[62] Therefore, he believes that the solution lies in setting restraints on the instrumental view of law.[63] He also argues that adopting the view of law as a means to an end could become a positive attribute if incorporated into a larger commitment to other properties of the law. In particular, he argues that there should be a return to the notion that the law is the principal preserver of justice, that the law serves the public good, that legal rules are binding on government officials, and that judges should always render objective decisions based on the law.[64]

The author lays out the devolutionary trajectory of the American legal culture but fails to appreciate the nature of the root cause of the legal culture's ailment. While he catalogues the detrimental effects of the instrumental view of law, he stops short of rejecting the notion that the law is instrumental in its essence.[65] The author discovers the problem that, according to his own assessment, lies at the heart of many of American culture's intractable problems, yet he fails to prescribe its complete cure.[66] Far from offering a positive solution, the author leaves more questions about how sick the legal system really is and how it can return to full health.

This book could be as much about a loss of our understanding of the common good and law's proper relationship to it as it is about the instrumental understanding of law. This book's analysis focuses on the fractious and contentious problems in contemporary American legal culture and associates it with the rise in the instrumental theory of law. At the same time, this book identifies the similarly detrimental movement of believing that there is no objective common good or end to which society should aspire. By gaining a higher vantage point, it may become more evident that the two problems are not merely coincidental, but correlative. The author identifies the dual aspect of the problem but seems to understand the aspects as independent and coinciding rather than as two symptoms of the same problem. If greater emphasis was given to the ontological shift from the traditional jurisprudence to the modern instrumental theory of law, more than a mere difference in approach may become evident. Consequentially, the cure may be more demanding than has been prescribed.

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62. *Id.* at 6.
63. *Id.*
64. *Id.* at 249.
65. *Id.* at 6.
66. *See id.* at 8.

In medieval jurisprudence, the purpose of the law was inextricably bound to its proper end—an end that informed the content of the law.[67] The law was not understood to be composed of distinct and separable means and ends, but of incorporating both aspects as properties of the law's very nature. Further, of its essence, positive law depended on the natural law and was necessarily ordered to the benefit of the commonwealth as a whole.[68] Likewise, the Founding Fathers believed that this nation's legal system presupposed that everyone subscribed to a common notion of society's good.[69] The shift from what Tamanaha describes as non-instrumental to instrumental views involves more than a change in approach to the law; rather, it suggests a fundamental change in the very nature of what law is.

Tamanaha presents the fundamental proposition of the instrumental view as composed of two parts: first, the view that the law is, by its nature, an instrument; and second, that it is an instrument that serves the social good.[70] He assesses the subsequent separation in terms of the first part of the proposition gaining support at the same time as the second part became less popular.[71] But the root cause of the departure from the medieval notion of law as non-instrumental—and by extension, the eventual prominence of the instrumental notion of law and its isolation from the common good—comes from the fundamental shift in understanding, or misunderstanding, law's essential nature. Likewise, solving the problem that threatens the rule of law may involve more than merely limiting the view of law in instrumental terms, but instead will require a fundamental rethinking of society's understanding of the nature of law itself.

67. *See* ST. THOMAS AQUINAS, SUMMA THEOLOGICA, Pt. I–II, Q. 95, Art. II (Fathers of the English Dominican Province trans., Christian Classics 1981).

68. *Id.* at Pt. I–II, Q. 95, Art. IV.

69. TAMANAHA, *supra* note 2, at 225.

70. *Id.* at 4.

71. *Id.*