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BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING. By *Brian Z. Tamanaha*. Princeton and Oxford: Princeton University Press. 2010. Pp. x, 252. Cloth, $70; paper, $24.95.

INTRODUCTION

The periodization of history, like chocolate cake, can have some bad effects on us, but it is hard to resist. We realize, of course, that Julius Caesar didn't think of himself as "Classical" and Richard the Lionhearted didn't regard the time in which he lived as the Middle Ages. Placing historical figures in subsequently defined periods separates us from them and impairs our ability to understand them on their own terms.[1] But it is difficult to understand anything about them at all if we try to envision history as continuous and undifferentiated. We need periodization to organize events that are numerous, remote, and unfamiliar, and to create stable images of cultures that are dramatically different from our own. One of the greatest services that a historian can perform is to identify and define a particular time period so that we can grasp its distinctive features. Another great service is to apply critical scrutiny to that definition in order to highlight and counteract the distortions that periodization inevitably creates.

Just as our mental topography of Western civilization is irretrievably shaped by its division into Classical Antiquity, the Early Middle Ages, the High Middle Ages, the Renaissance, the Reformation, and the Early Modern Era, so our mental topography of American legal history is shaped by its division into formalism, realism, legal process, and the modern period, the last of which consists of law and economics, critical legal studies, and law and society. Legal historians have done us a great service by grouping the work of judges and scholars into these readily comprehended periods and defining the mode of thought that characterizes each one. In his new book, *Beyond the Formalist-Realist Divide*, Brian Tamanaha[2] does us a great service by revealing that this periodization rests on serious distortions.

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1. *See, e.g.*, DIETRICH GERHARD, OLD EUROPE: A STUDY OF CONTINUITY, 1000–1800 (1981); CHRIS WICKHAM, THE INHERITANCE OF ROME: A HISTORY OF EUROPE FROM 400 TO 1000 (2009); Jerry H. Bentley, *Cross-Cultural Interaction and Periodization in World History*, 101 AM. HIST. REV. 749 (1996).

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Specifically, he demonstrates that the formalists were not formalist, that they simply did not subscribe to the mode of thought that has long been regarded as their defining feature. He goes on show that the realists were not realists, or at least not nearly as realist as subsequent observers have depicted them.

What emerges from the analytic pressure that Tamanaha applies to our inherited periodization is a counternarrative of continuity. Rather than being divided into two crisply defined movements with opposing views of judicial decision making, the first seventy years of American legal academic thought can be seen as a more complex and unified exploration of related themes. But Tamanaha is after more than historical revisionism in this provocative and thoughtful book. If the formalists were not formalist and the realists were not realists, then judicial-politics scholars—perhaps the largest group of social scientists who study judicial decision making—are off on the wrong track in taking the realist critique as their inspiration and the formalist approach as their target.

This Review will begin by summarizing Tamanaha's book, with particular emphasis on his pathbreaking analysis of the so-called realists (Part I). It will then proceed to assess the theory of judicial decision making that he proposes on the basis of this analysis (Part II). The final section of the Review goes beyond the scope of Tamanaha's book to consider another of its implications. Our traditional approach to legal education is a product of the formalist era and has been taken to reflect the formalists' conception of law. But if the formalists were not formalist, then both the character of that approach and the current demands for its reform may need to be reassessed (Part III).

The final conclusion of this Review can be briefly stated at the outset. Not everyone will agree with Tamanaha's critique of the judicial-politics literature or his jurisprudential theory of judging, needless to say, although they certainly merit serious consideration. But anyone who writes about the history of American legal scholarship without taking his analysis of formalism and realism into account must henceforth be regarded as naïve and uninformed. *Beyond the Formalist-Realist Divide* is one of those rare works that not only provides new information and advances illuminating arguments, but changes our basic understanding of the subject it addresses.

I. Tamanaha's Critique of the Formalist-Realist Divide

The first period of American legal scholarship is generally taken to be the half century or so after the Civil War, when law schools developed and the full-time academics who taught in those schools began to produce a substantial body of legal scholarship. This is the period that we describe by using the term "legal formalism." Comprehensive criticisms of this scholarship were voiced virtually from its inception; the "most influential modern formulation of the story about the formalists" (p. 17) is Grant Gilmore's 1977 book, significantly titled *The Ages of American Law.* According to this story, formalist scholars and judges were so benighted as to believe that law is a comprehensive and autonomous system; that judges can derive their

decisions by mechanistic or syllogistic logic from the general principles that it embodies; and that they therefore thought they were not making law when confronted with a case of first impression, but only using logic to find the answer that the principles necessarily prescribed.

Tamanaha employs an interesting research strategy to assess this familiar account: he actually reads the work of the scholars who are labeled formalists. As he demonstrates through extensive citation and quotation, none of the people who were saddled with this sobriquet believed the doctrines that have been so consistently ascribed to them. Instead, they recognized that law is often open-ended or indeterminate and were fully aware that judges need to deploy judgment, experience, and background understandings to decide cases coming before them (pp. 18–19, 32–43). In one telling passage, Tamanaha quotes Gilmore's characterization of the formalists as committed to the view that "courts never legislate—that the judicial function is merely to declare the law that already exists."[3] He then proceeds to cite eight law review articles, published between 1870 and 1914, whose titles include the terms "judicial legislation" or "judge-made law" and which recognize the necessity and value of this process (p. 19). He concludes with an 1894 statement from the president of the New York bar—surely a reliable representative of the legal establishment at that time—recognizing that "the courts have indulged in judicial legislation for centuries" (p. 19).

Judicial legislation creates potential legitimacy problems, even if one ignores the deeper questions of democratic accountability, because it conflicts with stare decisis. Critics asserted that the so-called formalists avoided this quandary by means of a "mechanical jurisprudence" that claimed to apply rigidly determined decision rules, denied uncertainty, and clung slavishly to existing precedents.[4] But as Tamanaha demonstrates, lawyers and judges of the time were fully aware of the problem and adopted a variety of stances toward it, none of which involved outright denial of its existence. Some bemoaned the ability of judges to manipulate precedents in accordance with their personal predilections (pp. 32, 35), others celebrated the role of judgment as the essence of the judicial function (pp. 19–20, 34), and still others simply accepted both manipulation and judgment as inevitable features of a common law regime (pp. 19, 39). In other words, the law review writers of the so-called formalist period understood the open-ended nature of judicial decision making and were able to debate its vices and virtues in sophisticated terms.

Going beyond direct refutation, Tamanaha thoughtfully explains how five decades of legal thought and scholarship could have been so badly mischaracterized and misinterpreted. While part of the reason is simple academic slovenliness—he demonstrates, for example, that the views Jerome

3. P. 19 (emphasis omitted) (quoting GRANT GILMORE, AGES OF AMERICAN LAW 15 (1977)).

4. Pp. 27–43 (discussing Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908)—the main focus of Tamanaha's critique in this part of his book).

Frank attributes to Henry Maine are actually the views that Maine was criticizing (pp. 14–17)—the deeper and more instructive explanation is conceptual confusion. Encapsulating one's critique of this body of scholarly writing in disparaging terms such as "formalism" (which, he notes, the formalists never used to describe themselves)[5] and "mechanical jurisprudence" obscures the range of assertions that are being made about it. Those assertions are that the formalists believed, first, that law is based on an underlying and logically ordered set of principles; second, that the content of those principles could be discerned by deductive reasoning in an unambiguous fashion; third, that judges apply those principles, once discerned, to actual cases by deductive reasoning; and fourth, that the actual state of the common law that results from those principles is unambiguously discerned and consistently applied by judges.[6]

Tamanaha's scrupulous research reveals that the fourth position was rarely asserted during the formalist era; the "messy and uncertain" state of the law was readily and regularly acknowledged in the law review literature (p. 51). The third position was just as rare. Scholars and judges at the time understood that the messiness and uncertainty they observed in the law resulted from the "complexities involved in judging and . . . the foibles of human judges" (p. 51). Some of these scholars, most famously C.C. Langdell, did advance the claim that law is a science (pp. 28–29, 52), an assertion disputed by a number of practitioners at the time (pp. 29–31). But what Langdell and his academic colleagues were asserting, at most, were the first two propositions: that law, specifically common law, is based on principles and that those principles could be extended and applied by deductive reasoning (pp. 52–53). Like the treatise writers of this era, Langdell aspired to organize and explain those principles precisely because he was aware that judging is a complex task and that the state of the law was uncertain and confused. As Tamanaha states, "The failure to keep track of the distinctions between law abstractly or ideally conceived and views about the actual state of the law, and how these two perspectives on law relate to deduction in judging, lies at the heart of today's misunderstandings of the 'formalist age' " (p. 54).

Having demolished our standard image of the formalists, Tamanaha proceeds to the legal realists. This is not simply an effort to engage in the serial assassination of inherited ideas, but a logical step in his project of rethinking the intellectual history of American legal scholarship and its theory of judicial decision making. The realists, who did indeed describe themselves as such, conceived of their enterprise as a direct refutation of the formalists. Their critique, in part, was that the prevailing academic theory of

5. In fact, as he points out as an interesting amplification, even the legal realists did not use this term to describe their target. It does not appear until after World War II, and did not serve as a definitive description of the era it now describes until Gilmore and his contemporaries employed it for that purpose in the 1970s. Pp. 59–61.

6. I am rephrasing slightly here for the sake of brevity. In his full discussion, which occupies most of Chapter 4, Tamanaha lists these principles in a different order and describes them a bit differently.

judicial decision making had perpetrated the naïve belief that common law was a logical deduction from readily identified and enduring principles of Anglo-American law, whereas it was actually the product of individual decisions by judges who, as a result of their naïveté, had lost touch with the political and social realities of their day.[7] The realists' constructive project, in part, was to locate these decisions in their political and historical context and to advance the notion that "judges respond to complexes of facts (which invoke rules) rather than reasoning downward from rules" (p. 83).

Based on his discussion of the formalists, Tamanaha argues that the realists were mistaken in charging their predecessors with a naïve, mechanistic theory of judicial decision making, and that we are naïve in taking their critique at face value. In some sense, it is the realists who are to blame for the conflation of the four propositions that Tamanaha lists as separate assertions about the nature of common law and common law decision making. But having accepted the realists' combative caricature of their predecessors, we have made a further mistake in caricaturing the realists as maintaining an equally combative attitude toward law in general. Again relying on the technique of careful reading, Tamanaha concludes that, with one exception, the realists were not "realists" in the sense that the term has been passed down to us today. Most of the scholars and judges whom we identify as such—Thurman Arnold, Benjamin Cardozo, Charles Clark, Felix Cohen, Walter Wheeler Cook, Karl Llewellyn—"believed in law and fervently labored to improve it" (p. 94). They were judges, reformers, and educators who saw themselves as bringing the legal system into accord with modern times, not as undermining its influence or legitimacy (pp. 93–98). The exception is Jerome Frank, whose 1930 book, *Law and the Modern Mind*, advanced an extreme position that was not shared by other realists, but has been taken as emblematic of the entire school of thought by subsequent scholars (pp. 96–97).

One major theme that emerges from Tamanaha's reconsideration of formalism and realism is the predominance of continuity over qualitative change in the first seven decades of American legal scholarship. "Realism about judging," he observes, "was commonplace decades before the legal realists came on the scene" (p. 67). The insights that we now attribute to the realists about the indeterminacy of law and the role of personal attitudes in judicial decision making—the insights we condemn the formalists for failing to discover—were in fact quite prevalent in the so-called formalist era. The cynicism about judges and the binding effect of precedent that we now attribute to the realists, and either praise them or condemn them for according to our predilections, was in fact quite rare in the self-called realist era (pp. 91–98). The commitment to the legal system and the desire to improve it by improving the caliber of judicial decision making was common to both

7. *See, e.g.*, Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Karl N. Llewellyn, *A Realistic Jurisprudence: The Next Step*, 30 COLUM. L. REV. 431 (1930).

eras, although the realists thought the formalists were only interested in justification. And neither the formalists nor the realists were a movement, in the social-science sense of a group of people with a shared purpose and a unified outlook (pp. 102–06). Rather, legal scholars during the entirety of these two supposedly opposing periods were engaged in a sustained, polyphonic inquiry into the judicial decision-making process, with the same themes and same concerns interwoven into a continuous scholarly tradition.

Tamanaha's revisionist account of legal realism and legal formalism, though arresting on its own terms, is of more than historical importance. He goes on to argue that our misconceptions about these bodies of legal scholarship exercise a continuing impact on the way we formulate current theories of judicial decision making. Political scientists who have undertaken the study of this subject have been impelled by these misconceptions to begin from false premises and reach unjustified conclusions (pp. 111–31). "Modern political scientists, like everyone else, swallowed whole the story about the supposed dominance of mechanical jurisprudence," Tamanaha writes (p. 114). Their scholarship, frequently described as the field of "judicial politics," has been fueled by the desire to explode the myth that judges decide cases solely on the basis of the law, with no reference to external factors and no influence from their own political perspectives.[8] In this enterprise of demolition, according to Tamanaha, they see themselves as the heirs to the legal realists, who discovered the great secret that judicial decision making is little more than politics and predilection, but failed to demonstrate their point for lack of the empirical skills that political scientists can now deploy.[9]

The real myths involved in this enterprise, Tamanaha argues, are the ones that have shaped the prevailing periodization of American legal scholarship. First is the myth that the so-called formalists believed that the law was a closed system of readily discerned principles that definitively could and did determine judicial decisions. Second is the equally common myth that the realists were correct in leveling this criticism at their predecessors. Third is the myth that the realists themselves rejected this view for the opposite view that law never affects judicial decision making and that decisions are invariably the product of the judges' political opinions.

Operating on the basis of these mistaken myths, Tamanaha argues, judicial politics scholars have adopted a number of highly questionable

8. Pp. 111–21. Some of the principal works Tamanaha cites as examples of this approach are LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS (2005); HENRY R. GLICK, COURTS, POLITICS, AND JUSTICE (1983); WALTER F. MURPHY ET AL., COURTS, JUDGES, & POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS (5th ed. 2002); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL'Y 155 (1994); Martin Shapiro, *Political Jurisprudence*, 52 KY. L.J. 294 (1964).

9. For a discussion of the realists' lack of empirical research skills, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960, at 181–85 (1992); JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995); John Henry Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFF. L. REV. 195 (1980).

strategies for collecting empirical data about judicial decision making. To begin with, they have concluded that judges are either "deluded or deceptive" (p. 122), that these judges either do not understand their own decision-making process or are willfully concealing that process to legitimate their actions (pp. 122–25). Having discounted the judges' own doctrinal rationale for their decisions, judicial politics scholars adopt research techniques that overemphasize the role of the political motivations that they assume, based on their misinterpretation of the legal realists, to be genuine. They rely on determinations of statistical significance that show only that politics matters, but not how much it matters (pp. 145–48); and they fail to establish a baseline for the level of fidelity to doctrine that could reasonably be expected from a process of human decision making, thus making every departure appear to confirm that there is no fidelity at all (pp. 148–52). Finally, they apply these defective techniques to the subset of judicial decisions that are most likely to confirm the behavior that their caricatures of the formalists and realists have led them to suspect. They devote a disproportionate amount of their attention to the Supreme Court, treating it as typical or paradigmatic, whereas it is actually exceptional (pp. 121–22, 132–33, 197–98). When they turn their attention to the lower federal courts, they have tended to select nonunanimous decisions by appellate panels or conflicting decisions at different levels, again taking these cases as typical of judicial decision making in general.[10]

The predictable result of these questionable data collection strategies, according to Tamanaha, is that the judicial-politics scholars have reached incorrect results regarding the nature of judicial decision making. In contrast, political scientists who free themselves from the inherited myths about the formalists and realists—a relatively small proportion in Tamanaha's view—are able to listen to judges' accounts of their decision processes, craft accurate metrics to assess political influence, and pay attention to the lower courts that constitute the vast majority of the federal judiciary (pp. 133–45). What they find is that law, not ideology, generally determines judicial decisions, while ideology plays a decisive role in the delimited number of cases where the law is uncertain and the level of political controversy is high.[11] Interviews with judges, which this less tendentious approach treats as a valid data-gathering device, reveal that judges generally want to do a good job and be well regarded by their colleagues (pp. 133–41). Even more importantly, they believe in the rule of law, a belief that is often stronger than their ideological reaction to the particular issue in the case at hand (pp. 143–44, 194–95). The result is that judges generally behave the way the so-called formalists actually said they did, and as the realists conceded that they did, not in the unrestrained way that contemporary scholars say the realists said

10. Pp. 147–48. For this point, Tamanaha relies upon VIRGINIA A. HETTINGER ET AL., JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING (2006).

11. Pp. 136–37 (citing DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURT OF APPEALS (2002)).

(although also not in the totally constrained way that the realists said that the formalists had said).

These considerations lead Tamanaha to advance his own theory of judicial decision making, which he calls "balanced realism." Based on the empirical studies that are free of our inherited misconceptions about formalism, realism, and the judicial process generally, he argues that most cases are uncontroversial and are thus controlled by law, but that law is sometimes uncertain and judges must then rely on their own views, including their political views, to reach a resolution. To quote from his conclusion, a balanced realism expects and understands "that judicial decisions frequently are consistent with and determined by the law" (p. 194), but "that law is continuously being worked out by judges" (p. 195), "that judges are sometimes confronted with what they consider 'bad rules' or 'bad results' " (p. 191), "that social factors and considerations play into judicial decision making in various ways" (p. 193), and "that the bents of judges will influence their decisions in various ways that are not conscious or deliberate" (p. 187). In effect, his conclusion reiterates and summarizes his critique. American legal scholars have never argued that judges' decisions are unaffected by their attitudes or that these decisions can be reached by direct application of definitive principles, but neither have they argued that judges decide exclusively on the basis of their attitudes without reference to law and precedent. Rather they have engaged in a continuing and balanced inquiry into the way that law and attitudes interact. Tamanaha generates his own theory by placing himself securely within that tradition.

II. The Theory of Judicial Decision Making

Having identified our misconceptions about the formalists' and realists' approaches to judicial decision making and diagnosed judicial-politics scholars' theory of judicial decision making as afflicted by those misconceptions, Tamanaha proceeds to advance a theory of his own. This Part is devoted to an evaluation of that theory. Before proceeding, it is worth restating, in a more explicit manner, the evaluation of his critique that appears in the preceding section. While it is certainly possible to contest some of Tamanaha's specific assertions,[12] his general point, however disconcerting it may be for people who have inherited the conventional periodization (namely, all of us), is one that should be accepted and incorporated into the standard account of American legal scholarship. It is incisive and convincing, and a tour de force of intellectual history.

12. For example, Tamanaha argues that the realists were not really a "discrete group," in part because "the individuals identified as realists did not agree among themselves on [typically realist] positions, and others not named as realists embraced one or more of these positions." P. 70 (footnotes omitted). But he does not offer criteria for determining when a group of scholars should be counted as a discrete group or movement. The two tests that his statement suggests seem too demanding. It is a characteristic feature of scholarly movements that they include internal debate. Similarly, if the existence of intellectual forbears were taken to refute the existence of a school of thought, there would be few, if any, schools of thought in existence.

Tamanaha's critique of judicial-politics or judicial-attitudes studies is more vulnerable to criticism. His points are telling ones, and perhaps he is justified in voicing a valid critique in a book about a broader topic without adding all the caveats that might qualify that critique. The problem is that the theme of his book, and its major contribution, is to combat our simplistic and inaccurate caricatures of major schools of legal scholarship, and his exuberant attack on the judicial-politics school may be purveying a caricature of his own. The careful studies of lower court decisions that he cites with approval (pp. 133–45) are not as rare as he asserts, nor is the scope of careful scholarship limited to lower courts. As the judicial-politics field has evolved, its conclusions have become more modulated, varied, and subtle. Its practitioners have controlled more carefully for additional variables,[13] assessed the effects of personal experience as well as attitudes,[14] attempted to measure the extent to which judges' attitudes change as a result of their service on the court,[15] and explored variances in judicial decision making based on the use of doctrinal devices such as legislative history and statutory interpretation canons in addition to variances based on attitude.[16]

In Tamanaha's defense, however, a full assessment of the judicial-politics literature is beyond the scope of his book. His treatment of this literature is an outgrowth of his revisionist account of legal realism and is useful as a demonstration of how scholars can go at least partially wrong by misconstruing a body of work and then using it as a target. The main purpose of the critique, moreover, is to serve as a springboard for his own theory of judicial decision making.

Judicial decision making is of course a mode of human behavior. One of the leading theories of behavior in modern social science, and one that has had an enormous impact on legal scholarship, is the rational-actor theory derived from microeconomics. According to that theory, people's behavior, in all circumstances, can be understood as an effort to maximize their material self-interest. This theory produces intriguing and somewhat startling results when applied to government officials such as executive leaders, legislators, and administrators. For example, the theory leads to the conclusion that legislators are motivated solely by their desire to retain their jobs by being reelected, and that neither their own ideology nor their desire to

13. *E.g.*, Gregory A. Caldeira et al., *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549 (1999); Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1997).

14. *E.g.*, Jilda M. Aliotta, *Combining judges' attributes and case characteristics: an alternative approach to explaining Supreme Court decisionmaking*, 71 JUDICATURE 277 (1988); James J. Brudney et al., *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675 (1999); Lee Epstein et al., *Circuit Effects: How the Norm of Federal Judicial Experience Biases the Supreme Court*, 157 U. PA. L. REV. 833 (2009).

15. Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483 (2007).

16. James J. Brudney & Cory Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005); Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1 (1998).

represent their constituents' views determines their behavior to any significant extent.[17] But no one has ever produced a convincing account of how this approach might apply to federal judges at the appellate level.[18] The structural protections these judges are afforded, most notably tenure of office and salary guarantees, combined with intensive monitoring to prevent bribery, preclude all the ordinary self-interest-maximizing activities such as job retention or income expansion. One could speculate that they would want to maximize their leisure under these circumstances by doing as little as possible,[19] but casual observation refutes that theory. One could also speculate that they would want to maximize their opportunity to be promoted, but there are few higher positions than a federal appellate judge, and none higher than a Supreme Court Justice other than president or pope.[20]

The inability of this leading social-science theory to account for the behavior of judges has left the field free for the judicial-politics or judicial-attitudes studies. Despite all the caveats and qualifications just mentioned, there is no denying Tamanaha's basic point about this literature: it concludes that ideology is the principal determinant of judicial decisions and that legal rules play a secondary, if not trivial, role.[21] Juxtaposing these two leading social science efforts to explain the behavior of public officials leads to an interesting contrast. Legislators are supposed to base their actions on ideology, either their own about what is best for the country or that of their constituents.[22] When asked, that is what many of them say they do.[23] But many social scientists reject their account and conclude that ideology plays

17. *See, e.g.*, ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982).

18. For some leading efforts to do so, see RICHARD A. POSNER, OVERCOMING LAW 109–44 (1995); Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107 (1983); Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129 (1980).

19. POSNER, *supra* note 18, at 135–44. But he cannot find any maximizing behavior, which is what would be required for a useful theory. All that he is able to assert is that judges sometimes resort to labor-saving devices such as dismissing cases because they are moot, unripe, or political questions, something that is readily explicable on other grounds.

20. Franklin Roosevelt considered William O. Douglas, whom he had appointed to the Supreme Court in 1939, for his running mate in 1944. CONRAD BLACK, FRANKLIN DELANO ROOSEVELT: CHAMPION OF FREEDOM 967–70 (2003); DAVID MCCULLOUGH, TRUMAN 304–13 (1992). In addition, James Byrnes, who had served briefly on the Court, was regarded as a leading candidate. BLACK, *supra* at 967–70; MCCULLOUGH, *supra* at 297–313. As far as I know, no Supreme Court Justice has ever been a contender for the papacy.

21. Pp. 111–21; *see also* sources cited *supra* note 8 (citing sources that Tamanaha treats as adopting this approach).

22. *See* HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 168–89 (1967) (discussing in detail the Burkean concept of representation); *see also* EDMUND BURKE, *Speech at the Conclusion of the Poll (1774)*, *in* ON EMPIRE, LIBERTY, AND REFORM: SPEECHES AND LETTERS 48–49 (David Bromwich ed., 2000).

23. *See, e.g.*, CHRISTOPHER J. DEERING & STEVEN S. SMITH, COMMITTEES IN CONGRESS (3d ed. 1997); RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES (1973). I came to the same conclusion when studying the history of a federal statute. *See* Edward L. Rubin, *Legislative Methodology: Some Lessons from the Truth-in-Lending Act*, 80 GEO. L.J. 233, 263–66 (1991).

little or no role in their decision-making process.[24] Judges are supposed to base their actions on law. When asked, that is what they say they do. But many social scientists reject their account and conclude that their decisions are based exclusively on ideology.[25] Admittedly, legislators and judges are in different structural positions, specifically with respect to job security. But it seems odd that ideology, which is so weak a force that it cannot overcome even the most minor or speculative threat to legislators' ability to be re-elected, can simultaneously be so strong a force that it can overcome judges' clear and nearly universal understanding about the proper basis for their decisions.

A great virtue of Tamanaha's theory of judicial decision making is that it takes full account of the motivations that the judges themselves identify. As Tamanaha notes, judges have always acknowledged that their personal judgment and ideological views are an ineradicable part of the decision-making process. But they also insist that they make a concerted effort to follow the law, and that they do so most of the time. They generally say, as Tamanaha notes, that they perceive about 90 percent of the cases presented to them as controlled by law, by which they mean that any federal judge, presented with such a case, would reach the same conclusion (pp. 128–29, 144).

This is such a sociologically plausible position that it has great appeal even apart from the direct evidence that Tamanaha presents in its support. It would be startling if the entire group of federal judges consistently violated the norms of their position. We might expect such behavior if most of the people appointed to the federal judiciary were drug dealers, survivalists, or some other group that is alienated from, and antagonistic to, the prevailing norms of our society. But this is not the case. Federal judges are generally people from middle class or upper-middle class backgrounds. They have performed well—in most cases very well—as measured by conventional indicators such as school grades, standardized test scores, recommendation letters, and personal relations with supervisors and colleagues. In addition, they have generally succeeded in conventional roles, most often as public and private attorneys, prior to entering the judiciary. When being considered for the position, they are subject to intensive scrutiny that will tend to eliminate, or deter in advance, anyone who departs from the mainstream to a significant extent.

People like these, when given a high-prestige position that society as a whole regards as important, generally try to follow the rules that pertain to that position and do a good job as defined by those rules. They are unlikely to adopt a consistently disobedient or manipulative stance. Tamanaha's theory of judging, unlike many of its rivals, incorporates this highly plausible model of judicial behavior. He of course avoids the error that, as he points out, was incorrectly attributed to the formalists. He is fully aware, as the formalists themselves were, that judicial decision making is a human

24. *See supra* sources cited note 23.

25. *See supra* sources cited note 13.

process, not a mechanical one; that the judges' opinions affect their decision making; and that they make errors and go off on tangents. But he is more concerned about avoiding the countervailing tendency that, as he also points out, was incorrectly attributed to the realists. He insists that judges are not irresponsible, mercurial, or insincere, but that they take legal doctrine seriously and strive to obey it.

The difficulty with Tamanaha's theory of judicial decision making, despite its many virtues, is that it seems too benign, too sanguine, about the concept of rule following and judges' ability to employ that approach. To be more specific, he attempts to cordon off the influence of ideology in a way that raises some serious questions. The judges' commonly expressed belief that 90% of their cases are determined by law and are essentially free of ideology sounds a bit like an urban legend. The judges are almost certainly correct in their assessment that 90% of their cases do not elicit controversy and would be decided the same way by virtually any federal judge, but that does not necessarily mean that ideology is absent from those decisions. It may only mean that virtually all federal judges share an ideology that determines 90% of the cases. This would not be particularly surprising, given the overlap in their backgrounds, training, experience, and professional norms. Indeed, the very same sociological phenomena that support Tamanaha's rejection of the pseudorealist position reflected in the judicial-politics literature cast doubt on the reliability of the judges' self-assessment that he so readily accepts. Because they tend to obey, and indeed internalize, the norms of their position, judges are unlikely to perceive the ideological assumptions embedded in those norms.

Moreover, even if we consider only consciously contested ideological issues, the 10% of the cases where such issues arise may not be as small a proportion as it initially appears. These cases probably represent the growing edge of the law, the issues that determine its future contours. If two countries are fighting each other along a shared frontier, we would not say that they are 90% at peace; rather, we would say that they are fully at war, but fighting in only 10% of each country's total area. The lawmaking process, which is what the judicial-attitudes studies focus on, and which is the source of greatest concern from the perspective of legitimacy, may be occurring along a similarly contested border, but have a similarly comprehensive impact on the law in its entirety.

A third factor that renders judicial decision making more ideological than Tamanaha acknowledges is the role of the Supreme Court. It is true, as he notes, that the "Supreme Court hears about one-tenth of 1 percent of federal court cases, a miniscule number winnowed and selected out from the massive total" (p. 197). But this unquestioned numerical reality does not mean, by itself, that assessing the role of ideology in judging by looking at Supreme Court decisions is a conceptual error, as Tamanaha asserts (pp. 121–22, 132, 197–98). The fact that the Supreme Court has an almost exclusively discretionary jurisdiction, unlike other federal courts, means that the Justices have the opportunity to take the ones that will produce the greatest

impact on our legal system.[26] That is their job, after all, so the same behavioral theory that supports Tamanaha's claim that judges try to follow the law also supports the observation that the Supreme Court takes the cases most likely to change it.

Moreover, that same theory suggests that once the Court has changed the law, lower federal courts will be heavily influenced by its decision. Thus, the Justices can answer as Aesop's lioness did when the rabbit asked her how many children she had: "Only one, but that one is a lion." Consider, for example, the one-person, one-vote rule. In the near half-century since the Court declared the issue justiciable,[27] it has handed down fewer than one decision per year implementing this rule.[28] In contrast, the lower court cases on this subject probably number in the thousands. But the Supreme Court's relatively small number of decisions has created the legal framework within which all of those lower court cases were decided.[29] This observation does not depend on any strong assertions about the lower courts' fidelity to law. All it claims is that these decisions exercise a strong influence on lower court judges, whether those judges follow or distinguish them, and whether they are trying to implement their own ideologies or follow the law. Even if the lower court judges are implementing their own ideologies, they must take account of the Supreme Court's decisions. And those decisions necessarily incorporate the Supreme Court's ideologically driven resolutions, resolutions that were and continue to be highly controversial.[30]

Underlying all these observations about the difficulty of cabining ideology within a small subset of judicial decisions is a more basic point about ideology itself, a term that Tamanaha does not define. Ideology is a mindset, a connected group of beliefs about the way the nation should be governed. It is not a set of tools that one deploys when confronted with disagreement, but a comprehensive framework of thought that affects one's basic interpretation of reality. The difficulty with the public choice theory of legislative behavior is that it assumes a level of control over this process that few people are capable of exercising. The virtue of the judicial-politics literature is that it acknowledges the force of ideology; its difficulty, as just described, is that it tends to underemphasize the role of rule following within the ideology of mainstream individuals.

It seems to me that there is a more plausible model of the judicial process that incorporates Tamanaha's central insight about the American

26. *See* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991).

27. Baker v. Carr, 369 U.S. 186, 197–98 (1962).

28. For a summary of these decisions, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 882–90 (3d ed. 2006).

29. *See* BRUCE E. CAIN, THE REAPPORTIONMENT PUZZLE (1984).

30. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 69–74 (1990). For different views on this still-controversial issue, see Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001) and Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643 (1993).

judiciary's commitment to law but that also accounts for the pervasive character of ideology. Ideology operates universally; it is always a factor in a judge's decision-making process. But the desire to follow the law, in exactly the manner that the conventional accounts of judicial decision making provide, is an equally pervasive factor. The result is that judges continually strive to integrate the two. That is, they strive to reach decisions that do what is best for the nation, according to their own understanding, but that also comport with existing legal doctrine.[31] Since these motivations are occurring within a single person's mind, they naturally interact with one another. The judge's assessment of what is best for the nation will influence her interpretation of legal doctrine, but the body of legal doctrine will also influence her ideological assessments.

Ideology and doctrine will interact in different ways over the range of cases that the judge decides. In some cases, such as interpreting a statute that establishes a rule of the road, or deciding a contract dispute between two commercial parties, the only consideration that will seem relevant to most judges is fidelity to prior doctrine. In other cases, doctrine will be so indeterminate that policy judgments will be the primary consideration, although these judgments must nonetheless be articulated in doctrinal terms.[32] When judges find that they cannot implement their preferences in ways that comport with legal doctrine, they will often relinquish those preferences, an inclination that distinguishes law-trained people from most other members of society. But this tendency is counteracted by the inherent dynamism of our legal system—its capacity for accommodating new doctrinal formulations that embody the evolving views of the judiciary.

The legal realists accused the formalists of falsely claiming that doctrine could be separated from ideology. Tamanaha's most striking and convincing point is that the scholars and judges they identified as formalists did not actually subscribe to this belief. His second point is that the realists, while insisting that the formalists were wrong, did not themselves subscribe to the belief that ideology could be separated from doctrine, in the sense that it would be the only determinant of judicial decisions. The natural conclusion that would seem to follow from these observations is not that doctrine can sometimes be separated from ideology but rather than the two interact, in a variety of complex ways, across the entire range of judicial decision making. Tamanaha's evocative term for his theory of judicial decision making—"balanced" realism, not "partial" or "cabined" realism—would seem to be more applicable to that conclusion than to the notion that ideology only affects a delimited number of decisions.

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31. MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE 211–48 (1998); Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989 (1996).

32. The need to state a policy position in doctrinal terms, that is, in terms that resemble prior law in form even if the content is new, represents a genuine constraint on judges. Another is that a new legal policy will not have much influence unless it coordinates the integrative efforts of other judges, a truly demanding constraint. See FEELEY & RUBIN, *supra* note 31, at 226–33.

III. The Implications for Legal Education

In recent years, there has been mounting dissatisfaction with the traditional approach to legal education.[33] That approach is a product of the formalist era and was developed by the most famous of the formalists, C.C. Langdell.[34] Critics often attribute the many defects they perceive in traditional legal education to the formalist conception of law that Langdell and his followers maintained. But if the formalists were not formalists, as Tamanaha convincingly demonstrates, what are we now to make of the educational approach that they bequeathed to us? Does Tamanaha's revision undermine the current critique and serve as a means of rehabilitating the traditional approach? Tamanaha does not discuss legal education in his book, but a feature of truly important books, like this one, is that it has implications for subjects beyond those that the author chooses to address.

Tamanaha's discussion of Langdell's views about law in general can serve as a starting point for this inquiry. This discussion appears in his explanation of the way that critics of legal formalism have conflated four possible but separate claims involving the certainty of the law. To reiterate, these are, first, that law is based on an underlying and logically ordered set of principles; second, that the content of these principles can be discerned by deductive reasoning in an unambiguous fashion; third, that judges apply those principles, once discerned, to actual cases by deductive reasoning; and fourth, that the actual state of the common law results from those principles as unambiguously discerned and definitively applied by judges (p. 51). According to Tamanaha, Langdell believed only the first two propositions and asserted that law could be considered a science on that basis. He directly challenged the last two propositions, however; "he was highly critical of the actual reasoning of judges" and he "considered law to be in a defective state" as a result of their mistakes (p. 53).

Detailed consideration of the educational approach that Landgell developed confirms Tamanaha's claim. At the time Langdell arrived at Harvard, European law schools had been teaching their students using treatises and lecture formats for about six hundred years. Treatises, moreover, were the standard form of legal scholarship in the United States as well as Europe. What is striking about Langdell's approach, and ultimately responsible for its impact, is the new idea of teaching law students from primary sources—specifically the decisions in appellate cases. Rather than writing a treatise in

33. Elizabeth Mertz, The Language of Law School: Learning to "Think Like a Lawyer" (2007); William Sullivan et al., Educating Lawyers: Preparation for the Profession of Law (2007); Todd Rakoff & Martha Minow, *A Case for Another Case Method*, 60 Vand. L. Rev. 597 (2007); Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 Vand. L. Rev. 515 (2007); Russell Weaver, *Langdell's Legacy: Living with the Case Method*, 36 Vill. L. Rev. 517 (1991).

34. *See* William C. Chase, The American Law School and the Rise of Administrative Government 26–27 (1982); William P. LaPiana, Logic and Experience: The Origin of Modern Legal Education (1994); Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s, at 35–50 (1983); Anthony Chase, *The Birth of the Modern Law School*, 23 Am. J. Legal Hist. 329 (1979).

his own subject, which was contracts, he developed a new teaching tool, the casebook, to present those sources to the students. Langdell also developed a strikingly new mode of teaching, known somewhat inaccurately as the Socratic method, to present and discuss those primary sources.

Langdell's design for education is clearly based on the fact that he rejected the fourth proposition, just as Tamanaha argues. If he had truly believed that the current common law decisions accurately reflected the legal system's underlying principles, then he would presumably have taught his contracts course from a treatise rather than from a casebook. Much more basically, however, his approach is premised on a rejection of the third proposition as well. He understood that underlying legal principles, even if they can be developed and extended by deductive reasoning, cannot be applied to the real world situations that confront the judge in a deductive, mechanical manner. Rather, the process requires experience and judgment, just as Tamanaha tells us that he and the other so-called formalists believed. To teach this process to the students, therefore, Langdell developed an approach which required them to practice, refine, and ultimately internalize a way of reasoning; they were not only, and indeed not primarily, supposed to learn what a lawyer knows but, in the famous phrase, "learn to think like a lawyer."[35] This is the reason why hypotheticals ("instead of a contract for paper clips, suppose it was a contract for venomous snakes") play such a large role in the Langdellian approach. It is not because the hypothetical is likely to arise—in some sense, the more unlikely the better—but because it provides a way of practicing and refining the mode of analysis and judgment that is an inevitable part of the judicial decision-making process.

Langdell's method could be described as "learning by doing," but this is actually John Dewey's educational philosophy, not Langdell's.[36] One of the most significant detriments in continuing the traditional, Langdellian approach is that it predates Dewey and thus fails to incorporate all the insights about student-centered learning that were developed during the course of the twentieth century on the basis of Dewey's insights.[37] Clinical education, perhaps the most significant post-Langdellian innovation in American legal education,[38] is truly learning by doing. The problem with Langdell's curriculum, from this perspective, is that it fails to incorporate so many of a lawyer's tasks that one might expect to find in a genuine learning-by-doing

35. *See* MERTZ, *supra* note 33, at 12–30; Bruce A. Kimball, *"Warn Students That I Entertain Heretical Opinions, Which They Are Not to Take as Law": The Inception of Case Method Teaching in the Classrooms of the Early C.C. Langdell, 1870–1883*, 17 LAW & HIST. REV. 57 (1999).

36. JOHN DEWEY, DEMOCRACY AND EDUCATION (1916); JOHN DEWEY, EXPERIENCE AND EDUCATION (1938).

37. Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609, 643–50 (2007).

38. *See generally* PHILIP G. SCHRAG & MICHAEL MELTSNER, REFLECTIONS ON CLINICAL LEGAL EDUCATION (1998); STEVENS, *supra* note 34, at 214–16; WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 7–12, 118–25 (2007); Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577 (1987).

educational program, such as client interviewing, client advising, motion practice, deposition taking, brief writing, contract negotiation, contract drafting, and law-office management.[39]

There is nothing inconsistent in teaching professional skills of this sort in a university graduate department. Rather, training in these skills was omitted from Langdell's curriculum because he was after something else entirely. The Socratic method was not designed to teach the skill of appellate advocacy, the lawyer task that seems most similar to the law school classroom dynamic; if that was what the classroom experience did, there would have been no felt need to develop moot court programs. Rather, Langdell viewed his approach as an essential way to teach a basic understanding of the law itself. That is because, as Tamanaha tells us, he believed that applying legal principles to real-world situations involves judgment and experience and that judges, in doing so, were actually making law on the basis of those principles. Because this process was not deductive, it could not be reduced to a formula or set of rules that could be taught from a treatise. Students had to be guided through the process itself—to understand how it worked from the inside, as it were. By exploding the myths about legal formalism and demonstrating that Langdell and his contemporaries fully understood this judgmental process, Tamanaha has provided enormously valuable clarification about the rationale that lies behind the educational approach that still dominates our system of legal education.

One problem with the Langdellian approach, as noted above and as Tamanaha's analysis of formalist legal thought indicates, is that it is less modern than it appears; the classroom dialogue is not intended to teach a skill, but rather an understanding of the judicial process and the common law. But Tamanaha's analysis also reveals a much deeper problem with traditional legal education. As he notes, Langdell may not have believed the last two propositions that true formalism (the sort that never existed) entails, but he did believe the first two. That is, he believed that law is based on an underlying and logically ordered set of principles and that the content of these principles can be discerned by deductive reasoning in an unambiguous fashion. Langdell's assertion that the study of law is a form of science is based on these beliefs (pp. 52–53).

It was these first two propositions that Langdell used as the basis of his curriculum, and it was the assertion that they gave law the character of science that provided his argument for placing a law school in a major academic university.[40] He relied on primary sources because they constitute data about the underlying regularities of law, just as empirical observations constitute data that enable the scientist to discover the underlying

39. As Tamanaha points out, part of the realist critique of the formalists involved a critique of the educational curriculum the formalists developed, and a call for a more experientially based curriculum. P. 94; *see also* Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933); K.N. Llewellyn, *On What is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651 (1935).

40. On Langdell's belief that the study of law was a science, see LAPIANA, *supra* note 34, at 55–78; STEVENS, *supra* note 34, at 52–59.

regularities of nature. But for lawyers, as for scientists, discerning those regularities is not an easy task; it requires real analytic ability, sustained attention, and balanced judgment. This is another aspect of the ability that the Socratic method was designed to teach. Interrogating students about the basis of a judicial decision, testing their assertions with increasingly refined hypotheticals, and challenging them to justify their conclusions will enable them to discern the legal regularities that govern the Anglo-American common law system and that should govern the decision in the case. Having grasped the relevant principle, the student can then return to the case to see if it was correctly decided. The whole approach does not make sense unless those principles exist, unless there are embedded, logically ordered regularities that can be discerned. In their absence, the relevant question about a judicial decision would be whether it followed the law and what policy position it advanced.

The difficulty with basing a law school curriculum on these first two propositions—that law is based on an underlying and logically ordered set of principles and that the content of those principles could be discerned by deductive reasoning—is that they are false, as false as the last two propositions. The idea that they exist probably comes from Blackstone, England's first legal academic, who may have used them as an argument for placing himself in a major academic university.[41] Common law certainly contains some general rules regarding volition, foreseeability, standards of care, and so forth, but it is largely the product of incremental decision making by judges who were given statutory jurisdiction by England's royal administration and left to devise the content of the law themselves. As the Supreme Court stated when it rejected the doctrine of general common law in *Erie Railroad Co. v. Tompkins*, the law of the state that the federal courts are obligated to apply consists of the actual decisions handed down by state judges, not of some set of Platonic principles that the decisions imperfectly reflect.[42]

More basically, an educational system based on Langdell's approach is defective because common law is no longer the dominant law of the United States. It is only a part of our law, and an increasingly minor part. The major part consists of statutes and regulations, the legal machinery of modern regulatory government. Langdell was not at fault for ignoring this body of law when he designed his curriculum because it did not exist at the time, at least at the national level. But subsequent legal academics are at fault for continuing to rely on Langdell's curriculum after its exclusive focus on common law ceased to reflect the actual legal system of the nation. The real problem goes still deeper, however. Because common law develops incrementally, through the work of individual judges who are loosely organized and lightly coordinated, inherent consistency or coherence becomes an important vir-

41. Blackstone was a professor at Oxford from 1753 to 1766. He wrote his treatise, WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (University of Chicago Press 1979) (1756), largely while he was there.

42. 304 U.S. 64 (1938).

tue. Common law achieves the clarity and predictability that a system of legal rules requires largely through that internal consistency. When one teaches common law, therefore, there is a natural tendency to focus on the efforts of its creators—judges—to achieve consistency and coherence. The Langdellian belief that these efforts are not merely instrumental but reflect deep, quasi-mystical principles that represent the soul of Anglo-American law will obviously tend to amplify this focus, perhaps to the level of obsession.

Coherence and consistency, however, are only two of the virtues that a legal system is expected to possess, particularly in a modern administrative state. Law is the instrumentality by which the modern state achieves many of the economic and social goals that constitute its essential purpose. Law helps manage the economic production that has moved out of the home and into large, impersonal, and potentially oppressive offices and factories. It regulates the provision of consumer products that are now supplied by large mass-marketing firms, rather than by people's neighbors. It shapes the public educational, health care, and welfare programs that replace the long-gone structures of traditional village life. It secures equality and social justice in place of the social, racial, and religious hierarchies that characterized premodern society and consigned so many of its members to subordinate or marginal positions. In performing these functions, the primary virtue of law is its ability to achieve the purposes for which it is intended: to protect people, provide services, and achieve justice. Its coherence and consistency is a secondary consideration, first, because most law is now being promulgated by organized institutions such as legislatures and agencies, not by a loosely coordinated group of judges; and, second, because consistency is only of value to the extent that it contributes to the law's ability to serve these enormously important purposes. A curriculum that is focused on consistency, and perhaps obsessed by it, conveys an impoverished and increasingly irrelevant message about modern law to modern law students.

Conclusion

As mentioned, Tamanaha does not discuss legal education in his book, and he does not necessarily endorse this critique of it, since his previous book condemned the increasingly instrumental character of modern law.[43] Nonetheless, the book's most definitive contribution, its revisionist description of legal formalism, provides great insights into the subject of legal education. It informs us that Langdell and his contemporaries understood that judges made law, relied on judgment, and often made mistakes. That explains how they were able to develop such a lively, vivid, and open-ended classroom dynamic that has maintained its appeal for over a century. In addition, *Beyond the Formalist-Realist Divide* informs us about the real beliefs of the so-called formalists, their concept of common law as derived from

43. Brian Z. Tamanaha, Law as a Means to an End: Threat to the Rule of Law (2006).

embedded principles that could be extended by deductive reasons. That explains why the curriculum they designed, no matter how lively and vivid its presentation, is seriously out of date in our modern legal system and needs to be entirely rethought.