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A Judge's Role in the Rule of Law

William F. Hurst IV

Brian Z. Tamanaha, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY*. Cambridge University Press, 2004. 180 pp. \$28.99.

Ronald A. Cass, *RULE OF LAW IN AMERICA, THE*. Johns Hopkins University Press, 2001. 214 pp. \$19.95.

President Bush's 2005 nominations to the Supreme Court of the United States intensified the discussion over the role of judges in the American judicial system. The majority of that discussion has focused on the rule of law and how it pertains to the scope of judicial power. As a nominee before the Senate Judiciary Committee, now-Chief Justice John Roberts proclaimed, "It is [the] rule of law that protects the rights and liberties of all Americans. It is the envy of the world. Because without the rule of law, any rights are meaningless."

Two recently published books, *On the Rule of Law: History, Politics, Theory* by Brian Z. Tamanaha, and *The Rule of Law in America* by Ronald A. Cass, provide an in-depth analysis into what the rule of law means today, its history, and what impact its meaning has on the current American judiciary.

Tamanaha is quick to point out the uniqueness that exists when it comes to the idea of the rule of law. The rule of law as an ideal has received unprecedented endorsement that no other single political idea has ever achieved. Chinese leaders have supported the establishment of the rule of law in their own country. President Bush is frequently quoted as supporting "democracy and the rule of law." Iranian leaders have embraced the importance of the rule of law. Even a former Afghan warlord, campaigning for a position in the post-Taliban government, was quoted as saying, "Now is the time to defend ourselves not with tanks and armed corps but by the rule of law." Similar endorsements can be attributed to many more political leaders, leaders of governments that seem to have very little respect for the values, such as individual rights, capitalism, and democracy, that are essential to judicial system in the United States.

One of the questions that Tamanaha attempts to answer is what role the judge plays in the rule of law. In searching for the answer, Tamanaha writes at great length about the history of the rule and how it has developed as a concept throughout the ages. Tamanaha describes how the rule of law was started as a vague concept in Greek thought, how nobles used the idea during the Middle Ages to protect themselves against the tyranny of the kings, and how numerous political movements and theorists had influence on what the rule of law means today.

Of these movements, the classic liberalism movement of the late-seventeenth and eighteenth centuries had the greatest

impact on what is understood today to be the rule of law. Classic liberalism stressed many ideas, such as individual liberty, capitalism, and government based on the consent of the citizenry. In terms of the rule of law, however, it was key that classic liberalism stressed a competitive interdependence within the government. With the idea that no single institution should accumulate total power, liberals saw the division of government into separate compartments as essential in the preservation of liberty. This division of power included creating a supreme independent judiciary, one that could rein in the other branches of government when they threatened the liberty of the citizenry. No single individual was above the law, every citizen and government actor was accountable to the law. This model of judicial independence is what today's American legal system is built upon. Many skeptics point out that such a system does not always protect liberty as it was originally designed to do, but Tamanaha points out while the system is not perfect, "Law is the skeleton that holds the liberal system upright and gives it form and stability."

In a classic liberal system, judges were allocated a special place as the final preservers of the rule of law. The laws of the land were seen as being different from morality or politics in the sense that they were not arbitrary or subject to the passions of a few, but rather the laws were formed by the consent of the citizenry, and it was the judge's role to ensure that those laws were followed. It was seen as the judge's role not to change the law or interpret it in a manner that best suited his desires. The judge was seen as a mere conduit for announcing what the law required.

The classic liberal ideal of the rule of law began to decline with the increasing demand for a social welfare state in the end of the nineteenth century and continuing throughout the late twentieth century. One clear downside to the economics of classic liberalism was that while it fostered an unprecedented expansion of commercial activity, its rewards were spread unequally, creating disparity among social classes. One of the more glaring inequalities was the working poor toiling long hours in abominable conditions, and doing so for little pay and few benefits. This inequity appeared not only to be harsh but grossly unfair, as those who benefited the most appeared to labor the least and therefore be the least deserving.

In response to these inequities, governments began to shed themselves of their laissez-faire economics and began to increase the amount of economic regulation and social welfare. This increase in the United States began in large part as a response to the Great Depression, and except for intermittent episodes of deregulation and welfare reform, has continued into the new millennium. During this time, the rule of law

come under fire, as it was often viewed as a blockade for many of the progressive changes that were sought by many during the twentieth century.

The role of the judge changed dramatically during this transformation. Judges in the social-welfare state were increasingly asked to apply open-ended standards like fairness, good faith, reasonableness, and unconscionability. Judges were often asked to engage in purposive reasoning in order to achieve legislatively established policy goals. This change in the role of the judiciary was seen by some observers as contrary to formal rule-of-law principles. Rather than simply applying the law as it was written, many judges went outside the domain of legal rules and legal reasoning to consult external sources of knowledge to discern the lay sense of justice. Many decisions began to be based on political or economic arguments, rather than the legal arguments that advocates of the rule of law wished to see. Observers warned that the rule of law was being threatened by having unelected judges make decisions no different in kind from those made by legislatures.

In his book, Cass writes at length about what role a judge should play in today's modern understanding of the rule of law. As one would expect, opinions differ greatly on what that role should be. Cass divides the opinions into two camps. The first is what Cass calls the partnership model of judging. This model describes judges as substantially unconstrained, motivated by a complex set of instincts, interest, and incentives. As Cass points out, judges are seen as partners with other branches of government, rightly granting substantial room to choose among several legitimate, alternative decisional paths.

The opposing camp is the agency model of judging, which finds judges' decisions primarily governed by external legal authority. The judges' background, politics, and personal preferences do not disappear entirely, but rather are treated as incidental, not dominant factors. Judges perform their duties removed from politics, constrained instead by forces that can

be characterized as belonging to a relatively autonomous domain of law. Under this system, a judge is not allowed to do what he or she thinks is best or what is the most appropriate according to some principle divorced from positive law, but instead the judge is directed to find the proper meaning for a particular law. The agency model emphasizes that the judge's role is fixed irrespective of his or her own individual preferences.

Cass analyzes the evidence that supports both models, but he concludes that most judges do not conform fully to either polar model. There are institutional incentives that encourage judges to follow whichever model they choose to follow. Most notably absent, however, are binding constraints that would prevent judges from injecting personal beliefs into decisions. The influences that a judge uses in the decision-making process depends wholly on the particular judge. While a judge might face strong criticism for the use of particular influences (such as international law), in most cases such criticism is the maximum extent of negative repercussions that a judge would face. This is especially true in the federal judiciary, where judges have lifetime appointment and the threat of impeachment is almost nonexistent.

In conclusion, both books are unable to point to a specific definition of the rule of law, nor is either able to say precisely what role a judge plays within that definition. Perhaps that is the point, however, as the prevailing theme of both books is that the definition for the rule of law depends wholly on the perspective of the definer. The same can be said for the role of a judge, as it is a judge's prerogative to decide exactly what role to play within the judicial system. Tamanaha's and Cass's works are excellent tools in grasping the array of approaches to applying the rule of law in today's judicial system.

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