

Cambridge University Press

978-0-521-86952-2 - Law as a Means to an End: Threat to the Rule of Law

Brian Z. Tamanaha

Frontmatter

[More information](#)

Law as a Means to an End

The contemporary U.S. legal culture is marked by ubiquitous battles among various groups attempting to seize control of the law and wield it against others in pursuit of their particular agendas. This battle takes place in administrative, legislative, and judicial arenas at both the state and federal levels. This book identifies the underlying source of these battles in the spread of the instrumental view of law – the idea that law is purely a means to an end – in a context of sharp disagreement over the social good. It traces the rise of the instrumental view of law in the course of the past two centuries, then demonstrates the pervasiveness of this view of law and its implications within the contemporary legal culture, and ends by showing the various ways in which seeing law in purely instrumental terms threatens to corrode the rule of law.

Brian Z. Tamanaha is the Chief Judge Benjamin N. Cardozo Professor of Law at St. John's University School of Law. He delivered the inaugural Montesquieu Lecture (2004) at the University of Tilburg. He is the author of *On the Rule of Law* (Cambridge 2004), *Realistic Socio-Legal Theory* (1997), and *A General Jurisprudence of Law and Society* (2001), which won the Herbert Jacob Book Prize in 2001 and the inaugural Dennis Leslie Mahoney Prize in Legal Theory (2006) for the outstanding contemporary work in sociological jurisprudence. He has published many articles and is the Associate Editor of *Law and Society Review*.

Cambridge University Press

978-0-521-86952-2 - Law as a Means to an End: Threat to the Rule of Law

Brian Z. Tamanaha

Frontmatter

[More information](#)

The Law in Context Series

Editors: William Twining (University College London)
and Christopher McCrudden (Lincoln College, Oxford)

Since 1970, the Law in Context Series has been in the forefront of the movement to broaden the study of law. It has been a vehicle for the publication of innovative scholarly books that treat law and legal phenomena critically in their social, political, and economic contexts from a variety of perspectives to bear on new and existing areas of law taught in universities. A contextual approach involves treating legal subjects broadly, using material from other social sciences and from any other discipline that helps to explain the operation in practice of the subject under discussion. It is hoped that this orientation is at once more stimulating and more realistic than the bare exposition of legal rules. The series includes original books that have a different emphasis from traditional legal textbooks, while maintaining the same high standards of scholarship. They are written primarily for undergraduate and graduate students of law and of the disciplines, but most also appeal to wider readership. In the past, most books in the series have focused on English law, but recent publications include books on European law, globalization, transnational legal processes, and comparative law.

Books in the Series

Anderson, Schum & Twining: *Analysis of Evidence*
Ashworth: *Sentencing and Criminal Justice*
Barton & Douglas: *Law and Parenthood*
Beecher-Monas: *Evaluating Scientific Evidence: An Interdisciplinary Framework for Intellectual Due Process*
Bell: *French Legal Cultures*
Bercusson: *European Labour Law*
Birkinshaw: *European Public Law*
Birkinshaw: *Freedom of Information: The Law, the Practice and the Ideal*
Cane: *Atiyah's Accidents, Compensation and the Law*
Clarke & Kohler: *Property Law*
Collins: *The Law of Contract*
Cranton Scott & Black: *Consumers and the Law*
Davies: *Perspectives on Labour Law*
De Sousa Santos: *Toward a New Legal Common Sense*
Diduck: *Law's Families*
Elworthy & Holder: *Environmental Protection: Text and Materials*
Fortin: *Children's Rights and the Developing Law*
Glover Thomas: *Reconstructing Mental Health Law and Policy*
Gobert & Punch: *Rethinking Corporate Crime*
Goodrich: *Languages of Law*
Harlow & Rawlings: *Law and Administration: Text and Materials*
Harris: *An Introduction to Law*
Harris: *Remedies, Contract and Tort*
Harvey: *Seeking Asylum in the UK: Problems and Prospects*
Hervey & McHale: *Health Law and the European Union*
Lacey & Wells: *Reconstructing Criminal Law*
Lewis: *Choice and the Legal Order: Rising above Politics*
Likosky: *Law, Infrastructure and Human Rights*
Likosky: *Transnational Legal Processes*
Maughan & Webb: *Lawyering Skills and the Legal Process*
Moffat: *Trusts Law: Text and Materials*
Norrie: *Crime, Reason and History*
O'Dair: *Legal Ethics*

Continued after the index

Cambridge University Press

978-0-521-86952-2 - Law as a Means to an End: Threat to the Rule of Law

Brian Z. Tamanaha

Frontmatter

[More information](#)

Law as a Means to an End

Threat to the Rule
of Law

Brian Z. Tamanaha



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press

978-0-521-86952-2 - Law as a Means to an End: Threat to the Rule of Law

Brian Z. Tamanaha

Frontmatter

[More information](#)

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press

32 Avenue of the Americas, New York, NY 10013-2473, USA

www.cambridge.org

Information on this title: www.cambridge.org/9780521869522

© Brian Z. Tamanaha 2006

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2006

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication Data

Tamanaha, Brian Z.

Law as a means to an end : threat to the rule of law / Brian Tamanaha.

p. cm.

Includes bibliographical references and index.

ISBN-13: 978-0-521-86952-2 (hardback)

ISBN-10: 0-521-86952-8 (hardback)

ISBN-13: 978-0-521-68967-0 (pbk.)

ISBN-10: 0-521-68967-8 (pbk.)

1. Rule of law – United States – History. 2. Law – United States – Philosophy.

3. Legal positivism. 4. Instrumentalism (Philosophy). I. Title

KF382.T36 2007

340'.11 – dc22 2006013845

ISBN-13 978-0-521-86952-2 hardback

ISBN-10 0-521-86952-8 hardback

ISBN-13 978-0-521-68967-0 paperback

ISBN-10 0-521-68967-8 paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party Internet Web sites referred to in this publication and does not guarantee that any content on such Web sites is, or will remain, accurate or appropriate.

Cambridge University Press

978-0-521-86952-2 - Law as a Means to an End: Threat to the Rule of Law

Brian Z. Tamanaha

Frontmatter

[More information](#)

For

Lawrence M. Friedman

Marc Galanter

Morty Horwitz

William Twining

Contents

<i>Acknowledgments</i>	<i>page xi</i>
Introduction	1
Part 1 The spread of legal instrumentalism	
1 Non-instrumental views of law	11
2 A changing society and common law in the nineteenth century	24
3 Nineteenth-century legislation and legal profession	41
4 Instrumentalism of the legal realists	60
5 Twentieth-century Supreme Court instrumentalism	77
Part 2 Contemporary legal instrumentalism	
6 Instrumentalism in legal academia in the 1970s	101
7 Instrumentalism in theories of law	118
8 Instrumentalism in the legal profession	133
9 Instrumentalism of cause litigation	156
10 Instrumentalism and the judiciary	172
11 Instrumentalism in legislation and administration	190
Part 3 Corroding the rule of law	
12 Collapse of higher law, deterioration of common good	215
13 The threat to legality	227
Epilogue	246
<i>Index</i>	251

Cambridge University Press

978-0-521-86952-2 - Law as a Means to an End: Threat to the Rule of Law

Brian Z. Tamanaha

Frontmatter

[More information](#)

Acknowledgments

An outline of this book was presented as the inaugural Montesquieu Lecture (2004) at the University of Tilburg. I thank the law faculty at the University of Tilburg for this honor, and for encouraging me to set out my views on the most significant contemporary developments in legal theory. I thank John Berger of Cambridge University Press for his enthusiastic support for this book from the very first day I suggested it to him, and I thank the two anonymous reviewers John procured for their helpful critical comments on the entire manuscript. I appreciate their patience in wading through the messy initial draft I submitted; their input fundamentally shaped the final product. I thank Susan Fortney, Rob Vischer, Peter Margulies, Gary Minda, John Barrett, and Marc Galanter for their helpful comments on particular chapters, and I thank Tim Zick, Nelson Tebbe, and William Twining for their comments on the entire manuscript. I thank Lawrence M. Friedman for responding to several detailed inquiries on various historical issues early in the writing of the book. I thank the Berkeley Center for the Study of Law and Society, the Stanford Law School faculty, and the University of Groningen legal theory faculty group, for inviting me to present aspects of this book, and for the feedback I received. I thank Mike Schindhelm for his excellent research support. I thank Astrid Emel and Jaenne Legrow and the rest of the library staff for responding with good humor and promptness to my many requests for books and articles from old or obscure sources. I thank Mary Cadette and Linda Smith for their superb assistance in the editorial process. My special thanks go to Honorata, Jolijt, and Kats for their understanding and unflagging support for this project and to Sava for inspiring me to get the book done.

This book is dedicated to Lawrence M. Friedman, Marc Galanter, Morty Horwitz, and William Twining. About a dozen years ago, each of them reached out to me under different circumstances and expressed an interest in my work and in me as a person. For an obscure academic just starting out, there can be no greater boost than the chance to interact with scholars who have accomplished so much. Over the years, I have enjoyed lunches, dinners, long walks, and even a few sleep-overs and many personal and intellectual conversations with each. I have learned from their

Cambridge University Press
978-0-521-86952-2 - Law as a Means to an End: Threat to the Rule of Law
Brian Z. Tamanaha
Frontmatter
[More information](#)

xii Acknowledgments

work, as well as from their personal examples. I know each of them will object to various aspects of this book, but all will support my writing of it. They have each mentored many individuals, and I feel lucky to be included. This dedication is a token of my gratitude for their generosity and to show how much I cherish our relationships.