Defending the Rule of Law in an Era of Cultural Fragmentation and Cynicism

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Abstract

Abandonment of a belief in the objectivity of knowledge, along with the postmodernist assertion that language, truth and power are intertwined has left us with a sense of profound uncertainty. This pervasive doubt extends to virtually all realms, including law. The sense of uncertainty causes us to struggle over the application of indeterminate rules written in indeterminate language applied to indeterminate contexts.

At the core of our uncertainty in the context of the perceived integrity of the Rule of Law is that once our most important legal doctrines were disconnected from any belief in divine or natural sources of right and wrong existing independent of humanity but to which we are subject, nothing of consensual substance has been able to replace those strong belief systems. This means that for all issues of social consequence choices must be made in an environment where there are no clear formulae to guide us. Lacking clear moral formulae we have increasingly resorted to intimidation, accusations of bigotry, ill will and agenda-driven malice in advancing our positions and condemning those of our opponents. The challenge is that without a reasonable degree of shared morality and belief the terms of law are too open-textured to produce clear justifications for many of the conclusions offered in areas of the most critical and intense social conflicts. In law, those who purport to be able to identify certainty in interpretation, such as Justice Antonin Scalia, themselves offer only relativistic methods that are as vulnerable to attack as being as biased as the choices made by those they criticize.

While the disconnection between law, natural law and divinity is rationally and evidentially justifiable in terms of our being unable to “prove” through methods acceptable to our “modern” post-Enlightenment community that God or an overarching system of natural law exists, we have nothing to replace the value system represented by faith, mystery and myth
other than resort to political power. Nor is it likely we can reinvent a strong consensual source for law and fundamental values. With the resulting moral vacuum this means that, since law is a primary method of power in Western society, gaining control of the institutions by which law is created, interpreted and applied is central to the strategies of competing factions of all kinds. The dilemma is that the struggle to control law and legal institutions is weakening the Rule of Law by undermining respect for law and its institutions, reducing our ability to compromise because we are left with the unsatisfying mantra of, “that’s just your opinion—and I have a different one” or “I’m right and you are wrong and if you don’t agree with me then you are a bigot”. The irony is that our reliance on concepts such as equal protection, fairness, equity and similar articulations of basic principles is itself necessarily a form of belief in natural law because the terms are empty vessels into which we must pour meaning.

Introduction

What we label “law” is a specialized political system backed by the implicit threat of force. The system uses choices of law to allocate social goods, rights and obligations and of course there are inevitable struggles over how allocations are made and who benefits the most from the choices. In a Rule of Law system law is a critical means of regulating and influencing behavior. Law is thus intimately connected with and generative of power. ¹ This makes law part of a very different universe of valuation, intermediate proofs and judgmental choice than we intend when we speak of science, empiricism or philosophical inquiry aimed at uncovering fundamental truths.

Law is essentially a system by which we balance competing interests in ways intended to mitigate conflicts and produce outcomes that do not confer inordinate benefits on one set of interests while imposing inordinate detriments on others. When the institutions, decision makers and processes of law become too heavily slanted toward particular

interests the system loses its perceived integrity and we are thrust into a conflict representing the naked exercise of power. In that context while we may use words such as equality, equal protection, fairness, community, justice and the like, the words are empty without true shared moral content because they are little more than manipulative ploys offered as rationalizations for an interest group’s desires.

The conditions within which the Rule of Law operates have changed dramatically over the past several decades. The pace of change is accelerating and heavy demands have been placed on law as an instrument of strategic change driven by interest group agendas and the desire by competing interest groups to retain or gain power. This transformation of the nature and texture of the Rule of Law has been accompanied and aided by the postmodernist critique of law as a “soft” language of power, a language subject to abuse by those in control of political and economic institutions as well as those attempting to wrest power from others.2

**Behind “Oz’s Curtain**

Our human institutions, including the Rule of Law, are inevitably imperfect when judged against theoretical models. As such they cannot withstand close scrutiny. Unless power is dictated at the point of a gun in an absolute dictatorship, effective authority requires masking in the way of the Wizard of Oz. It is as Aristotle warned: “the law has no power to command obedience except that of habit, which can only be given by time, so that a readiness to change from old to new laws enfeebles the power of the law.”3 The “story” of the Rule of Law requires what in the literary realm is referred to as the “suspension of disbelief”. The need to engage in deception, including self-deception, is particularly great in a “soft” system such as the Rule of Law.

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2 John Patrick Diggins, *The Rise and Fall of the American Left* (W.W. Norton & Co., New York and London, 1992). Diggins argues the Left: “has become ... hooked on European “postmodern” theories that have more to do with domination than with liberation. Earlier in the century the Left fought power with ideas provided by knowledge; today knowledge is suspect in its claims to efficacy and objectivity, and ideas are simply “discourses” about this or that. A Left without power is familiar and perhaps a defining characteristic of its historical predicament; a Left without knowledge loses its excuse for being.” Id, at 17.

3 *See, Aristotle, The Politics, Bk. II, c. 8, B. Jowett trans., The Oxford Translation of Aristotle, W.D. Ross ed. (1921).*
Without an independent judiciary there can be no Rule of Law or real democracy. But judicial independence imposes the responsibility to exercise judgment and wise restraint and to understand the practical limits of the judicial task. Justice Stephen Breyer has warned that: “[Judicial] Independence doesn't mean you decide the way you want. Independence means you decide according to the law and the facts.... The balance has tipped too far, and when the balance has tipped too far, that threatens the institution. To threaten the institution is to threaten fair administration of justice and protection of liberty.”

Justice Anthony Kennedy makes the connection between the respect for law and perception of judicial integrity in the following way: “A commitment to the constitution is not something that's genetic, it's not inherited, it's not automatic. It has to be taught. And each generation must learn about the constitution and the values of constitutional institutions within the context of their own time, within the environment of their own time. And if we are in an era in which there is a loss of confidence in the judicial system--and, even worse, a misunderstanding of the judicial system--then we must take steps to correct it.” He goes on to conclude that: “I do sense that there is a growing misunderstanding, a growing lack of comprehension, of the necessity of independent judges.... There must be a rededication to the constitution in every generation. And every generation faces a different challenge.”

As a traditional method for organizing the formal rules of society and obtaining agreement the Rule of Law gained its power and perceived authenticity because it operated from behind a façade of illusions and assumptions. When forced into the light of rational and empirical critique it is exposed as an artificial political construct. This is because

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5 Kennedy, Moyers, “Justice for Sale?”; id.
6 Kennedy, Moyers, “Justice for Sale?”, id.
7 See, ERIC HOFER, THE TRUE BELIEVER: THOUGHTS ON THE NATURE OF MASS MOVEMENTS (1951), and his discussion of how the “fault finding man of words” attacks a dominant orthodoxy in order to undermine its perceived legitimacy and hold on power. Id, at 120.
necessary elements of law operating within the system we can call the Western variant of the Rule of Law include myth, aspiration, faith in some kind of Judeo-Christian divinity even if Deistic in nature, natural law and choice. It even carries with it a degree of hypocrisy. Part of the illusion that has given the Rule of Law its staying power is its ability to maintain a slow, sometimes almost glacial pace of change. When that change is too rapid and involves principles and institutions considered fundamental in our society the Rule of Law is exposed as an instrument of raw political power controlled by particular interest groups. It may retain its power but loses its tacit legitimacy.

Even the very liberal Supreme Court Justice Ruth Bader Ginsburg has gone on record as stating that the *Roe v. Wade* case was too broad a ruling made too soon in the process of the ongoing shift that was occurring in the area of abortion at the state level, concluding that: "Doctrinal limbs too swiftly shaped, experience teaches, may prove unstable."8 The importance of the gradual pace of change in legal interpretations exists in part because the language of legal doctrines is ambiguous and open-textured.

Though they may not always be aware of the fact, judges commonly rely on legal fictions and rhetorical assumptions in their interpretations. These devices are intended to allow change but to do so carefully and gradually after a period of “signaling” through a variety of disputes and formal decisions unfolding over years.9 It is a serious challenge to the perceived integrity of the Rule of Law that the pace of judicially-driven change has accelerated dramatically in disputed areas at the core of our traditions. These include

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9 Edward Levi remarks: “The categories used in the legal process must be left ambiguous in order to permit the infusion of new ideas…. Furthermore, agreement on any other basis would be impossible. In this manner the laws come to express the ideas of the community and even when written in general terms, in statute or constitution, are molded for the specific case.” EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 4 (Univ. Chicago 1949). Levi continues, “The law forum is the most explicit demonstration of the mechanism required for a moving classification system. The folklore of law may choose to ignore the imperfections in legal reasoning, but the law forum itself has taken care of them.” Id. at 4.
societal conflicts such as abortion, gay marriage, individual privacy and limits on governmental behavior.

The result has been a series of “culture shocks” that have weakened the perceived integrity of the Rule of Law, rendering it as a more-or-less naked exercise of power rather than reflective of a shared sense of community. This use of the judiciary to transform society goes considerably beyond Bacon’s description of the proper role of judges. He explained in Maximes of the Law that judicial decisions are inherently and appropriately limited to the “immediate cause.” “It were infinite for the law to judge the causes of causes, and their impulsions one of another: therefore it contenteth itself with the immediate cause; and judgeth of acts by that, without looking to any further degree.”

The willingness of judges to be the driving force behind fundamental decisions that generate sweeping institutional changes in core areas of social dispute has altered the perception of the judicial institution, particularly as to the federal courts and more importantly the US Supreme Court. With this willingness on the part of politically selected judges holding lifetime appointments to overreach the traditional role of the judiciary it is little wonder that we are witnessing bitter contests in Congress and individual states over who is selected for a role that has increasingly arrogated to itself the power of lawmaking rather than law interpretation.

David Cole states: “[I]n landmark cases ... the Justices alter the puzzle itself and create law. Thus, while judicial legitimacy requires faithful adherence to precedent, legal development turns on creative acts.” While this description is accurate in part, the problem is that when judges become “too creative” and range too far out in front of a democratic populace, their

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11 Bacon, The Maxims of the Law, “Regula I”. 
creation of law undermines the judicial institution even while they advance what appears to be their personal or political agenda.\textsuperscript{12}

Such a criticism seems appropriate in the situation of Federal Court judge Vaughan Walker who presided over the challenge to California’s Proposition 8 and ultimately rendered a precedent-setting decision with significant import on the issue of gay marriage. The fact that Judge Walker was homosexual, involved in a long-term partnership with a single individual is something that should have been disclosed at the beginning of the case assignment. It is a legitimate issue about whether Walker may have been influenced by that fact and the possibility that he might have been interested in taking direct advantage of the outcome of his judicial decision.

In any other decision-making situation we would automatically question the motivation and independence of an individual who could himself directly benefit from the outcome of the decision, including the possibility that the person had pre-judged the outcome as a matter of personal preference or bias. As a lawyer this inevitably calls the integrity of Judge Walker’s decision into question. I am not taking a position on the issue of gay marriage itself but am willing to argue that a judge who can achieve a direct benefit from the decision he renders is not a disinterested decision-maker. Simply put, Judge Walker should not have been the person who decided the case. The issue is too important as a societal matter to allow it to be seen as the product of direct judicial bias on the part of the specific decision-maker.

One could argue that the above logic also applies to a judge involved in a heterosexual relationship, but fairness suggests that someone in a general sense is not the same as a person who potentially stands to benefit \textit{directly} from a specific decision. We all have our biases and preferences. But the possibility of personal direct benefit offers a situation in which those biases and benefits are much more likely to influence our perspectives and

shape the outcome. This certainly applies to matters in which there is fundamental social disagreement about the nature of core social institutions.

Justice Kennedy observed that: “Our system presumes that there are certain principles that are more important than the temper of the times. And [to protect those principles] you must have a judge who is detached, who is independent, who is fair, who is committed only to those principles, and not public pressures of other sort. That’s the meaning of neutrality.” Absent that essential neutrality and independence the community’s claim to be the exclusive means for dispute resolution is seen by many as illegitimate and people who consider themselves wronged begin to take private action.

The argument, one that has some undeniable validity, is that those in power choose and manipulate the language of law to perpetuate and expand their power and that they do this without reference to matters of fairness and justice to others outside their circles of direct concern or allied support. The problem is that while the postmodern critique of knowledge, law and politics is accurate as a theoretical observation it is not “without sin”. Much of the critique is driven less by intellectual curiosity than by the pursuit of aggressive political agendas in an effort to destabilize the foundations of a system being challenged so that their own can be put in place—much as was done by Medieval sappers undermining the foundations of besieged fortresses. The critique is one-sided in that it deconstructs

13 Kennedy Interview, Moyers, “Justice for Sale?”, supra n. 4.
14 THOMAS HOBBES, THE LEVIATHAN, Part I, Ch. 13 (C.B. MacPherson ed. 1968). See also, Abner Mikva, “The Wooing of Our Judges”, as he opines: “Of course it may be a coincidence that none of the seminars financed by private interests take place in Chicago in January or in Atlanta in July. It may be a coincidence that the judges who attend usually come down on the same side of important policy questions as those who financed the meetings. It may even be a coincidence that environmentalists are seldom invited to speak. But surely any citizen who reads about judges attending fancy meetings under questionable sponsorship will have well-founded doubts about their objectivity.”
15 On the topic of group self-interest and blindness as to others’ concerns, see, Robert A. Dahl, Dilemmas of Pluralist Democracy: Autonomy vs. Control (Yale University Press 1982). Dahl argues: “Organizations ... are not mere relay stations that receive and send signals from their members about their interests. Organizations amplify the signals and generate new ones. Often they sharpen particularistic demands at the expense of broader needs, and short-run against long-run needs. .... Leaders therefore play down potential cleavages and conflicts among their own members and exaggerate the salience of conflicts with outsiders. Organizations thereby strengthen both solidarity and division, cohesion and conflict; they reinforce solidarity among members and conflicts with nonmembers. Because associations help to fragment the concerns of citizens, interests that many citizens might share—latent ones perhaps—may be slighted.” Id, at 44.
16 Eric Hoffer reminds us that “faultfinding men of words” are the initial step in attacking an existing system. Their aim is not a full and balanced intellectual analysis of the truth of the system being critiqued but an undermining of its stated principles and legitimacy. See, Eric Hoffer, The True Believer: Thoughts on the Nature of Mass Movements 120
or “saps” existing law by demonstrating its inadequacies and abuses while ignoring the constructive principles that preserve the integrity of the Rule of Law.  

A result of the position that law is power and that control of its language, institutions and processes offers the path to achieving one’s goals and preventing others from imposing their will on us, is that law is at best no more than an instrumentality. Once we conclude that law is nothing more than an instrument of power in the service of whoever controls it then gaining control and harnessing it to your own purposes is the obvious strategy.  

**Needing a Core of Shared Fundamental Values**

We tend to use the term *Rule of Law* as a non-specific general reference to a set of deep cultural values that are part of the philosophical and political air we breathe, values we take for granted even if left largely inchoate. In order to understand the nature of that risk it is important to define the system’s elements. Only when we have brought its constituent elements to the surface can we assess the extent to which it is endangered. Australian Mark Cooray offers a useful outline for our purposes. He defines the Rule of Law as a system involving the following nine points. 

1. The supremacy of law, which means that all persons (individuals and government) are subject to law.  
2. A concept of justice which emphasises interpersonal adjudication, law based on standards and the importance of procedures.

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17 See, Francois Furet, *The Passing of an Illusion: The Idea of Communism in the Twentieth Century* (University of Chicago 1999). Furet describes the fact that the Soviets used the European intellectual class to weaken the Russian system and bring Marxist ideology into Europe. Then after taking power the Soviets quickly took steps to eliminate the intellectuals or integrate them into their propaganda machinery. Furet remarks: “twentieth-century French writers aligned themselves with parties, especially radical ones hostile to democracy. They always played the same (provisional) role as supernumeraries, were manipulated as one man, and were sacrificed, when necessary, to the will of the party.” *Id*, at 3. “The decimation of the Soviet intelligentsia during the 1930s went all but unnoticed in Western Europe. The Right ignored it, for lack of interest; the Left, for lack of perception.” *Id* at 482.  

18 Daniel Boorstin describes our quandary. “[T]he mystery—of law in modern society ... [is] How retain any belief in the immanence of law, in its superiority to our individual, temporary needs, after we have adopted a whole-hearted modern belief in its instrumentality? How continue to believe that something about our law is changeless after we have discovered that it may be infinitely plastic? How believe that in some sense the basic laws of society are given us by God, after we have become convinced that we have given them to ourselves.” Daniel Boorstin, *The Decline of Radicalism* 76 (1969).  

3. Restrictions on the exercise of discretionary power.
4. The doctrine of judicial precedent.
5. The common law methodology.
6. Legislation should be prospective and not retrospective.
7. An independent judiciary.
8. The exercise by Parliament of the legislative power and restrictions on exercise of legislative power by the executive.
9. An underlying moral basis for all law.\(^\text{20}\)

The most important points about which we should be concerned include the idea of the supremacy of law over the preferences of individuals and government actors; the necessity of restrictions on discretionary power, including that of the judiciary and the executive; the importance of maintaining respect for the judicial institution in a context where it is being increasingly politicized in service of hotly contested and divisive issues; and the requirement of an independent judiciary, albeit one in which judges understand and honor the limits on their role considerably better than appears to be the case among a number of federal judges as well as a divided Supreme Court. Along with these controversial principles is one that will be questioned as well as being poorly understood. That principle is the importance of a society having a moral basis for its law that is at least reasonably consensual and shared.

On the matter of the moral basis of law Lord Devlin offered his perspective on the necessity for a shared set of deeper values within a community governed by the Rule of Law. He concluded:

“[S]ociety means a community of ideas, without shared ideas on politics, morals, and ethics no society can exist. Each one of us has ideas about what is good and what is evil; they cannot be kept private from the society in which we live. If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the

\(^{20}\) Cooray, “Rule of Law,” id.
bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.” 21

The requirement of a moral basis or the “invisible bonds of common thought” does not mean a theocracy or the elimination of the doctrine of the separation of church and state. 22 It does stand for the proposition that a society that has lost its source of deep moral value as a guiding belief system no longer possesses the shared tacit norms required to sustain the Rule of Law. It becomes a fragmented system in which conflicts over power and dominance are the order of the day rather than negotiation, compromise and adaptation. 23

The analysis offered here explores how those key elements of the Rule of Law are under attack to the extent that we are losing the philosophical and normative core of the system and devolving to one in which individual and interest group power reign paramount and where respect for the authority and authenticity of the judicial institution degrades. 24 As this occurs law becomes nothing more than a raw competition for power and dominance. A consequence as this unfolds is that the ability of members of our society to reach workable


22 Mark Cooray introduces his ideas about the necessity of a moral basis for law in the following terms: “Morality” or “moral values” in the context of law and government tends to be popularly associated with an established church and legal regulation of sexual morality, pornography, blasphemy and other matters which could be described as ‘social morality’. The word ‘morality’ is much wider than this - and it is the wider meaning that is used here. The dictionary defines morals in terms of ethics and right and wrong. The basic moral code of the Christian faith is mirrored in other religions and accepted by many who are agnostics and atheists. The common law ... which is the foundation of the legal system, subject to alteration by Parliament, is based on Christian morality.” He goes on to argue that: “Morality includes such values as honesty, the pursuit of truth, responsibility, duty, fairness in interpersonal relations, concern for one’s immediate neighbours, respect for property, loyalty and duty to one’s spouse and children, the work ethic and keeping one’s word. The emphasis is upon the duty and responsibility of the individual. No society can function efficiently or humanely and no civilisation can endure, without these values.”

23 Cooray adds: “The list is not meant to be exhaustive but the emphasis is deliberately upon personal duties and responsibilities. This principle of traditional morality constitutes the basis of the common law. They also constitute a moral code which provides the necessary restraints that maintain freedom. Freedom exists only in a society where people respect the rights and freedoms of others.” Cooray, “The Rule of Law,” id.

compromises is overwhelmed by the passions of unyielding fanatics and factions. If that goes too far we will have lost the spirit of the Western liberal tradition.

The inability to negotiate even reasonable compromise is a phenomenon produced by the emotional intensity of the conflicts being fought by opposed interest and identity groups. Our thesis relative to political and legal choice has been that we reach decisions regarding allocation of rights and duties through a process of discourse and negotiation based on reason and prudence with an eye directed toward maintaining the sense of the system’s legitimacy.

Roscoe Pound, for example, described law’s function as involving the “reasoned ordering of conduct.” The reasoned ordering to which he refers is supposed to be achieved through the rules of law. The irony is that regardless of our rhetoric about Reason and Truth, ideology and hypocrisy are inevitable and necessary parts of this process of choice, ordering and interpretation. The problem at this point is that every contested issue is a “war” in which our opponents are truly considered “enemies” with the increasing unwillingness to give “no quarter” in the struggle.

This Hobbesian “state of nature” in which every identity group is pitted against anyone who doesn't immediately accept the agenda of others is produced by the rise of aggressive collectives concentrated on specific agendas and working from a sense of betrayal, unfairness and hypocrisy by the traditional system. This has produced a situation of impassioned conflict and demands for corrective and compensatory justice. The intensity of the advocates’ beliefs in the injustice of their treatment and the fact that many of the

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25 Cooray, “The Rule of Law,” *id.* Explains the social function of a shared system of morality. “Traditional morality is inestimably important. Without it, all kinds of injustices and oppressions against individual persons are sanctioned; not the distorted and imaginary oppressions of Marxist theory but the real oppressions which arise when men forget the golden rule: love your neighbour as yourself. The abandonment of traditional morality is the cue for expropriation of private property, heavy taxation, theft, waste, compulsory association, totalitarian thought control, sexual exploitation, disloyalty to family, impoliteness, social engineering and genocide, not to mention impiety. The values of a society derive from its spiritual and moral foundations. When those foundations are destroyed a vacuum exists and people can be manipulated according to the ideology and power ambitions of ruling elites.”

26 Roscoe Pound, *New Paths of the Law* 3 (University of Nebraska Press, 1950), explains: “Conflict and competition and overlapping of men’s desires and demands and claims, in the formulation of what they take to be their reasonable expectations, require a systematic adjustment of relations, a reasoned ordering of conduct, if a politically organized society is to endure.”
positions are grounded on a history of discrimination and unjust treatment has made reasoned discourse difficult at best and impossible in many instances. This is because an inverse relation exists between passion and self-interest contrasted with reason and the need to balance the range of interests in a community.

As passions and self-interest rise, the ability and willingness to engage in rational and evidentiary interactions plummet. Everything and everyone not of our identity group is distrusted. All institutions are seen as means to an end—our ends if we control them and “enemies” agendas if we do not. The dilemma is as Martin Buber argued a generation ago: “In our age, in which the true meaning of every word is encompassed by delusion and falsehood, and the original intention of the human glance is stifled by tenacious mistrust, it is of decisive importance to find again the genuineness of speech and existence as We.”

Unfortunately, the situation has become much worse since Buber offered this warning and it is unlikely that the “We” of our “Humpty Dumpty” can be glued back together after fracturing on the ground of animosity, mistrust and narrow self-interest.

As Jung explains: “[T]he gift of reason and critical reflection is not one of man’s outstanding peculiarities, and even where it exists it proves to be wavering and inconstant, the more so, as a rule, the bigger the political groups are. The mass crushes out the insight and reflection that are still possible with the individual, and this necessarily leads to doctrinaire and authoritarian tyranny if ever the constitutional State should succumb to a fit of weakness.” Law becomes a focused weapon in such a climate, not a mechanism for adaptation and compromise.

Part of the problem likely lies at the feet of American law faculty in their approach to educating those who go on to become lawyers, judges and policy makers. If those graduates lack a deep moral grounding in the underlying principles of the operation of law in society—and the limits of its application—then it is inevitable that the law is seen as

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27 Martin Buber, *The Knowledge of Man* 108 (George Allen & Unwin, London, 1965); edited and with an Introduction by Maurice Friedman, translated from German by Maurice Friedman and Ronald Gregor Smith.

nothing more than instrumentality to be used to achieve any goal a particular interest
desires. Former Harvard law professor Harold Berman suggests: “It is widely accepted in
our law schools that law is essentially something that is made by political authorities,
including legislators, judges, and administrators, to effectuate their policies; that law is
especially a means of social engineering; that law is essentially a pragmatic device, an
instrument, used by those in power to accomplish their will. Of course law is all that. But it
is not solely that—it is not essentially that. What is omitted from the prevailing view is a
belief that law is rooted in something bigger than the people who hand it down—that law is
rooted in history and in the moral order of the universe.” 29

A difficulty, of course, is that in some important areas of conflict history has been thrust
aside as if it never existed and while many would argue their moral position is valid it tends
to represent only their own belief system or that of their identity group advancing a
specific issue about which they are fervent believers. It is not about a belief that we
operate within a universal (and natural) moral order or, equally important, that we must
act as if we are doing so in order to preserve systemic integrity.

The stripping away of illusions about the fairness of our decision-making institutions, and
the individual decision-makers in whom we have vested power, has occurred because the
conflict between interest groups is over perceived unfairness about creation and
application of the rules. Disputes over the priority and weight to be given different kinds
of arguably meritorious qualities are found even in simple democracies. Few will agree on
the terms of distributive justice or on the specific choices of merit that should govern us.
Nor will there be consensus on the preferable nature of what should be considered

meritorious and thus rewarded. The controversy and competition is therefore about whose values and vision of community are privileged over others.

“Creedal Compression” and the Rise of Aggressive Identity Groups

The “brass ring” of institutional power is that even though our social and political choices are assumptions the successful choices are imbued with the power of the state and the losers cast on the rubbish heap of failed agendas. In a system ostensibly devoted to democratic choice it is inevitable that the majority will ultimately come to allocate social goods and benefits to themselves under the rationale that it is their “fair share” or that they merit the dispensation because they “need” it. Max Lerner described John Stuart Mill’s expanded concept of freedom within the democratic state, and recognition of the fact that majority rule often results in a creedal “compression” of freedom.

Lerner commended Mill for seeing that: “the enemies of human freedom may be found in the attitudes of the people themselves, and that the tyranny of the majority may be as hostile to the expression of a man’s life and temperament as the tyranny of the state.” He added that Mill “saw history as a kind of circulation of creeds, each of which demanded acceptance from the individual: no sooner is one swept away, then another starts forming, and—after a period of transition in which the latitude for opinions is relatively great—the

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30 See the discussion of claims to entitlement to rule others in the Politics, Bk. 3, c. 13, 1283b27, where Aristotle describes the disputes over who should be considered best and most virtuous. “[T]he definitions on the basis of which people claim that they themselves deserve to rule while everyone else deserves to be their subjects, are none of them correct. For, in fact, even against those whose claim to deserve control of the ruling body is based on virtue, multitudes would have some argument of justice to make, as they would likewise against those whose claim to deserve it is based on wealth.”

31 John Patrick Diggins, The Rise and Fall of the American Left, (W.W. Norton & Co., New York and London, 1992. “If the historical European Left … is to be defined as the attempt to realize “popular sovereignty,” the New Left in America may have to be defined as the attempt to realize the sovereignty of the unpopular.” Id. at 34.

32 Daniel Boorstin concludes: “The discovery, or even the belief that man could make his own laws, was burdensome … [N]early every man knew in his own heart the vague of his own knowledge and the uncertainty of his own wisdom about his society. Scrupulous men were troubled to think that their society was governed by a wisdom no greater than their own.” Daniel Boorstin, The Decline of Radicalism 74 (1963).

33 Max Lerner prefaces Mill’s On Liberty with the observation that: “The great strength of the book lies in its moving away from a narrow view of human freedom as an immunity from the power of the state. Mill takes two giant steps away from this, toward a broader view of freedom. Max Lerner ed., Essential Works of John Stuart Mill 250 (Bantam 1961).
new one is established and solidified, and exercises the same “power of compression” as the other.”

Having spent four decades or so in matters involving social justice this is precisely what I see having happened. The system I fought at the beginning was one of rampant discrimination, racism and sexism. The efforts of thousands of people went in to opposing and reforming that system. There have been many successes but at this point it seems clear that the successes in some instances have gone past the “tipping point” and that the “new majority” or “new normal” has become a repressive system that is “compressing” the freedom of many in America who are now afraid to engage in an honest social discourse because doing so brings the vitriolic and organized condemnation of various interest groups that are in control of our political discourse and an increasing part of our interpretation of law.

The issue of merit and the standards to be applied within a community has never been resolved. Disputes over the priority and weight to be given different kinds of arguably meritorious qualities are found even in the simplest democracies. Few will agree on the terms of distributive justice or on the specific choices of merit that should govern us. The disagreements are multiplied in more complex systems. Aristotle describes the irresolvable disputes over who should be considered best and most virtuous, explaining: “[T]he definitions on the basis of which people claim that they themselves deserve to rule while everyone else deserves to be their subjects, are none of them correct. For, in fact, even against those whose claim to deserve control of the ruling body is based on virtue, multitudes would have some argument of justice to make, as they would likewise against those whose claim to deserve it is based on wealth.”

With this realization, groups have mobilized since the 1960s to seize control of the institutions of power to assert their positions or defend them against attack. The Civil

34 Lerner/Mill, id.
35 See the discussion of claims to entitlement to rule others in The Politics, Bk. 3, c. 13, 1283b27.
Rights movement and the fight for gender equality drew tens of thousands of diverse people into the law with experiences, values and agendas very different from those of the white, heterosexual male establishment that had long controlled the legal and political system. I’m a male. I’m white. I’m heterosexual. Although I am not exactly sure how to describe the present state of my religious beliefs I was raised as a Protestant. My forebears even fought for the winning side in the American Revolution. Other than lacking generations of family wealth I am the template for which the Founding Fathers created the system.

I say this only because it is at this point undeniably true that “my kind” (I don’t really think that way) were the intended and real beneficiaries of the Declaration of Independence and the U.S. Constitution, regardless of the documents’ language that appears on its face to be nobly applicable to all humans of any gender or race. The tensions generated by the effort over our relatively recent history to extend the reach of the language to all logical points of application cannot be overstated or ignored. In the “original” culture of the Founding Fathers and for following generations African-Americans were counted as 60 percent of a person in the Constitution and even then that was for purposes of benefiting white males by weighting the votes of states in national elections. Women couldn’t own property in many states until late in the Nineteenth Century or vote until the passage of a constitutional amendment in the first part of the Twentieth Century. “Separate but [un]equal” was enshrined in Plessey v. Ferguson and reigned supreme as a matter of law until 1954. Potential Black voters were legally disenfranchised throughout the South until the passage of the Civil Rights Act in the 1960s, and disenfranchised by subtler techniques long after the Act’s passage.

It is entirely right and unsurprising that the breaking open of 200 years of discrimination has caused continual struggle and turmoil. My only problem is that this struggle for power and control of the primary institutions through which law is created, interpreted and applied--the judiciary, legislative and the executive branches of government--causes our “delicate fiction” of law to become even more tattered. Lord Acton is known for the statement that: “All power corrupts and absolute power corrupts absolutely.” The fuller
context is even more useful for analyzing the behavior of any powerful group. Acton states: "Liberty is not a means to a higher political end. It is itself the highest political end ... liberty is the only object which benefits all alike, and provokes no sincere opposition ... The danger is not that a particular class is unfit to govern. Every class is unfit to govern [emphasis added] ... Power tends to corrupt, and absolute power corrupts absolutely."  

I would include every identity group within Acton's warning. The traditional wonder of the American system, including its approach to religious freedom and the separation of Church and State, has been in its ability to diffuse power by spreading it broadly among competing interests and factions. We have now become organized into intense but fragmented groups that have been able to create collaborative networks due to the communications power of the Internet. This has rendered us into increasingly superficial and intolerant groupings that nonetheless have been able to align themselves with political constituencies for the purposes of creating alliances that multiple numbers and increase the likelihood of gaining and continuing political control. This is a phenomenon without precedent.

It is a problem for the continuing integrity and perceived authenticity of the Rule of Law that the internal nature of the system has changed through the emergence of new participants demanding access, opportunity and fair treatment according to rules that were not originally designed with them in mind. An American political system has been rightly forced to open itself up to women, racial minorities, claims to gay rights, diverse immigrant populations with different value systems and cultural expectations, and alternative non-Protestant religions.

It is obvious that we “aren’t in Athens anymore, Toto” but we still have not understood where we actually are and if there are any legal limits to the “new normal”. The changes were essential as a matter of justice but the result is that we are wandering in an unfamiliar landscape of law and social discourse. We require better understanding of the

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36 From Great Thinkers on Liberty, “Lord Acton’s epic warning that power corrupts, and absolute power corrupts absolutely,” http://www.libertystory.net/LSTHINKACTON.html.

37 Jacques Ellul concludes: “no proof can be furnished where motivations or intentions are concerned or interpretation of a fact is involved.” Jacques Ellul, Propaganda 57 (1965).
consequences of specific actions as powerful interests collide and make wide-ranging demands for access, opportunity and compensatory justice.\textsuperscript{38} This is the point where we need to consider what ought to be as a moral and social condition and what must be as a system of law enforced by the power of government.

Although we could date some of the shift from the enormous mixing and social stress created by the Great Depression and World War II and then \textit{Brown v. Board of Education} attempting to achieve real equality in American schools, the dynamics were intensified by the race riots of the 1960s, the reaction to the Viet Nam war, the launch of the Civil Rights era and the banning of prayer in public schools. By that point the “old rules” were being applied in ways their creators never imagined and “new rules” or interpretations that transformed the system were added.\textsuperscript{39} Part of that dynamic is that cultural “history” was discarded in critical areas and legal interpretations by judges were applied in ways not previously considered.

The irony is that while much has been written about a “clash of civilizations” due to legal and illegal immigration to America from cultures with different religious and civic traditions, we have experienced a far more powerful internal clash arising from within our own system. This conflict is being driven by what we think of as the Civil Rights movement and continuing in various forms today.\textsuperscript{40} It is as much from these changes and the breakdown of the traditional family structure and relatively static local communities that we see a profound loss of coherence and cultural consensus. Much of that change is admirable. Some of it is culturally disruptive if not destructive.

\textsuperscript{38} Peter Drucker describes what is happening as one of the “new realities” of an increasingly pluralist democracy. He explains that “The new pluralism ... focuses on power. It is a pluralism of single-cause, single-interest groups—the “mass movements” of small but highly disciplined minorities.” Peter Drucker, \textit{The New Realities} 76 (Harper & Row 1989).

\textsuperscript{39} Richard Polenberg, \textit{One Nation Divisible: Class, Race, and Ethnicity in the United States Since 1938} (Penguin 1980).

We saw a strategy of civil disobedience in the issue of gay marriage where the Mayor of San Francisco, as well as clerks and mayors in a handful of other jurisdictions, ignored state laws based on personal determination of right and wrong. Civil disobedience as an act of protest by courageous individuals is one thing. Refusal to obey duly enacted laws by elected officials empowered by the State is quite another when we are considering the duty to obey the law that lies at the center of the Rule of Law. On one level of morality these officials’ acts can still be understood as acts of principled civil disobedience. On another, however, whatever they may be as principled individual acts, when done by governmental officials they reflect contempt for the Rule of Law in an already fragile belief system where respect for law is essential if the system is to survive.  

Compare the recent “Sagebrush Rebellion” standoff in Nevada between federal officials and a rancher grazing his cattle on federal lands without paying the required fees. After the armed US officials decided to withdraw in the face of potentially violent resistance by the rancher and a significant number of armed citizens who came to his defense Senator Harry Reid went ballistic in stating that there must be significant governmental action against those who broke the law. At the same time he is willing to bring the entire power of the federal government to bear on a rancher because he “broke the law” over grazing fees, Senator Reid is leading the effort in Congress to grant amnesty and eventual citizenship to millions of illegal immigrants who clearly broke US laws. When one of the most powerful

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41 Jon Hurdle, “Maryland court strikes down same-sex marriage,” Tue Sep 18, 2007. "Maryland’s highest court ruled on Tuesday that marriage is between a man and a woman, overturning a lower court ruling and dashing the hopes of nine same-sex couples who wanted legal protection for long-term partners. The state’s appeals court, in a 4-3 decision, said the state has a legitimate interest in maintaining heterosexual marriage as the institution that allows procreation and the traditional family structure. “Our task ... is to determine whether the right to same-sex marriage is so deeply embedded in the history, tradition and culture of this state and nation that it should be deemed fundamental,” the court wrote in a 244-page opinion. “We hold that it is not.” .... The court recognized that the intimate relationships of gays and lesbians “extend to the core of the right to personal autonomy.” But it argued that those relationships do not require the courts or the state to formally recognize them as marriage.”

42 CNN Political Unit, "Reid calls supporters of Nevada cattle rancher 'domestic terrorists'", April 17, 2014. "Never one to mince words, Sen. Harry Reid, D-Nevada, lumped supporters of Bunkerville rancher Cliven Bundy in with the Eric Rudolphs, Richard Reids and Timothy McVeighs. The senate majority leader labeled those who defended the rancher against a Bureau of Land Management cattle roundup "domestic terrorists" at a Thursday evening question-and-answer session hosted by the Las Vegas Review-Journal.” "Reid insisted that the conflict was not over. The Nevada lawmaker said he spoke with both federal and state law officials, including Attorney General Eric Holder, and was given assurances a task force would be established to deal with the Bundy case. "It is an issue that we cannot let go, just walk away from,” Reid said." [http://politicalticker.blogs.cnn.com/2014/04/17/reid-calls-supporters-of-nevada-cattle-rancher-domestic-terrorists/](http://politicalticker.blogs.cnn.com/2014/04/17/reid-calls-supporters-of-nevada-cattle-rancher-domestic-terrorists/)
elected officials in America “picks and chooses” sides about which “lawbreakers” should be prosecuted based on his own political biases and preferences it is little wonder that respect for the law and the Rule of Law is disintegrating.

Unless we understand the necessity of balancing competing interests within a diverse system we risk judging the legitimacy of the system against a standard that bears little relation to the best possible mode of operation. Recognition of the need to be honest and realistic about how humans operate in society provided the foundation for Aristotle’s description of the distinctions between “pure” and “imperfect” forms of government. In comparing the forms he concluded that while democracy was an imperfect form that unfortunately carried within itself corrupting qualities it was the best we could achieve. At this point we need to spend some time elaborating the terms and methods of what might be called “reconstructive” interpretation of law and society.

**The Nature of the System We Call the Rule of Law**

The Rule of Law is at risk as a value system that almost invisibly orders our society. The risk to the core spirit of the Rule of Law is being produced by the struggle among competing factions and identity groups whose specific agendas are aimed at controlling the institutions of power, including the judiciary, for their own purposes. A consequence of the struggle is that the Rule of Law, the centerpiece of Western civilization, is an endangered construct that operates best from behind the scenes. It is a “delicate fiction” that works through a combination of assumptions about human nature and behavior.

Legal knowledge and the principles of social choice and judicial interpretation fall into a realm that is neither science nor philosophy. Law builds its conclusions on a bed of

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43 See Aristotle’s discussion of the attributes of various forms of political regimes in *The Politics*, Bk 3, c. 7 and Bk. 6, supra, n. .


45 Ernest Becker warns us of the delicate nature of our assumptions: “The world of human aspiration is largely fictitious and if we do not understand this we understand nothing about man…. Man’s freedom is a fabricated freedom, and he pays the price for it. He must at all times defend the utter fragility of his delicately constituted fiction, deny its artificiality.” Ernest Becker, *The Birth and Death of Meaning* 139 (2d ed. 1971).
assumption, assertion and shifting reality that we never really capture with accuracy. Considerably more fragile than we care to admit, the Rule of Law requires artifice, self-deception and hypocrisy to hold together. This is because no human political construct can withstand the impact of pure Reason or the requirement that all its premises, principles, values and decisions be grounded on demonstrably sound evidence.

Colin McGinn observes the dilemma we face in trying to understand our world through philosophical inquiry. “Philosophy is not the same as science. Science asks answerable questions ... while philosophy seems mired in controversy, perpetually worrying at the same questions, not making the kind of progress characteristic of science.” 46 He adds: “It is because of ... [the] fundamental divide between thought and reality that human knowledge is problematic. Knowledge is the attempt by the mind to keep track of reality, to embrace it in thought. It is the mind trying to get beyond itself. This is an enterprise fraught with difficulties and pitfalls.... Knowledge is a kind of marriage of mind and world, and like all marriages it has its failures and frustrations, its disharmonies and misalignments.”47 This is the nature of law and legal interpretation.

The Rule of Law as “Social Commons”

In the environmental arena Garrett Hardin’s article, “The Tragedy of the Commons” is considered a classic depiction of how individually rational self-centered decisions cumulatively destroy the productive capacity of a shared resource such as land, air and water. 48 In the same way as natural systems can be described as a “commons” that can have its generative capacity destroyed by the accumulating weight of seemingly rational but self-serving decisions that fail to take others’ needs and actions into account, the Rule of Law is a metaphysical commons that is an essential element of the liberal “political ecology” of Western democracies. Just as Hardin’s “tragedy of the commons” warns us that

natural commons can be degraded by the collective impact of selfish individual choices that viewed in isolation seem rational but that collectively destroy the system, so can the Rule of Law be undermined by the implementation of group agendas. These agendas may appear entirely appropriate in isolation but fail to take the needs of the full community as a sort of “social ecology” into account.

Wittingly or not, we have used the philosophical and religious assumptions of the Western Judeo-Christian tradition and embedded them deeply in the fabric of political organization and values implemented through the Rule of Law. One way this was done was the incorporation of Aristotelian thought into the doctrines of the Catholic Church and consequently into the content of what was taught and written in European universities. This construction of the Western system cannot be overstated in its importance and effect. The connection was so close that Hobbes called universities the “handmaid of the Romane religion.”

It was the melding of concept, belief and religious tenet in ways that produced a unique system of thought and politics as it was refined and distilled. Natural law and divine law were part of the study engaged in as part of European and then American education. Thomas Aquinas, for example, described a hierarchy that included the divine revelation of law, natural law, moral law and human law. The four types of law were not independent disconnected units but elements of an integrated system.

Part of the historical equation was acceptance that natural and divine law not only existed but informed human-made laws. This assumption was explicit for centuries. But the respectability of admitting to a belief in such things changed with the emergence of the Enlightenment, the rejection of political dominance in Europe of the Roman Catholic Church, the splintered and diffused chaos of Protestantism and the rise of Science as a surrogate religion. Bruce Kimball remarks: “By the beginning of the eighteenth century, the

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disease of sophistic scholasticism had thoroughly infected the thirty-two universities of the Holy Roman Empire; and hope for future reform lay mainly in the founding of Halle (1694), Gottingen (1734), and Erlangen (1743).” But this only removed the explicit treatment. The ideas were already so deeply embedded in our conceptual structures that they create a hidden order governing how we think. 51

A result was that, outside explicitly religious contexts, belief in natural and divine law shifted into a “stealth” mode that nonetheless still inform and influence our decisions. For some the beliefs remained but in the infatuation with Science we surrendered to the popular contempt of what were considered metaphysical dreams. For many others, however, natural and divine law provided a continuing tacit substructure of values and assumptions that shaped our thought and decision making even while we assumed we were free of their influence.

The conversion of natural and divine law into a tacit dimension was inevitable given that those concepts formed the foundation for all our concepts for several millennia. It is impossible for us to step outside this system after more than 2000 years during which they permeated our worldviews and shaped the language and architecture of our conceptual structures, values, philosophy and beliefs. Implicit or explicit, overt or tacit, these values are part of the linguistic air we breathe. They determine how we are able to perceive our world. They are also the foundation principles of the Rule of Law.

Even if we cannot at this point extricate ourselves from natural law, or from a sense of divine law, we can act in ways that alter how these largely tacit beliefs are applied. We have done that with increasing frequency. In part this has been for legitimate intellectual reasons and partly because, even if we need the construct of natural law and the Rule of Law, we have exposed many abusive applications in the hands of dominant groups which have used the power to achieve the illegitimate subordination of others.

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The challenge is how we undo and prevent abuses of racism, classicism, gender bias and illegitimate and unjust distributions of social goods and opportunities while protecting the core values of the system including freedom of discourse and the need to balance competing interests. Preserving the integrity and force of the Rule of Law requires a degree of shared values and the acceptance of a set of “natural law” principles. While the most fundamental principles emerged from religious tenets developed within the Judeo-Christian tradition that does not render them illegitimate as standards by which we conduct ourselves and establish rules. That fact most likely gives the principles their unstated legitimacy and power to guide our choices. The system may be unable to affirmatively acknowledge the tacit values of natural and divine law but there are fundamental values to which we can and even must ascribe if the Rule of Law is to be defended. “Plausible deniability” occurs in all political systems and the Rule of law is the framework and value-base of Western democracy.

In the midst of the stresses and social turmoil we have lost the ability to compromise in ways that allow for reasoned adjustments between competing interests. Locke argued that the institution of law operated as an “umpire,” acknowledging that absent a willingness to accept the presumptively neutral decisions of the umpire the system would not work. The problem is that the “umpires” of the law are neither neutral nor unbiased. At this point everyone is operating according to biases. In essence, they have “chosen sides” on competing teams. We are not satisfied even with neutrality because balanced analysis may get in the way of achieving our desired agendas. Nor can the competitors always be faulted because in a context where the playing field of rights and duties is unfairly skewed neutrality can lead to a superficially neutral but distorted outcome.

This difficulty is created because a lack of neutrality has always been the reality to some degree but the illusion was nonetheless essential for retaining a belief in the integrity and

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fairness of law. 53 While judicial rhetoric describes law as a search for truth, the “umpiring” function of judges has never really been truth-based. This in itself does nothing to indict the system because wise, fair or necessary outcomes achieved within the political construct of law are more accurately described as the appropriate goals of the processes of law. This is inevitable because the law is at its base a political system that allocates social goods, rights and obligations. 54 Justice Blackmun reflects this in Roe v. Wade when he endorses Justice Holmes’s dissenting observation in Lochner v. New York: “[T]he Constitution is made for people of fundamentally differing views ....” 55 At this point it seems that there is far less effort to balance competing views than to impose one side’s desires. The law in that instance becomes the sheer exercise of power rather than a mechanism for compromise and accommodation.

The legal system is not a self-contained theoretical construct of ideal justice but is intended to reflect, diffuse, and balance competing claims for political and economic power. The choices made by judges and legislators occur as a product of advocacy and goal-oriented valuation rather than evidence and reason. This makes the truths of advocacy ones of rhetoric and persuasion rather than balanced evidence. Aristotle captured this idea of implicit hypocrisy when describing the role of the advocate. He explained: “[Y]ou must render the audience well-disposed to yourself, and ill-disposed to your opponent; (2) you must magnify and depreciate [make whatever forms your case seem more important and whatever forms his case seem less].” 56

53 Roger Scruton, Modern Philosophy: An Introduction and Survey (Penguin Press, NY 1994), remarks that “Not all human thinking is directed towards truth. In art and myth we allow ourselves the free use of fictions. Truth lurks within those fictions, and in the case of myth a kind of revelation may advance behind the veil of falsehood. But neither art nor myth is assessed on the grounds of its literal truth, and neither is discarded merely because it presents no valid arguments.” A lawyer’s statement that telling the truth in civil litigation “is, of course, a very attractive proposition. But ... while that might be nice in a perfect world, it is not the way the system operates in litigation in this country.” received this response from an indignant court in Monsanto Co. v. Aetna Casualty and Surety Co, 593 A. 2d 1013 (Del. Super. Ct. 1990). The judge wrote: “I am compelled in the strongest way possible to reject counsel’s observations as being so repugnant and so odious to fair minded people that it can only be considered as anathema to any system of civil justice under law.”

54 For analysis of these ideas, see, John Finnis, “Allocating Risks and Suffering: Some Hidden Traps”, 38 Cleve. St. L. Rev. 193 (1990); See also, Cass R. Sunstein, Free Markets and Social Justice (1997). Sunstein offers the insight that: “we value things, events, and relationships in ways that are not reducible to some larger and more encompassing value. ... [H]uman goods are not assessed along a single metric.” Id, at 70.


The Common Law developed as a system for resolving local disputes in a culture where the participants had little mobility, lived within a matrix of connections evolved over generations, and possessed a shared set of norms and values. That culture disappeared in the kaleidoscopic and attenuated environment of America. One of the most important differences occurs because of factors that include a loss of homogeneity, disappearance of local connections and shared norms, loss of respect for authority, and the transient nature of modern society. The result is that new forms of law have been created that act as if there is still a coherent core of shared values even while attempting to reflect the diversity of political interests impatient for immediate change.

Law as the Language of Power

Ruth Anshen has written that humans don’t just use language, but are the language they use. It is not only individual humans but their societies that are shaped by the language we use to define who we are, who we wish to be, and what we want to accept or reject. The social language we use to describe our most important ideals and beliefs is not simply passive rhetoric but actively creates the nature of the social entity itself. The law is a language of power that is imbued with ritual authority when the proper incantation is voiced. A collision of the prevailing and challenging constructs of the languages of power takes place among competing factions as societies increase in complexity, scale and composition.

In American Law, Lawrence Friedman captured the role of law in a complex democracy, arguing: “In complex societies custom is too flabby to do all the work—to run the machinery of order. Law carries a powerful stick: the threat of force. This is the fist inside its velvet glove ...” Law has become a potent force by which we construct the language

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57 These issues are explored in two works by Jerold Auerbach. See, Jerold S. Auerbach, Justice Without Law? (1983) and Jerold Auerbach, Unequal Justice (1976). Auerbach describes the adversary system as having numerous defects but as a necessary evil in an anonymous society that has lost any sense of being bound within the informal norms of a local and tight-knit community.

58 R.N. Anshen, Language: An Enquiry into Its Meaning and Functions (1983). Anshen argues: “man is that being on earth who does not have language. Man is language.”

that shapes who we are as individuals and as a society. It has taken on the role of overt societal regulator more and more as the system has fragmented into conflicting interest and identity groups. Part of the process through which law operates to construct its language of power involves determination of right and wrong and allocation of duties and benefits. Absent customary and consensual agreement we resort to the default position represented by law and its implicit threat of force. The mechanism only works if members of the political community share the tacit understanding that the “currency” represented by law is backed by the application of force if its dictates are not obeyed.

The increasingly false assumption about the limited power of the judiciary is stated clearly in *Federalist # 78*. “Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.”

Many have discovered that the judiciary is, after all, not “the least dangerous” branch of American government, particularly in a complex and conflicted community where the reality of having to face regular elections has effectively paralyzed the legislative and executive branches.

Even if Alexander Hamilton were correct at the time he penned these words, the Supreme Court, and other federal courts particularly, have acquired a degree of power that was never envisioned or intended by the creators of the U.S. Constitution. They are creating law in fundamental areas in which even legislatures would be suspect. To allow the judiciary to reach legal creativity in areas such as gay marriage is beyond the meaning of what might have been intended under the concept of equal protection and equality of treatment. This has nothing to do with whether the logic is correct on some level but

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60 “The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.” *Federalist No. 78*, “The Judiciary Department,” McLean’s Edition, Alexander Hamilton.
whether it is something courts ought to be doing and within the role as opposed to the empowerment of the judiciary. This is reflected in Adolf Berle’s discussion of the changes in the nature of judicial power where he describes the Court’s power as final with the prospect that some might see taking to the streets as their only path to what they consider justice.

In a review of Berle’s book, *Power*, *Time* magazine observed: “Berle calls the modern [Supreme] court “a revolutionary committee” that has reached “a power position senior to both the executive and legislative branches.” He considers the Warren court’s assumption of legislative responsibility both inevitable and desirable—in his terms, its school-desegregation and reapportionment decisions filled “fragments of chaos.” He foresees, however, that the court’s increasing use of the 14th Amendment, especially its “equal protection of the laws” doctrine, can be logically extended from schools and voting to such new areas as the granting of private credit and pension rights and even to a system of guaranteed income by judicial decree. Judicial power, Berle feels, has not been adequately “institutionalized.” It is now subject to no appeal “other than agitation or, at worst, mobs in the streets.”" 61

Supreme Court Justice Antonin Scalia is a judicial linguist who is aware of the great power of the Court and generally takes extreme care to voice arguments that he considers consistent with a restrained role while occasionally assailing those he thinks would have the Court wander too far into unwise or forbidden territory. In language hinting at what we said a moment ago about a continuing tacit belief in some form of Natural Law, Scalia speaks dismissively of a legal scholar’s version of “law’s quandary” and observes that: “Law’s quandary, then, is that we believe like legal realists but act as though there were indeed some omnipresent, overarching law.” 62

While Scalia sees this behavior as suspect and rationally illegitimate, we have no realistic alternative. The fact is that we need to pretend (perhaps even to ourselves) that we are operating within a grounded and precise legal universe even though we continually utilize deep and partially inchoate principles as the foundation sources for our logic and interpretations. But recognition of the existence of a “quandary” says little or nothing about how we should approach the task or what standards should be applied.

Scalia’s argument that the standards to be applied in constitutional interpretation are clear and concrete ignores the essential hypocrisy on which all our fundamental premises are grounded. Scalia is either deceiving himself as to the nature of ambiguous legal language or is acting as a rhetorician with full knowledge that his arguments concerning the clarity of legal language and the reference to original intent in interpreting Constitutional provisions are as baseless from the perspective of being matters of hard and obvious truth as are his opponents’ use of loose interpretation and the resort to claims about changed conditions in American culture. On either side we witness the advocate’s hypocrisy aimed at persuasion as to the rightness of your position.

There are good reasons to engage in the self-deception and constructive ignorance that characterize a good deal of judicial thought in America. One is that law helps to hold the social system together against efforts to impose one interest group’s political will on others by embedding its preferences in legal doctrine that invokes the full power of the state. Diffusion of power and resistance to power are ongoing necessities in a complex democracy. Justice Rehnquist, dissenting in Furman v. Georgia, quotes from Mill’s, On Liberty: “The disposition of mankind, whether as rulers or as fellow-citizens, to impose

\[\text{for America (Basic Books 2005).}\]

\[\text{On the nature of public discourse as inherently outcome oriented and oblivious to the truth of matters as opposed to persuasion see, George Walden’s review of Arthur Schopenhauer, The Art of Always Being Right, introduction by A C Grayling (Gibson Square Books). Walden remarks: “The melancholy aspect comes in the main premise of the book: that the point of public argument is not to be right, but to win. Truth cannot be the first casualty in our daily war of words, Schopenhauer suggests, because it was never the bone of contention in the first place. “We must regard objective truth as an accidental circumstance, and look only to the defence [sic] of our own position and the refutation of the opponent’s... Dialectic, then, has as little to do with truth as the fencing master considers who is in the right when a quarrel leads to a duel.”} \]

their own opinions and inclinations as a rule of conduct on others, is so energetically supported by some of the best and by some of the worst feelings incident to human nature, that it is hardly ever kept under restraint by anything but want of power.”  

The legal system negotiates, diffuses, and balances competing claims for political and economic power. John Finnis sounds positively postmodern in his assertion that law is a “cultural object, constructed or posited by creative human decision ... an instrument we adopt because we have no other way of agreeing amongst ourselves over significant spans of time about precisely how to pursue our moral project well.” He goes on to describe law as providing “algorithm[s] for deciding as many questions as possible.... As far as it can, the law seeks to provide sources of reasoning—statutes and statute-based rules, common law rules, and customs—capable of ranking (commensurating) alternative dispute resolutions as right or wrong, and thus better or worse.”

Similar to Finnis, Cass Sunstein concludes: “we value things, events, and relationships in ways that are not reducible to some larger and more encompassing value. ... [H]uman goods are not commensurable. By this I mean that human goods are not assessed along a single metric.” He goes on to conclude that: “efforts to insist on a single kind of valuation and to make [all] goods commensurable, while designed to aid in human reasoning, may actually make such reasoning inferior to what it is when it is working well.”

Our dilemma is that we cannot afford to admit that all our fundamental norms are assumptions and choices because we must have reasonably consensual criteria on which social choices are grounded or we are adrift in a limbo where there is neither stability nor consistency. Societies cannot afford a lack of values at their cores whether those values

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65 Furman v. Georgia, 408 U.S. 238, 467 (1972) (Rehnquist, J., dissenting) (quoting J.S. Mill, On Liberty 28 (1885)).
67 Finnis, “Natural Law and Legal Reasoning,” id.
69 Sunstein, Free Markets. Id.
70 We elevate Reason to the highest levels, but Reason is only a tool and method. It does not provide the initial
are based on a belief in God, natural law, or the dictates of a hypothesized version of human nature. Something must provide a foundation deeper and more powerful than the mechanisms of human reason and rational choice that, after all, require substantive premises on which to work their “magic.”

The dilemma is that we still need to assume the validity of some of the imperfect data in order to construct a workable political model. It is at base a strategic system in which we choose what we want the output to be and then “reverse engineer” the model all the way back through the hypotheses and assumptions required to generate our preferred outcome. The assumptions may still be “garbage” but at least it is “our garbage.” In such a context we should not be surprised when the process cannot withstand critics who challenge the validity of the underlying assumptions.

Regardless of rhetoric, majority choice evidenced by democratic voting processes or rules of representation is not sufficient to sustain the integrity of our system over time. Without solid grounding in shared principles the system keeps inventing and multiplying premises. This process of continual expansion can occur to the point of chaotic uncertainty because without substantive standards nothing is justifiable as more valid than anything else. Something greater than “us” must underpin the choices or the system’s authenticity, integrity and authority are degraded. The need for grounding values and principles becomes even more challenging as diversity and distinct cultures begin to occupy the same political and social space. Disparities in belief, fundamental values and religious and social norms collide in a context where many of the participants are unable or unwilling to understand or accept the values and behaviors of others.

The difficulty we have faced in our modern complex community is that with the rejection of natural law or tenets that are implicitly religious in origin there is no single value capable

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substantive premises on which it operates. See Eugene Freeman and David Appel, *The Wisdom and Ideas of Plato* (1963) at 71, who remind us that: “All we can do by reasoning is to learn that if our first assertion is true, then all the implications, which follow from it according to the laws of valid reasoning, must also be true. But the laws of reasoning are silent concerning the truth of the crucial first premise.”
of trumping all others other than power. A result is that our ability to gain any consensus on what is to serve as authentic and central is limited and mostly procedural. Rather than a cohering core of shared beliefs we have generated disparate and often warring factions who have separated into the equivalent of religious sects or fanatical cults that are intent on advancing their particular creed and incapable of seeing any merit in others who do not share their assumptions about society, justice and values.

In such a system power and the ability to control the instruments and institutions by which power is created and applied are far more important than matters of truth. The loss of trust in the wisdom and fairness of the Supreme Court and other critical institutions of our democracy risks the unraveling of our view of government, a unique form fairly describable as the “Western political experiment.” In law the consensus is not on the truth of the proposition itself but on the authority and authenticity of the decision-makers.

Much of our view of institutional authority for the courts that are integral to the effective operation of the Rule of Law has been based on implicit trust and faith in their fairness rather than a fear of the use of force. The social fragmentation we have experienced has done much to alter these traditional perceptions. The overt politicization of the Supreme Court and other judicial bodies has contributed to the decline in respect.

An increasing problem is that the bellwether of systemic authenticity and authority in America, the U. S. Supreme Court, has itself become overtly politicized. This is seen in the strategic maneuvering to select candidates for appointment, and in the process of confirmation of judicial candidates in the Senate. The Court itself has fallen victim to the rise of bitterly opposed factions and increasing fragmentation of the society. This is reflected in various ways, including the fact that there are too many multiple authors of

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71 John W. Gardner, Excellence: Can We Be Equal and Excellent Too? 180 (Harper & Row, 1961). He adds: "We might as well admit that it is not easy for us as believers in democracy to dwell on the differences in capacity between men. Democratic philosophy has tended to ignore such differences where possible, and to belittle them where it could not ignore them.... But extreme equalitarianism—or as I would prefer to say, equalitarianism wrongly conceived—which ignores differences in native capacity and achievement, has not served democracy well. Carried far enough, it means the lopping off of any heads which come above dead level. It means committee rule, the individual smothered by the group. And it means the end of that striving for excellence which has produced mankind's greatest achievements." Gardner, Excellence, 17, 18.
important Supreme Court decisions to the point that the collage of opinions blurs the predictive and value functions of law. But each Justice seems to feel compelled to have his or her say on controversial issues to the point where there seems to have been a loss of internal discipline on the Court with unproductive dissension exposed. This feeds into the fragmented culture because the various dicta and hints are read as a form of “tea leaves” by which we try to predict the future. The loss of wise compromise and cohesion on the Court is contributing to a decline in respect for the institution and recognition that it is about getting your “horse” to the gate and obtaining a positive handicapping advantage for your probability of success.

The Supreme Court is now considerably less about logic and wisdom than political posturing and advocacy. *Roe v. Wade* and *Gonzales v. Carhart*, the initial abortion case and the most recent “partial birth abortion” decision, are prime examples of the problem. Thirty-three years after the Court’s decision in *Roe*, the contrast between Justice Kennedy’s majority opinion in *Carhart* and Justice Ginsburg’s scathing dissent is so stark that one is left with the impression they are operating from within entirely different universes. The Justices of the Supreme Court mirror society because they too have “chosen teams”.

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72 Dennis Lloyd describes judicial reasoning as not being “a chain of deduction” but “a succession of cumulative reasons which severally cooperate in favor of saying what the reasoner desires to urge.” Lloyd quotes from J. Wisdom to the effect that: “The reasons are like the legs of a chair, not the links of a chain.” D. Lloyd & M. Freeman, *Lloyd’s Introduction to Jurisprudence* 1140 (5th Ed., 1985).

73 Lyle Denniston, “On a splintered Court, who rules?”, SCOTUSblog, August 13, 2013. [http://www.scotusblog.com/2013/08/on-a-splintered-court-who-rules/](http://www.scotusblog.com/2013/08/on-a-splintered-court-who-rules/); David Paul Kuhn, “The Polarization of the Supreme Court”, RealClear Politics, July 2, 2010. [http://www.realclearpolitics.com/articles/2010/07/02/the_polarization_of_the_supreme_court_john_roberts_elana_kagan_106176.html](http://www.realclearpolitics.com/articles/2010/07/02/the_polarization_of_the_supreme_court_john_roberts_elana_kagan_106176.html). We have become accustomed to “minimum winning coalitions” in recent decades. But throughout the 19th century, a one-vote majority decided only 1 percent of cases on average. Between 1900 and 1950, that average rose to 4 percent. Since 1951, the average rate is 17 percent. One-vote majority rulings carry the same legal weight as all majority opinions. Yet they lack the symbolic power of decisions by a more united court. Experts consider these 5-to-4 decisions to be more expressly political than others, representing a threat to the court’s moral authority. In effect, that means the rise in hyper-partisanship in recent decades—visible from Congress to cable television—extends to the one branch designed to be above partisan politics. “But the deeper issue transcends any one case or court. The “supreme” authority of the high court rests on its legitimacy. The more absent consensus is from the high court, the more diminished its legitimacy and the more each decision will come to be viewed through a political lens.” See also, Mark Alan Thurmon, “When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions”, 42 Duke L. J. 419 (1992); Adam S. Hochschild, “The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective”, 4 Journal of Law & Policy 261 (2000); Mark Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (2005).

Such decisions as Carhart reveal that the Supreme Court has become a splintered political entity and, while a Court that could decide Dred Scott and Plessy v. Ferguson has always had a political dimension, the condition has grown extreme. The problem is that now the population has become aware of the political nature of the Court, and the degree to which political allegiances have penetrated the justices’ decisions has grown to match the social conflicts. 75 The Court cannot afford to be seen as just another political entity captured by special interests if the spirit of the Rule of Law is to survive but it is well along a path to being understood as such. When that occurs we will have no respected public institution of government.

Because of this our struggles are over what interests gain sufficient power to dictate their values to others or to prevent others from defining the terms of society. As the conflicts over power and control have occurred the integrity of the Rule of Law has been undermined because our decision-makers are suspect and our institutions challenged. Daniel Boorstin describes our plight. “For us, the idea of a constitution—a fundamental law which in some strange way is less changeable than the ordinary instruments of legislation—has had a peculiar therapeutic attraction. ... We retain an incurable belief that constitutions are born but not made....”76

Conclusion

Judicial integrity is at the heart of the Rule of Law. Supreme Court Justice Anthony Kennedy has observed that a judge has a special role in the American democracy, explaining that: “we live in a constitutional democracy, not [in] a democracy where the voice of the people each week, each year, has complete effect. We have certain constitutional principles that extend over time. Judges must be neutral in order to protect those principles.... There’s a rule of law, [and it has] three parts. [The first part is] the

75 An intriguing look at this is offered by Jeffrey Toobin, The Nine: Inside the Secret World of the Supreme Court (Random House, 2007). Toobin discusses the emergence of the political Right during the Reagan era and describes the continual jockeying for appointments and screening of judicial candidates centered around the Roe v. Wade decision on abortion.

government is bound by the law. [The second is] all people are treated equally. And [the third]: there are certain enduring human rights that must be protected. There must be both the perception and the reality that in defending these values, the judge is not affected by improper influences or improper restraints. That’s neutrality.”

But this intensifies the conflict over the “human rights that must be protected”. Where do “human rights” come from? If there is no natural or divine law from which rights are derived where does the requirement emerge that human rights must be protected? In a system based on “truth is power” then power defines rights, not some artificial set of rules promulgated by the UN that do not reflect the brutal history of human behavior. Analytically, there is no empirically demonstrable source for human rights and if we actually believe in rights we have of necessity made a choice that we can defend morally on a supposed basis of right versus wrong, or prudence based on thoughts about what keeps a society from engaging in civil war. But the reality is that every one of our choices are “non-demonstrable” in terms of empirical proof. The function of the Rule of Law is to help us bridge the gap between belief and empirical certainty. Once we undermine the integrity of the Rule of Law we ruin the essence of our unique political system.

A citizenry’s perception of fairness and independence in judicial decisions is a fundamental element of the Rule of Law. Aristotle warned that a sense of fairness, and of justice being served, were essential elements of any decent society. 78 Judges are the last defense of the Rule of Law’s integrity. When judicial decisions are seen as politicized rather than independent, or as done in the service of a special interest group or to advance judges’ self-interest rather than in a neutral and independent spirit, the sense of fairness and justice

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78 Aristotle argues that “justice is often thought to be the greatest of virtues…. And it is complete virtue in its fullest sense, because it is the actual exercise of complete virtue. It is complete because he who possesses it can exercise his virtue not only in himself but towards his neighbor also…. For this same reason justice, alone of the virtues, is thought to be “another’s good”, because it is related to our neighbor; for it does what is advantageous to another, either a ruler or a copartner.” ARISTOTLE, NICHOMACHEAN ETHICS, Bk. V, C. 1 (W.D. Ross translation and ed. 1925), IX THE OXFORD TRANSLATION OF ARISTOTLE.
that provides the moral binding force of the Rule of Law becomes weakened. 79 As respect for the fairness of law diminishes, greater governmental force must be used to ensure obedience.

John Locke observed that as part of their social contract humans surrender their inherent rights of private dispute resolution to the processes of the political community in order to transcend an insecure and uncertain state of nature based on individual power. Locke concluded: “all private judgment of every particular member being excluded, the community comes to be umpire, by settled standing rules, ... and the same to all parties....”80 Judges are the ultimate umpires of the community’s conflicts and their fair and equitable treatment of disputants is required for the process to be legitimate.

We implicitly and perhaps naively believe judges are guided by a sense of justice and what Aristotle called practical wisdom--a “true and reasoned state of capacity to act with regard to the things that are good or bad for man.”81 Judges are responsible for saving the soul of the Rule of Law through its just and equitable application to specific disputes. Our “practically wise” judges are best understood as the priests of the Rule of Law. A judge may be fallible and err. But if a judge is unfair or demonstrably biased the heart of the system is threatened.

We continue to have an inchoate belief in some kind of Natural Law in which justice is served in the specific dispute through the exercise of judicial wisdom. 82 When this belief is betrayed by judicial self-interest our faith in the sanctity and inherent justice of the law is

82 If, as Hobbes warns, the belief that God sets a pattern of divine laws to guide our behavior and regulate political community creates a difficulty for society, the “death of God” trumpeted by the Enlightenment creates an equivalent dilemma. A fully secular conception of society in which laws are based solely on the power of humans to make choices of law without some strong source of external or divine authority such as natural law or divine inspiration has resulted in a system in which humans lack deep principles of a kind sufficient to guide their judgments. See also, David Barnhizer, “Prophets, Priests, and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America”, 50 Pitts. L. Rev. 127 (1988); and Barnhizer, “Natural Law as Practical Methodology: A Finnisian Analysis of City of Richmond v. Croson”, 38 Cleve. St. L. Rev. 15 (1990).
weakened. At some point the law and its manifestation through judicial decisions is seen as simply another mechanism of social control—as flawed and contemptible as any other. When this occurs we are thrown back into a Hobbesian state of nature in which the only rational action is to protect our own interests by capturing or at least neutralizing the political processes. This includes the judiciary. Even if we cannot fully control the process we can create a political gridlock in which the power of the judicial institution cannot be used against us.

When the political community itself is split on a central moral issue, it is generally the best course for judges to avoid answering the questions at the points of the greatest volatility. Some questions are simply too difficult to be answered at a specific point in time and require cultural change and adaptation. In *Roe v. Wade*, Justice Blackmun wisely avoided dealing with the question of the point at which human life begins, observing: “We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary ... is not in a position to speculate as to the answer.”

Whatever might be said about the wisdom of the Court rendering that decision, in its precise terms, at that point in America’s debate on the issue and when, as Justice Ruth Ginsburg subsequently stated, the states were themselves going through a process of democratic consideration of the abortion issue it was wise for Justice Blackmun to recognize the limits of judicial decision-making on the matter of the point at which life could be said to exist. Of course, avoiding that decision allowed the Court to evade the most fundamental moral issue of whether what was being terminated was a living being or a fetus. This was a convenient “finessing” of a vital issue that has been submerged within the rhetoric of “freedom of choice” because this attempts to avoid the issue of “choice about what”? Stripped to its basics it is choice about life or death and so it is that the issue should remain a vital one for American society.

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In the same way, consider the unlikely possibility of a meeting of the minds on disputes relating to such concerns as weapons, drug use, pornography/obscenity, "hate crimes", free speech, censorship, government intrusions on property ownership, and privacy. These conflicts are not points of reasoned contention among fully rational interest groups but are fundamental, volatile, and even violent points of intersection of the most deeply held value systems. The means through which one interest group seeks to attain its goals at the expense of another includes obtaining favorable legislation and interpretations of legal doctrine by judges.