

BOOK REVIEW

BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING. By Brian Z. Tamanaha, Richmond, Va.: Princeton University Press, 2011, 252 pages, \$24.95.

*Reviewed by Professor Marin Roger Scordato **

In 1922, Charles Grove Haines, a political scientist, wrote, “American courts have clung to the belief that justice must be administered in accordance with fixed rules, which can be applied by a rather mechanical process of logical reasoning to a given state of facts and can be made to produce an inevitable result.”¹ Seventy-five years later, Frederick Schauer, a professor of law, wrote, “To the Legal Realist, rules serve not as sources of *ex ante* guidance, but as vehicles of *ex post* legitimation of decisions reached without regard for the rules.”² These quotes are illustrative of the classic divide between what has generally come to be called legal formalism and legal realism.

In his new book, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging*,³ Brian Tamanaha, a professor of law at the Washington University School of Law in St. Louis, seeks to demonstrate that this conventional account of a radical change in the understanding of the nature of common law jurisprudence

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1. BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 112–13 (2010) (quoting Charles Grove Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges*, 17 ILL. L. REV. 96, 98 (1922)).

2. *Id.* at 93–94 (quoting FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 192 (1991)).

3. *Id.* at 1–3.

from formalism to realism in the 1920s and 1930s is profoundly wrong.⁴ This effort follows years of excellent work in this area by Professor Tamanaha, including his 2006 book, *Law as a Means to an End: Threat to the Rule of Law*,⁵ and his 2004 book, *On the Rule of Law: History, Politics, Theory*.⁶

Professor Tamanaha seeks to show that many judges of the formalist era did not publicly espouse the kind of rigid, doctrinal formalism that is so often ascribed to them. Instead, he suggests many jurists thought of as formalists held a far more nuanced view of common law jurisprudence that was far closer to the traditional realist account than is generally supposed.⁷ Similarly, Professor Tamanaha seeks to demonstrate that many classic legal realists, including Jerome Frank, Roscoe Pound, and Karl Llewellyn, acknowledged the “rule bound” nature of actual adjudication much more than the conventional account suggests.⁸ His ambition in the book is nothing less than to thoroughly debunk and disprove the conventional account of the development of common law jurisprudence in the first half of the twentieth century.

The book contains four main parts. The first attempts to demonstrate that “the conventional account of the formalist age appears exceedingly thin, lacking in support.”⁹ Examples of such accounts coming under particular critical scrutiny include Jerome Frank’s *Law and the Modern Mind*,¹⁰ Grant Gilmore’s *The Ages of American Law*,¹¹ and Roscoe Pound’s *Mechanical Jurisprudence*.¹² Of *Law and the Modern Mind*, Professor Tamanaha writes, “Jerome Frank’s colorful book is often relied upon as an authority for prevailing views in the formalist age. These comments reveal, however, that he produced an unreliable account.”¹³

4. *Id.*

5. *See generally* BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* (William Twining & Christopher McCrudden eds., 2006).

6. *See generally* BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004).

7. TAMANAHA, *supra* note 1, at 3–5.

8. *Id.* at 93–98.

9. *Id.* at 63.

10. *See generally* JEROME FRANK, *LAW AND THE MODERN MIND* (Transaction Publishers ed. 2009).

11. *See generally* GRANT GILMORE, *THE AGES OF AMERICAN LAW* (1977).

12. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

13. TAMANAHA, *supra* note 1, at 17.

The second part of the book seeks to establish that “[t]he popular understanding of the legal realists on judging is wrong in essential respect[s],” and that, “[r]ealism about judging was commonplace decades before the legal realists came on the scene.”¹⁴ In this section, Professor Tamanaha employs a critical reevaluation of the work of Jerome Frank, Roscoe Pound, and Karl Llewellyn to convince the reader that, “Llewellyn and Frank, and the rest of those identified as realists, all along recognized the stabilizing and constraining factors in law.”¹⁵

In the third section of the book, Professor Tamanaha argues that the conventional, and inaccurate, depiction of a profound divide between formalism and realism has had a pernicious influence on quantitative studies of judging in American courts, particularly on studies produced by political scientists.¹⁶ Approaching the subject of their study from a strong legal realist perspective, these political scientists seek to quantitatively establish the non-mechanical nature of judges’ decision-making processes, to essentially prove empirically the basic realist insight.¹⁷ In so doing, they do not seek, and thus fail to measure, the degree to which different judges may be influenced in their formal decisions by their ideological commitments.¹⁸ Professor Tamanaha characterizes this failure as an overfocus on the question of whether political views manifest themselves in judicial decisions to the detriment of attempts to empirically answer the question of how much this dynamic is observed in different judges at different times and circumstances.¹⁹

Professor Tamanaha uses the fourth section of his book to discuss the implications of his challenge to the formalist-realist divide for legal theory. In this section, he offers the reader a penetrating analysis of the work of Duncan Kennedy and Frederick Schauer on the nature of formalism.²⁰ Professor Tamanaha questions the very possibility of a coherent formalist account of common law jurisprudence and suggests that some version of realism, even if not the strongest version offered by some commentators, is

14. *Id.* at 67.

15. *Id.* at 98.

16. *Id.* at 111–12.

17. *Id.*

18. *Id.* at 145–48.

19. *Id.*

20. *Id.* at 162–67.

the only plausible means of understanding the work of judges.²¹ He concludes that “judges do not reason mechanically. Legal rules are always understood by judges as social products with social purposes, which judges interpret through socially informed eyes and apply in particular social contexts.”²²

In this fourth section of the book Professor Tamanaha makes manifest that the terrain he stakes out beyond the formalist-realist divide is located squarely in realist territory.²³ He does not find persuasive the notion of a formalist-realist divide, in large part because he has great difficulty believing that any significant number of learned and experienced jurists or academics could ever have taken seriously, let alone publicly espoused, a strong version of formalism.²⁴ After surveying the formalist landscape—past and present, practical and theoretical—Professor Tamanaha finds little or nothing of value in the conventional version of formalism. He writes, “[Formalism] has absolutely no purchase today. . . . [It] has always served as a term of abuse with no real theoretical content.”²⁵

While Professor Tamanaha may be accurate in characterizing the relatively marginal status of strong formalism among legal theorists and in the legal academy, he takes little note of the continuing strong influence formalism exerts in the popular political culture. Indeed, when considerations of the nature of judges and appellate court jurisprudence surface in the popular culture, the posture adopted by the most prestigious and powerful members of our governing class is often strikingly formalist in nature.

For example, in 2005, when nominating Samuel Alito to be an Associate Justice of the Supreme Court, President George Bush said, “He has a deep understanding of the proper role of judges in our society. He understands that judges are to interpret the laws, not to impose their preferences or priorities on the people.”²⁶ In his opening statement to the Senate for his appointment, Justice Alito said, “The judge’s only obligation—and it’s a solemn obliga-

21. *Id.* at 161–62.

22. *Id.* at 171.

23. *Id.* at 162.

24. *Id.* at 160.

25. *Id.* at 160–61.

26. Press Release, Office of the Press Sec’y, President Nominates Judge Samuel A. Alito as Supreme Court Justice (Oct. 31, 2005), *available at* <http://georgewbush-Whitehouse.archives.gov/news/releases/2005/10/20051031.html>.

tion—is to the rule of law, and what that means is that in every single case, the judge has to do what the law requires.”²⁷ Later in the hearings he said, “Judges have to be careful not to inject their own views into the interpretation of the Constitution, and for that matter, into the interpretation of statutes. That is not the job that we are given. That is not authority that we are given.”²⁸ A poll conducted during Justice Alito’s confirmation hearings found that sixty-nine percent of the population believed that the personal views of a Justice should not have a role in their decisions.²⁹

Justice Alito is hardly alone. Chief Justice John Roberts in the opening statement of his confirmation hearing before the Senate Committee on the Judiciary said, “Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules, they apply them.”³⁰ Later in the hearings he said:

Sometimes it’s hard to give meaning to a constitutional term in a particular case. But you don’t look to your own values and beliefs. You look outside yourself to other sources. This is the basis for [why] judges wear black robes, because it doesn’t matter who they are as individuals. That’s not going to shape their decision. It’s their understanding of the law that will shape their decision.³¹

More recently, Justice Elena Kagan testified as follows during her confirmation hearings:

I am not quite sure how I would characterize my politics. But one thing I do know is that my politics would be, must be, have to be completely separate from my judging. And I agree with you to the extent that you’re saying, look, judging is about considering a case that comes before you, the parties that come before you, listening to the arguments they make, reading the briefs they file, and then considering how the law applies to their case . . . not how your own personal views, not how your own political views might suggest, you know, anything about the case, but what the law says, whether it is the

27. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr., To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2006) (statement of Samuel A. Alito, Jr.).

28. *Id.* at 355–56.

29. Christina Lagorio, *Poll: Americans ‘Undecided’ on Alito*, CBSNEWS.COM (Feb. 11, 2009, 6:52PM) <http://www.cbsnews.com/stories/2006/01/09/opinion/polls/main1192317.shtml> (last visited Dec. 12, 2011).

30. *Confirmation Hearing on the Nomination of John G. Roberts, Jr., To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.).

31. *Id.* at 178.

Constitution or whether it is a statute.

Now, sometimes that is a hard question, what the law says, and sometimes judges can disagree about that question. But the question is always what the law says.³²

Whatever may be the current consensus regarding strong realism, or “balanced realism,” among legal academics, it is abundantly clear that those in positions of power continue to believe that the only acceptable public position they can espouse is one of nearly strict traditional formalism. However discredited this kind of deterministic view of judging may be theoretically, it continues to enjoy a powerful status in our culture’s popular conception of the law and the legal system, and this status should not be regarded lightly.

Moreover, it is clear from even a cursory examination of our current appellate court structure and procedure that it has been influenced, if not prescribed, by a dominantly formalist, largely deterministic view of appellate jurisprudence. Why else would a decisional system be designed so that the supervising authority (the appellate courts) bases its review of trial courts on only a written record of the trial proceedings, formal written arguments, and, occasionally, short verbal presentations by the attorneys? Why not review actual recordings of witness testimony? Why not interview the jurors as to the actual effect of disputed occurrences in the courtroom? Why not interview the trial judge?

Why design a decisional system in which the critical decisionmakers, the judges, frequently face no mechanism of popular consent at their initial selection, or at any time thereafter? Why full life tenure?

There may exist subtle and elaborate justifications for such a design, and for such procedures, that are consistent with a realist understanding that issues faced by judges are not amenable to mechanical resolution and instead often require the exercise of significant policy judgment. If they exist, however, they are not the stuff of popular political culture, and they hold little sway in the country at large. In fact, they enjoy little or no status in the standard law school curriculum.

32. *The Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 69 (2010) (statement of Elena Kagan).

In contrast, the design of such a system is manifestly based upon a strongly formalist conception of the nature of appellate jurisprudence. From this perspective, appellate courts more or less “check the math” initially performed by the court below. Such a review is largely mechanical in nature, and largely determined by the application of existing law and precedent.

Such a traditionally formalist conception of the work of appellate courts accounts for the strikingly small number of inputs to the appellate process. Likewise, it explains the exceptionally limited scope of review and the lack of direct, democratic authority invested in the decisionmakers. If the appellate courts are primarily in the business of engaging in a technical review of the purely legal decisions made by the court below, and if this review is primarily a deductive product of the logical application of existing law, then it is, naturally enough, the exclusive work of technical experts. All that should be required for such work is the written record, some formal written briefs, and perhaps a short, highly stylized period of verbal exchange.

From a formalist perspective, this is technical work, being performed in a formal manner by highly educated, licensed professionals. It is comparable to a scientific review board looking over the logic by which the data generated in an experiment does or does not support the offered conclusions. It does not require of its decisionmakers the receipt of direct popular authority, or a periodic democratic check on the quality of their judgment. In fact, such a system, so understood, would naturally enough incline toward insulating its technical decision-makers from the popular will, just as our system does.

Any account of our current jurisprudence that suggests, as Professor Tamanaha does, that strong formalism is and always has been little more than a straw man against which realist arguments are framed and buttressed, must account for the continued strong, even dominant, presence that formalism holds in our popular culture. It must also account for the striking degree to which the structure and procedure of our appellate courts reflect a formalist conception of appellate jurisprudence.

Perhaps these accounts will be part of Professor Tamanaha’s future work in this area. As for this book, it is a bold and ambitious work. It is fearless in its challenge to established orthodoxy and in its willingness to offer a critical perspective on some of our

most respected legal theorists and historians. It is provocative and thought provoking. It is at all times clear, well written, and a pleasure to read. Professor Tamanaha has offered an important new perspective on the tension between formalism and realism in our legal system, and he is to be congratulated and thanked for the effort.