These legal historians have been showing how colonial law was a site of argumentation and contestation, and frequent borrowing from other similar jurisdictions. Law, in short, involved an active and often heated conversation that implicated a wide cast, not merely or exclusively the legal profession. Kostal's history does likewise, but it puts the metropole at the centre of its own history as well as that of the Empire, an essentially British one in which an incident arising from its imperial affairs raised direct questions and furious debate about the nature of the British state itself and its underlying commitment to law. His history is simultaneously imperial and national. He shows how law was at the very heart of that discourse, that it was not a closed discourse inhabited solely by lawyers but contested and irresolute, both in the debate and in the outcomes. Political historians tend to avoid law not only for lack of expertise but also because of their implicit subscription to a positivist depiction of it as a closed site of prediction and control. This is the model beneath both the Whig and counter-Whig historiographies and the one that Kostal exposes so well. His book is an important injection of law into both the imperial history and British political history of the late-nineteenth century.

P. G. McHUGH

Law as a Means to an End: Threat to the Rule of Law. By BRIAN Z. TAMANAHA. [Cambridge: Cambridge University Press. 2006. 255 pp. Hardback £43.00. ISBN 0521869528.]

FOLLOWING ON FROM the success of *A General Jurisprudence of Law and Society* (Oxford, 2001), and hot on the heels of *On the Rule of Law: History, Politics, Theory* (Cambridge, 2004), comes a new book from Brian Tamanaha—at once a high-paced historical thriller and a clamorous critique of contemporary US legal culture.

The book has three parts. The first is dedicated to an historical account of the "instrumental view of law", *i.e.* "the idea that law is a means to an end" (p. 1), beginning with the non-instrumental view of medieval understandings of the common law, and ending with the instrumentalism of the twentieth century US Supreme Court. The second is a contemporary survey of the instrumental view of law in a number of domains of US legal culture: legal scholarship, legal theory and legal practice. The third is a heavy warning of the alleged corrosion of the rule of law by instrumental views of law. Without wishing to discount the value of its historical account and socio-cultural analysis, the philosophical foundation upon which the book ultimately rests or falls is instrumentalism itself. This review therefore focuses on both the explication of the basic idea of understanding something as a means to an end, and more specifically on understanding law in such a way.

In a largely ignored but insightful paper entitled "Means and Ends" (in *The Principles of Social Order*, 1981) Lon Fuller examines some of the puzzles of means-ends reasoning. Fuller's aim was to answer John Stuart Mill's dictum that "All action is for the sake of some end, and rules of action, it seems natural to suppose, must take their whole character and colour from the end to which they are subservient". Fuller has a number of replies. First that "We must know what is possible before discussing what is desirable"; second that "Some limitation of means, imposed by circumstances or voluntarily accepted, is essential for an intelligent definition of the end sought". However, Fuller is

careful not to turn Mill's dictum entirely around. Instead, by referring to the metaphor of architecture, he notes that "Some vague conception of architectural ends at the outset is essential to define the range of means worthy of consideration for architectural purposes". Nevertheless, Fuller certainly has an argument. He is at pains to note that "human aims and impulses do not arrange themselves in a neat row of desired 'end states'. Instead they move in circles of interaction" (Ibid. p. 54). Thus it is not a simple matter of separating means and ends, and asking, for example, in relation to social institutions: "Is its end good and does it serve that end well?", but rather inquiring: "Does this institution, in a context of other institutions, create a pattern of living that is satisfying and worthy of man's capacities?" Further, "no abstractly conceived end ever remains the same after it has been given flesh and blood through some specific form of social implementation". We must also consider the cost of the means, for only then may we be able to decide whether the end is worth pursuing, and we must consider what Fuller calls "means-surplus", where other ends are produced as by-products to the end sought to be achieved. Most famously, Fuller answers the following question with an emphatic 'yes': "Is it true…that the means available for constructing social institutions are, like the means available to the architect, limited in range?" It is not a matter of means being designed and ends chosen. We must see institutions as "a part of the pattern of our lives", "pregnant with side-effects", and we must be ready to direct the radar of value over the conceptual and practical inseparability of means and ends.

Is Tamanaha's account of instrumentalism as subtle as Fuller's, or does it shed some of its nuance in order to make more pronounced the potential dangers that Tamanaha sees in the instrumental view of law? Instrumentalism, Tamanaha says, is pervasive in US culture: it manifests itself "as an account of the nature of law, as an attitude toward law that professors teach students, as a form of constitutional analysis, as a theoretical perspective on law, as an orientation of lawyers in their daily practice, as a strategic approach of organised groups that use litigation to further their agendas, as a view toward judges and judging, as a perception of legislators and administrators when enacting laws or regulations" (p. 1). This sociologically-rich list surely raises the question whether one idea can travel coherently between these very different realms of human endeavour.

Unsurprisingly Tamanaha struggles to give us a definition of instrumentalism that remains applicable to all these contexts. He says, for example, that "people see law as an instrument of power to advance their personal interests or the interests or policies of the individuals or groups they support" (*ibid.*), but it is not clear how "seeing law" in such general terms should dictate the detailed work of constitutional analysis or everyday legal practice. Similarly with Tamanaha's presentation of the opposite, non-instrumental, view: what does it mean to say that "law was widely understood to possess a necessary content and integrity that was, in some sense, given or predetermined" (*ibid.*)? Understood by whom, with what effect, and described as such from what perspective?

An underlying problem here is that Tamanaha's history and sociology overwhelm his philosophy. Eager as he is to persuade us of the pervasiveness of the instrumental view of law, he is forced to keep the basic idea simple so that it can remain applicable to his historical and sociological picture. If this book is meant to be an exercise in the history and sociology of an idea, it must first spend time on examining the analytical structure of the idea itself.

It is one thing to present a view of the historical evolution of law as the conglomeration of "the interests of thousands of individuals", as Rudolph von Jhering (quoted at p. 3) does, yet quite another to argue that "Today, law is widely viewed as an empty vessel to be filled as desired, and to be manipulated, invoked, and utilised in the furtherance of ends" (p. 1)—and, indeed, to insist on the conscious use of that view in so many different kinds of human activities. It is perhaps a direct consequence of his lack of analytical engagement that Tamanaha privileges a certain kind of methodological individualism, *i.e.* the way that individuals understand a phenomenon is either the exclusive, or at least the dominant, source of legal culture. But, to come round full circle to Fuller's paper, individuals and institutions together form patterns of lives. Does a social theorist of Tamanaha's stature really want us to believe that "Oliver Wendell Holmes, Roscoe Pound, and the Legal Realists…were the figures most responsible for promoting an instrumental view of law in the United States" (p. 3)?

It is here that we come to the real essence of this book: its relentless political fervour. This book should not be evaluated on the basis of its historical, philosophical or sociological treatment of an idea. Rather, its gift is to rouse us from the slumber of political indifference, from the forgetfulness of the common good and the unwitting sacrifice of the common good in a blind pursuit of personal interests. It is a plea, ultimately, for the infusion of minds engaged in the many lives of the law with the spectre of the public good. That is why the key point—the most important phrase in the entire book—is the following: "faith in the existence of common social purposes, or in our collective ability to agree upon them, has progressively disintegrated" (p. 4).

The problem, ironically, is the means by which Tamanaha has chosen to persuade us of this political end. His rhetoric is acerbic: he speaks, for example, of "the multiplication of groups *aggressively* pursuing their own agendas, *convinced* in the rightness of their claims" dealing "a deep wound to the notion of a shared social good" (p. 4, emphasis added; see also p. 223). Armed with the instrumental view of law we are all "*combatants* [who] will fight to control and use the implements of the law as *weapons* in social, political, religious, and economic disputes" (p. 2, emphasis added). This rhetoric hides the subtleties: for what difference is there between the subjection of law to the function of serving the social good and the generally defined instrumental view of law? Cannot the instrumental view of law encompass the collective striving for social good?

Many of us will want to argue, as Fuller did, that we cannot conceptually or pragmatically separate means and ends: that we must invoke the ends of law, and that we must consider the possible means by which we can achieve them, but that at the same time we must evaluate the means in proportion to the end and consider what other ends the possible means may produce as by-products. This need not be controversial: it is part of the analytical structure of the idea of means-ends relations. And, paradoxically perhaps, I do not think that Tamanaha would disagree. Rather, the essence of his argument is that we have become politically selfish and narcissistic: that the nature of the ends we invoke is too personal, too private, and insufficiently public.

This book, then, is political through and through. The heart of it (one that this reviewer would be eager to see Tamanaha elaborate) is chapter twelve, "Collapse of the higher law, deterioration of common good" (pp. 215–226). Tamanaha is quick to dismiss "modern pluralism and scepticism" of the common good (pp. 222–224), but less eager to develop a contemporary theory

of this notion. I believe Tamanaha when he says he "is not advocating a return to former non-instrumental understandings of law, which appears impossible" and when he pleads that he is not "a legal romanticist inclined toward a utopian view of the reality that accompanied former non-instrumental understandings of law" (p. 246). But the difficulties involved in producing a contemporary political theory of the common good and the concomitant theory of law as public reason should not permit us to be defeatist. Least of all should the difficulties permit the defeat of a theorist as immensely talented as Tamanaha.

What are the lessons that Tamanaha himself wishes us to take from his book? There are three: "First, legislators must be genuinely oriented toward enacting laws that are in the *common* good or *public* interest…Second, government officials must see it as their solemn duty to abide by the law in good faith; this duty is not satisfied by the manipulation of law and legal processes to achieve objectives. Third, judges, when rendering their decisions, must be committed to searching for the strongest, most correct *legal* answer; they must resist the temptation to succumb to the power they have to exploit the inherent indeterminacy of law to produce results they desire" (p. 250).

Tamanaha is an energetic travel companion. We should be grateful for his political sensitivity and his willingness to trawl through what he sees as a kind of Dante's Hell. But now that the warnings have been voiced, perhaps there is more, by way of a philosophy of law, that can be done to heed them?

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A Common Law Theory of Judicial Review: The Living Tree. By W. J. WALUCHOW. [Cambridge: Cambridge University Press. 2007. 283 pp. Hardback £48.00. ISBN 0521864763.]

WIL WALUCHOW'S NEW BOOK attempts to provide an alternative way of looking at the role of charters of rights and judicial review within democracies. His main target is Jeremy Waldron's recent systematic attack on both institutions in a series of articles and two important books, *The Dignity of Legislation* (Cambridge, 1999) and *Law and Disagreement* (Oxford, 1999). Following Waluchow's previous article, "Constitutions as Living Trees…An Idiot Defends" in *The Canadian Journal of Law and Jurisprudence*, where some arguments were sketched out, this book is the first comprehensive reaction to Waldron's challenge. It deals with an old question: in a constitutional democracy, by what justification can unaccountable and unelected judges strike down legislation approved by elected representatives? Even if democracy demands not merely the making of collective decisions but also the protection of individual rights, why should judges decide what these rights mean?

Such is the traditional way of formulating the problem. As a starting point, however, the author recommends that we clarify two sets of different questions that are usually blurred. The first set concerns the role and desirability of charters: (i) "What role is a Charter supposed to play in a constitutional democracy?"; and (ii) "Is a Charter (serving that particular role) a good thing to have in a constitutional democracy?" The second set relates to the desirability of judicial review and the way that it should be exercised: (iii) "Is judicial review on the basis of a Charter a good thing to have in a constitutional democracy (and if so, what form should it take)?"; and (iv)