

## THE RULE OF LAW IN AMERICA BY RONALD A. CASS

BY RANDOLPH J. MAY\*

It doesn't take a Lexis/Nexis search to know that over the last half dozen years there has been an upsurge of interest in—and posturing about—the “rule of law.” With impeachment proceedings and all that for the sake of ease may be put into the category of the Clinton troubles, and now with a long-term War on Terror confronting us, we have witnessed with what facility the “rule of law” mantle is used by partisans of all stripes. What a powerful rhetorical sword or shield it makes!

Indeed, as Ronald A. Cass, Dean and Professor of Law at Boston University School of Law, points out in his new book, *The Rule of Law in America*, the idea of the rule of law is so powerfully engrained in our constitutional culture that, amidst all the passions of the contested 2000 election, both Al Gore and George W. Bush “were prepared to accept courts as the ultimate arbiters of matters crucial to their ambitions.” Certainly, the foreknowledge that court decisions would be accepted in a contest over power to lead the government distinguishes America from the majority of the world's nations.

But what do we really mean when we invoke the rule of law? Has there been an erosion of the rule of law in America? And, if so, what should be done in the way of implementing corrective measures. These questions are at the heart of Dean Cass's book.

On the first point, Dean Cass dissects in considerable detail each of the crucial elements of any “rule of law” regime worthy of the name. In his view—and that of the majority of commentators, ancient and modern—these elements are: (1) fidelity to rules; (2) of principled predictability; (3) embodied in valid authority; (4) that is external to individual government decision makers. Putting these elements together somewhat less formally but nevertheless elegantly, Cass explains that the rule of law “pulls society in the direction of knowable, predictable, rule-based decision making, towards limitations on the alignment of power with legitimacy.” Reduced even further to its core, the rule of law implies a system in which the exercise of government power against individuals is constrained by what Cass calls “extrinsic rules of principled predictability.”

Cass's explication of what the rule of law means is entirely serviceable, especially for those not already steeped in jurisprudential theory. But it is on the second question—are we witnessing the rule of law's erosion?—that the book makes its most signal contribution to our present understanding. For, through reasoned and dispassionate argument, Dean Cass asserts, and goes a long way towards demonstrating, that, in the main, in resolving cases most judges, “feel inhibited from moving outside the bounds of authoritative sources even when their intuition strongly suggests that a particular outcome is just.” By examining data, such as high settlement and low appeal rates, indicators that judges' actions typically fall within a narrow range of predicted outcomes, he supports this general proposition fairly convincingly.

Obviously, in most cases there is some degree of running room for the exercise of discretion because the case is not “on all fours” with controlling authority. But most of the time, as a result of constraints ranging from reversal aversion to desire for approval from their professional colleagues, judges act as “translators of the law” in the sense that adhere closely to text in performing their

interpretative tasks. In one of the many instances in which he employs instructive analogies, Dean Cass contrasts this prevalent mode of judging with what he describes as Ronald Dworkin's “chain-novel” model. In that mode, a judge feels relatively unconstrained by existing text, taking his or her task to be the employment of creative impulses to contribute to the continuing evolution of the law as a work in progress.

Cass freely acknowledges that not all judges fit the “translator” mold, and even the ones that largely do, sometimes stray into the “chain-novel” mode. It is landmark Supreme Court decisions, of course, that attract the most public attention. Cass highlights a few cases, including *Brown v. Board of Education*, which he believes are rooted more in moral principles than analysis of the external legal authorities. But these are the exception, not the rule.

What about the Supreme Court's *Bush v. Gore II* decision, effectively ending the 2000 presidential contest? Wasn't that a prime example of a “political” decision? A meaningful discussion of *Bush v. Gore* is beyond the scope of this review. Suffice it to say that Cass's analysis, consistent with the tone of his book, is measured. In his view, the four dissenters had the better legal argument on the remedy question, that is, whether to simply stop the recount process. That aspect of the decision gives some sway to the “law as politics” contention. But Cass points out, as I have elsewhere as well, that despite differences of party and perspective, all the justices except Stevens and Ginsburg, agreed on the substantive issue—that the indisputably different standards being used to count votes violated the Constitution's equal protection guarantee. (While Cass also points out that the case presented unusual issues in a context unlikely to recur, and that a decision had to be reached quickly, I am not sure these factors ought to carry much weight in the debate over whether the decision was based more on law or politics.)

Finally, in the last part of *The Rule of Law in America*, Cass examines the extent to which problems, such as excessive punitive damage awards and abusive discovery and class action practices, undermine public confidence in the rule of law. While offering some modest suggestions for reform, he is careful to note even here that not-so-informed press coverage often fuels public perceptions that exaggerate the extent of the problems.

Having set forth the case that by and large the rule of law remains strong, perhaps Dean Cass next can turn to a more complete analysis—with more detailed practical reform recommendations—than offered in this book. In the meantime, he has done well to remind that if we assert too often, without a sound basis, that judges act unconstrained by the rule of law, we may actually create a self-fulfilling prophecy that “encourages judges to try a hand at creating the legal solutions they deem best suited to solve whatever problems they see.” If that were to happen, it would be a tragedy not only for us here at home, but for those abroad that look to America as an example of a constitutional republic in which the rule of law prevails.

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