The Unwritten Constitution and the Rule of Law

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1. INTRODUCTION

This article addresses the themes of the conference panel for which it was prepared: “Constitutional Interpretation, Extrapolation and Interpolation.” It does so not from the perspective of a bill of rights, but from the perspective of the common law of judicial review. My argument in brief is that even in the absence of a written constitution or bill of rights, judges have to engage in interpretation of constitutional values, if they are to make sense of the fact that we aspire to live under the regime of the rule of law.

I believe the terrain of such values — the terrain of the unwritten constitution — to be important to the theme of the legitimacy of these modes of interpretation for the following reason. If interpretation of constitutional values were an activity which judges could not avoid, then it might seem that what they are doing when they interpret is also legitimate. However, one should not confuse necessity with legitimacy. That one is forced to do something might excuse without justifying. Suppose that a theory holds that illegitimate activity occurs when judges impose values on a statute, in the sense that the values they claim to find in the statute are not the values explicitly stated by the legislature. Suppose further that the reason this activity is illegitimate is that the legislature represents the people and should have a monopoly on the creation of binding values. On this theory, one should shun bills of rights because

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they give judges a licence to impose their sense of value on statutes. A bill of rights is, that is, a political mistake. Moreover, it remains a mistake even when the decision to have a bill of rights is taken by the legislature. There is a puzzle here similar to the puzzle about why one cannot validly consent to enslavement. But just as we know the answer to the puzzle about consent, so we should know the answer the theory has to give to what we might think of as constitutional enslavement. The legislature has enslaved itself — severely curtailed its liberty — by committing itself to prior value constraints. More accurately, it has committed itself to rule by judges. Judges will not only have very different views about the values required, but will be tempted to use the values as a vehicle for importing values that were never contemplated by the legislature when it enacted the statute. Judges might have no choice but to interpret the bill of rights when it is clearly relevant, but that they have no choice does not make their activity legitimate.

So my argument is that the necessity of judicial interpretation of constitutional values does not depend on the presence of a bill of rights. Even in the absence of such a bill, judges must — if they are to be faithful to their duty to uphold the rule of law — interpret the positive law of a legal order in light of their understanding of unwritten constitutional values. It follows that the objection to the legitimacy of constitutional interpretation and to its more creative sprouts — extrapolation and interpolation — is an objection to the rule of law. A choice to govern through legal order involves a commitment to abide by the values of the rule of law, the unwritten constitution of legal order.

My foil is the legal theory of United States Supreme Court Justice Antonin Scalia, whose position on constitutional interpretation is also the foil for Laurence Tribe’s and Michael Dorf’s article, where they deploy the terms constitutional interpretation, extrapolation, and interpolation to describe the reasoning in a dissent by Harlan J.¹ But I will argue that Tribe and Dorf underestimate the challenge of Scalia J.’s position, a challenge best taken up on the terrain of the unwritten constitution.

II. INTERPRETATION: A NECESSARY BUT ILLEGITIMATE ENTERPRISE

Tribe and Dorf respond to a suggestion by Scalia J. about how to select the appropriate level of generality in determining a right. His method examines “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified" in order, they say, to achieve value neutrality and thus avoid the arbitrariness of judicial value judgments. But Tribe and Dorf argue that Scalia J.'s method turns out to be a disguise for the importation of values and they advocate a different method, one that requires value judgments but avoids arbitrariness. They advance

a theory of constitutional interpretation that takes as its point of departure Justice Harlan’s observation in Poe that the search for unenumerated rights should proceed by interpolation and extrapolation from the enumerated rights. ... [W]e argue that a typical judicial opinion distinguishes between essential and non-essential facts, and that by paying attention to such distinctions, judges trained in the method of the common law can generalize from prior cases without merely imposing their own values.3

According to them,

Justice Harlan was engaged in a process of interpolation and extrapolation. From a set of specific liberties that the Bill of Rights explicitly protects, he inferred unifying principles at a higher level of abstraction, focusing at times upon rights instrumentally required if one is to enjoy those specified, and at times upon rights logically presupposed if those specified are to make sense.4

In order to avoid the intricacies of American constitutional debate, I want to restate their challenge to Scalia J. more abstractly. Judicial interpretation of a constitutional document is necessarily a value-laden enterprise. Hence, claims to value neutrality must disguise judicial importation of value. And since that importation happens in a subterranean fashion it is more likely than other methods to be arbitrary in the sense that the outcome will depend not on the law but on the judge’s political

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3 Tribe and Dorf, supra, note 1, at 1059 (emphasis omitted).
4 Id., at 1068.
preferences. For these other methods acknowledge the value-laden nature of interpretation by explicitly engaging in it. Their structure weeds out arbitrariness by anchoring all interpretations firmly in the text of the constitution and by accepting the onus of justifying any principles that are not enumerated in the text as principles necessary to make sense of or achieve the purposes of the enumerated principles.

Necessity does not, of course, mean anything like logical necessity since one has to recognize that judges who work within this structure will on occasion, even often, disagree with each other about how the onus is best discharged. So their conclusions will depend in a non-trivial way on their individual understandings of how to make the best moral sense of the constitutional text, that is, on their individual moral sensibilities. But to recognize this fact is not to concede that the conclusions are arbitrary. The kind of objectivity that is available in constitutional interpretation is not to be equated with value neutrality, but with adherence to the rigours of the explicit, properly structured interpretative process.

If my more abstract account of the challenge is accurate then it is one whose substance I by and large accept. But my concern is that it does not quite confront Scalia J.’s position because it requires that he share an important assumption that I think the coherence of his legal theory requires him to reject. This is the assumption of the legitimacy of judicial interpretation, however understood, of the written constitution.

It might seem strange to attribute to a well-known judge of the United States Supreme Court a rejection of the legitimacy of constitutional interpretation. Consider, however, the central elements of Scalia J.’s description of his legal theory in *A Matter of Interpretation*. Justice Scalia’s target in that book is the methodology of common law interpretation, which requires that judges try to reach a conclusion they think represents the best resolution of the case. He claims not to object to that methodology when it is applied to the common law. But he objects strongly on democratic grounds to its application to statutes, since such application involves substituting the judicial sense of what is appropriate for what the legislature as a matter of fact intended to convey in the text of the statute. And he objects even more strongly when that same methodology is applied to interpreting the constitution. What we have

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then is “the common law returned, but infinitely more powerful than what the old common law ever pretended to be, for now it trumps even the statutes of democratic legislatures.” In particular, he objects to the idea of the “Living Constitution,” the idea that the Constitution should be regarded as a document whose meaning will evolve to conform to new understandings of the rights and principles that require protection. Not only do we get through this idea judicial legislation of appropriate moral standards, but it contradicts the “whole purpose” of a constitution—“to prevent change.”

It is significant that Scalia J. does not make this point just about the United States Constitution, but about constitutions in general. It is not only the case that the judges of many other supreme courts are much more open than the judges of his Court to the idea of a living constitution, but in fact their constitutions often enjoin them to be open in this way, even requiring them to interpret their domestic documents in the light of evolving standards of international law. That Scalia J. is willing to make this point tells us that his textualism is not so much about the words in a text. Nor is it even about what one might infer about the intentions of the drafters or the expectations of their audience, for example, that judges charged with interpreting the text of the South African constitution are under a duty to update their understanding of what the constitution requires in the light of evolving international law. Rather, his textualism is a political stance about how to interpret constitutional texts, whatever the texts say, in order to try to preserve to the greatest extent possible the integrity of his theory of legal order.

His theory is within the tradition I call democratic legal positivism. According to this tradition, we live in an era where not only are statutes the primary source of law but also, because ours is the democratic era and because statutes represent the judgment of the people, statutes are the only legitimate source of law. Nevertheless, in the face of this reality judges wedded to common law methodology under the guise of interpreting the law persist in imposing their understandings of what law ought to be on statutes, thus usurping legislative authority.

These positivists combine a democratic argument that it is for the legislature alone to decide what values should have legal force with a

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6 Id., at 38.
7 Id., at 40-47, at 40.
positivist argument that the most fundamental value of the rule of law is certainty. On their model of law, values and norms have legal force only when they can be identified as law by hard or factual tests. Such tests require judges to avoid reliance on their own moral judgment, thus helping to ensure that legal values and norms are only those values and norms that have been explicitly incorporated by the legislature into the law of the land.

Positivist judges who find that their duty to apply the law includes the duty to interpret a bill of rights will experience some dissonance because they desire to avoid the kind of moral deliberation required by this duty. They cope with the dissonance by confining the scope of their interpretations to various proxies for factual legislative intention — what the founding fathers in fact had in mind, what their immediate audience would have taken them to have in mind, and so on. These interpretative techniques are rife with well-known problems. But the problems are serious only if one regards the techniques as genuine attempts to legitimate constitutional interpretation. If instead they are seen as techniques or holding actions, designed to limit the scope of an illegitimate activity in which judges have no choice but to engage, then the techniques are a lot more plausible. It follows that any interpretative activity that goes beyond these techniques is even more illegitimate. Extrapolating from the constitutional text is more illegitimate because it departs by definition from textualism, while interpolation — adding words to the text — is even worse.

8 See the evocative title of Scalia, “Originalism: The Lesser Evil” (1989) 57 U. Cincinnati L. Rev. 849, though he does not depict his position as I do here. In his presentation at the conference, Scalia J. poured scorn on those who do not hold his position because he alleged that they are committed to believing that the drafters of the Constitution intended that the Constitution mean whatever judges in the future want it to mean. That belief is of course absurd, but it is not more absurd than Scalia J.’s belief that the drafters intended the Constitution to be interpreted as they wanted it interpreted. As countless critics of Scalia J.’s kind of position have pointed out, no one who drafts a bill of rights can, as a matter of logic, intend the bill to be governed by her particular understanding of the rights, otherwise she would enact that understanding. The fact that judges and academics persist in holding this equally absurd position deserves an explanation. And I believe that the explanation might well lie in the fact that the position, while illogical, is required for judges of a positivist bent to continue to work in a legal order much of whose structure is resistant to their views.

9 See Scalia, supra, note 5, at 147, where he concedes that if one does not take it as a given that judges should enforce a constitution against the legislature then his “argument ceases to have force as a justification for [his] mode of interpretation [and] becomes an
Textualism is then not a way of legitimating an approach to constitutional interpretation but a compromise positivist judges make in order to prevent a bad situation from getting worse. It is much the same approach that is advocated for interpreting the text of ordinary statutes when they incorporate open-textured value terms like fairness or reasonableness. These terms should not be treated by judges as invitations to engage in deliberation about their meaning, but as landmines the judges should try to defuse by confining their scope to the extent possible. Similarly, the common law is to be treated as far as possible as a system of determinate rules whose content does not form a backdrop for interpretation of general law, but rather are rules that apply only within particular areas of private law. Thus positivist judges will try hard to "hedge" themselves in by "announcing rules" in their judgments.

The compromises positivist judges make are forced on them by the fact that the Benthamite dream of a completely codified legal order in which all law is positive law with a determinate content was never realized. They are thus forced to try to make the institutions of the legal order in which they find themselves conform as far as possible to their understanding of law and the rule of law. At best, such judges will have a profound ambivalence to the common law, something nowhere better illustrated than in A Matter of Interpretation. Thus, while Scalia J. is willing to have the writ of the common law run in private law, he is hostile to the idea that the common law should form an interpretative backdrop to the interpretation of statutes. Here he exemplifies the classic argument directed to the overall inconsistency of the evolutionists: Why, given what they believe the Bill of Rights is, would they want judges to be its ultimate interpreters?"

This point explains why, for example, it makes sense to describe Viscount Maugham's judgment in Liversidge v. Anderson (1941), [1942] A.C. 206 as a positivist one, despite the fact that he interpreted the requirement that the minister had to have "reasonable cause to believe" that someone was a threat to national security and so should be detained as really meaning if the minister were "satisfied that ...." And that "interpolatory" move had the result, in his view, that the Court could not require the minister to justify the detention to it. See my "Intimations of Legality Amid the Clash of Arms," International Constitutional Law Journal [forthcoming].


See Dyzenhaus, "The Genealogy of Legal Positivism" (2004) 24 Oxford J. Legal Stud. 39. This article provides the bridge from my argument in this chapter to the kind of positivism articulated by HLA Hart and Joseph Raz. In the absence of that bridge, my argument has to be confined to positivist judges.
hostility of positivism to the common law tradition. He also displays the concern that common law judges will say that they are simply deciding in accordance with the reason of the law in order to bootstrap themselves into an increasingly powerful position in their relationship with the legislature.

This shows that positivists cannot be ambivalent about one area of constitutional law in common law jurisdictions, the common law of judicial review of administrative action, where — to adopt a classic formulation — the "justice of the common law will supply the omission of the legislature." To them, the common law of judicial review seems like the paradigm of judicial usurpation of an alleged legislative monopoly on law-making power.

One way of trying to legitimate the common law of judicial review is to point out that there has to be an omission — a legislative silence or gap for judges to fill. Since the legislature has the power either to preempt such judicial creativity by being explicit from the outset or to react by way of amending legislation, it is legitimate for judges to assume that initial silence or the failure to amend are signs of tacit legislative consent. In my view, this is not a very convincing explanation for the legitimacy of judicial review. If the idea that one can discern actual legislative intent in statutory text is problematic, it seems doubly problematic to infer actual intent from silence. I will come back to the issue of legitimacy below. For the moment, I want to note only that judicial review might seem less objectionable, albeit still illegitimate, to positivists if the legislature in the absence of a written constitution seems able to either pre-empt or override the judges. That same fact might also make the common law of judicial review seem not really part of constitutional law, if one equates constitutional law with law that constrains legislatures.

I will argue below that this equation is wrong. The fact that a legislature has the power to override a constitutional principle does not show that the principle is not constitutional. And there is perhaps a kind of appreciation of this point in the unwillingness of most democratic legal
positivists to take any comfort from the potential for legislative override.\textsuperscript{14} My argument starts with a sketch of judicial review in Canada.

III. The Common Law of Judicial Review

Consider a recent decision of the Canadian Supreme Court, \textit{C.U.P.E. v. Ontario (Minister of Labour)}.\textsuperscript{15} This case concerned the interpretation of an Ontario statute that replaced the right of certain unions to strike and of employers to lock out with a system of compulsory arbitration — the \textit{Hospital Labour Disputes Arbitration Act (HLDA)\textsuperscript{16}}. In simplified outline, the system of arbitration that had evolved was one in which arbitrators were drawn from a mutually acceptable list of experienced people. When the parties were unable to agree on an outcome, the arbitrator would be appointed to settle the matter.

A Conservative provincial government came to power in 1995 on a platform that included massive restructuring of the public service. It did not amend the statute but decided to replace the list of mutually acceptable arbitrators with one composed of retired judges. This practice was challenged in the courts and the Ontario Court of Appeal upheld the union’s argument that the minister, in changing the process for making appointments, had violated the principles of natural justice. Justice Binnie for the majority of the Supreme Court also found for the union but on different grounds — the interpretation of the statute, in particular section 6(5) which gave the minister the power to appoint as arbitrator “a person who is, in the opinion of the Minister, qualified to act.” In Binnie J.’s view, once the statute was understood in its context, one had to see that the minister had a “narrow role” ... “to substitute for the parties in naming a third arbitrator in case of their disagreement.”\textsuperscript{17} In that context, he found that there were implied limits on the minister’s discretion — the statute required him to “select arbitrators from candidates who were qualified not only by their impartiality, but by their


\textsuperscript{15} [2003] 1 S.C.R. 539 [hereinafter “\textit{CUPE}”].


\textsuperscript{17} \textit{CUPE, supra}, note 15, at para. 50.
expertise and general acceptance in the labour relations community." He thus found that when the minister selected candidates without any regard to these limits, he was acting in a way that was manifestly or patently unreasonable, and thus did not meet the appropriate standard for review of such decisions.

One of Binnie J.'s principal points of reference is *Roncarelli v. Duplessis*, a Supreme Court decision from the 1950s, and in particular the reasoning of Rand J., who authored several judgments which are regarded as relying on the idea of an unwritten constitution or implied bill of rights. In *Roncarelli* the issue arose because Roncarelli had the liquor licence for his restaurant revoked as a punishment for standing bail for Jehovah's Witnesses, whose missionary activities were bitterly opposed by the government of the province. In order to find that the premier of Quebec had acted illegally in instigating the revocation, Justice Rand had to overcome the obstacle that the official in charge seemed a "law unto himself," as one of the dissenting judges put it. This judge held the view that the only controls on the official were the controls that the legislature had explicitly prescribed and there all that the legislature had done was give the official a subjectively phrased discretion.

Two paragraphs of Rand J.'s judgment are worth quoting in full on this point. He said:

In public regulation of this sort there is no such thing as absolute and untrammeled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions.

"Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted. ... That, in the

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18 Id., at para. 49.
20 Id., at 166-67, per Cartwright J. (dissenting).
presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.\(^{21}\)

Justice Rand is reasoning that it is a constitutional requirement that administrative officials act in accordance with the rule of law, whether or not there is a written constitution that imposes that requirement. Moreover, for him that requirement makes sense only if the rule of law is understood quite substantively, as including values that inform the perspective within which judges are to understand the statute which delegates authority to the administration.\(^{22}\)

Now in \textit{CUPE} the government lawyers did not claim that the minister was a law unto himself — that he had an “absolute and untrammeled discretion.” Rather their claim was that the minister had legitimate reasons for his conduct which were closely associated with the purpose of the statute, including the chronic delay and cost associated with arbitrations and the fact that he was drawing on “people who had spent their professional lives as neutrals.”\(^{23}\)

Against this, the union’s lawyers pointed out that in other legislation, enacted after the Ontario Court of Appeal’s decision in this case, the government had put into the statute a provision that gave the minister the authority to appoint an arbitrator who “has no previous experience as an arbitrator,” “has not previously been or is not recognized as a person mutually acceptable to both trade unions and employers,” and “is not a member of a class of persons which has been or is recognized as comprising individuals who are mutually acceptable to both trade unions and employers.”\(^{24}\) While the minister said this subsequent legislation was

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\(^{21}\) \textit{Id.}, at 140-42.


\(^{23}\) \textit{CUPE}, supra, note 15, at paras. 90-92.

\(^{24}\) \textit{Back to School Act (Toronto and Windsor)}, 2001, S.O. 2001, c. 1, s. 11(4). I have heard that one of the factums presented to the Supreme Court called this provision the “orangutan” provision, on the basis that it permitted the government to appoint an orangutan as an arbitrator.
irrelevant, the union argued that it "manifests an explicit legislative intent to exclude the otherwise crucially relevant criteria of expertise and general acceptability." The union's view was that the "new legislation shows the HLDAAs as the Minister would like it to be, but is not."25

Justice Binnie did not comment directly on these claims. But he did say that "courts generally infer" that "the legislature intended the statutory decision maker to function within the established principles and constraints of administrative law."26 And he said that when it came to the adjudication of "interest" disputes, that is, the sorts of disputes at stake under the HLDAAs, "it is particularly important to insist on clear and unequivocal legislative language before finding a legislative intent to oust the requirement of impartiality either expressly or by necessary implication."27

In making these two claims, Binnie J. is recognizing that for a common law judge it takes what I call a substantive privative clause if the legislature wishes to oust judicial review on the basis of values that judges consider to be legal fundamentals. As I will now show, the difference between the substantive privative clause and a general privative clause is that the latter seeks to undercut the formal aspect of judicial independence while the former seeks to remove the substantive basis for which they have independence.

A general privative clause is a provision in a statute that purports to oust the jurisdiction of the courts to review the decisions of an administrative tribunal. The general privative clause is directed at the formal place judges have in the legal order — formal in that without an independent institution there would be no check on the legal limits of legislative delegations of authority. Since the 1960s and 1970s, courts in the common law world have held that a privative clause is largely redundant.

25 CUPE, at paras. 81-82.
26 Id., at para. 99.
27 Id., at para. 121. Note that these remarks occur in the section of his judgment where he deals with procedural fairness and the fact that the minister, who has an interest in the outcome of the arbitration, appoints the arbitrator. But the remarks clearly apply to the part of his judgment that deals with substantive review since they tell us what it would take for Binnie J. to find the substantive exercise precluded by the statute. That is, the legislature would have to go further than stating explicitly that the minister has the power of appointment. It would have to, as in the Back to School Act, state that that power could be exercised unconstrained by factors that conditioned an impartial exercise of the power, given that it was the minister's to exercise.
They argued that a legislature cannot seriously intend that a tribunal be delegated legally unlimited authority and thus that judges are constitutionally entitled to review decisions that trench on those limits.\textsuperscript{28}

Courts often concluded that the legislature was sending the same sort of hands-off message by couching grants of discretion subjectively, that is, using the kind of “if satisfied that” language found in the grant of discretion to appoint arbitrators in the \textit{HLDAA}.\textsuperscript{29} Such a grant of authority, even one which says that the “decision will be within the sole and unfettered discretion of the minister,” might seek to deliver the same general hands-off message to judges, but it does not do so by saying “do not review.” Rather it can be interpreted to say that the court is not entitled to enquire into the grounds of the decision. Thus courts did not find this kind of message as constitutionally obnoxious as the general privative clause, as they claimed they could still check the legality of the decision, at least to see whether the official had acted in bad faith.

This claim was always rather hollow in the absence of other requirements. But it has been long recognized that in general those subject to a decision should be given a hearing at which they can learn the basis

\textsuperscript{28} In Canada, the courts had a constitutional peg on which to hang their argument, in s. 96 of the \textit{Constitution Act, 1867} [(U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II., No. 5], which reserves the power of appointment of superior court judges to the federal government. My own view of s. 96 is that it is not only a slim peg, but that if it had not existed the course of Canadian constitutional history in respect of jurisprudence on judicial independence might have been little different. Without it, the Supreme Court would have simply asserted an authority on the basis of its inherent common law jurisdiction to maintain the rule of law. Put differently, s. 96 is just a convenient basis for the judges’ sense that they are the ultimate guardians of the principles of the unwritten constitution. Note that the House of Lords seems to have asserted an even more extensive, constitutionally protected review authority against the United Kingdom Parliament without ever referring to the \textit{Act of Settlement} [(U.K.), 12 & 13 Will. 3, c. 2]. The more extensive review arises from the gloss placed by the House of Lords in \textit{R. v. Lord President of the Privy Council, ex parte Page}, [1993] A.C. 682 on \textit{Anisminic Ltd. v. Foreign Compensation Commission}, [1969] 2 A.C. 147. While the latter could be interpreted as holding that a preclusive or privative clause could not totally exclude judicial review, the former has been interpreted as emptying such clauses of all meaning.

\textsuperscript{29} Indeed, the \textit{HLDAA} contained a double whammy as s. 7 was a privative clause precluding any application for judicial review once an arbitrator had been appointed, so that it would be “presumed conclusively that the board has been established in accordance with this Act.” Both the majority and the dissent took the combination of privative clause and subjective conferral of discretion to indicate that the standard of review was the least intrusive patent unreasonableness standard. See the dissent in \textit{CUPE, supra}, note 15, at para. 17 and Binnie J., at para. 151.
of the official’s view as to how the matter should be disposed and an opportunity to contest that basis. That requirement — the *audi alteram partem* rule — did not seem to judges to negate the delegation of discretionary authority to the official, since the entire substance of the decision was left to the official. In other words, the requirement was firmly on the process side of the distinction between process and substance.

But if all that requirement imposes is a show of presenting a case and listening to the subject of the decision, the claim about legality still looks hollow. Unsurprisingly, judges developed more intrusive tests for legality, though they tried to frame these negatively, as having to do with factors officials could not take into account, “irrelevant factors,” or “improper purposes,” thus seeking to avoid the impression that they were telling the official how to decide. Indeed, these negative tests stay very close to the idea of bad faith, as is illustrated by *Roncarelli*. If the official acted for such and such a reason, his decision would be illegal because acting on that reason disclosed bad faith or something close to it.

However, in the absence of a duty to give reasons for the decision, and, moreover reasons that go some distance to showing how the official justified his decision in the light of all the factors, the claim still seems hollow. So it was a kind of logical development of the view that the requirements of legality are not hollow, that judges came to articulate a general duty to give reasons, and tests for the adequacy of those reasons which permit the judge to ask whether the reasons provide a reasonable justification of the decision. And with these developments comes a sense that in order for some decisions to receive an adequate justification, there are not only factors that the decision maker must not take into account, but also factors that he must take into account — considerations that are not only relevant, but mandatory.

Thus in a decision that is Justice Binnie’s other principal point of reference, *Baker v. Canada (Minister of Citizenship & Immigration)*, the Supreme Court decided that an immigration official who had to decide whether a deportation order should be stayed on “humanitarian and compassionate” grounds had to give substantial weight to the interests of the deportee’s children. Moreover, it is in this decision that the highest court of a common law country has for the first time articulated

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a general duty to give reasons, which will then be assessed on the appropriate standard. So the “perspective within which a statute is intended to operate” is constituted not only by the statute. As Madame Justice L’Heureux-Dubé put it in Baker, discretion must still be “exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter.”31 In making these claims she consciously elided what had hitherto been seen as two quite distinct categories of review — review of official interpretations of the law and review of discretionary decisions — arguing that the latter required officials to interpret the law of their statutory mandate in much the same fashion as the former.

In sum, the flip side of the constitutional disability of the legislature to preclude judicial review and thus judges’ formal independence in the constitutional order, is that judges will and should use their independence in the service of the fundamental values of that legal order. The substantive privative clause does not then prohibit review. Rather, it seeks explicitly to remove grounds for review, for example, by saying that the courts may not review even if a decision is unreasonable, biased, or made in bad faith. Only the latter kind of message serves to exclude the constitutional rule of law approach that in my view underpins Binnie J.’s reasoning. The general privative clause or subjectively couched grant of discretion has to be reinterpreted, so that there is an independent check on the executive to ensure that it acts within the limits of its authority. But those limits are not formal; they are substantive in that they are set by fundamental or constitutional legal values.

Judicial independence is not then a good in itself but instrumental in that it serves those values. If there is no written bill of rights in place that protects those values, then the supreme legislature will have the authority to override those values using a substantive privative clause — one which makes it clear that the officials to whom authority is delegated may act outside of the controls of the rule of law. In doing this, the legislature deprives the judges of the substance of their constitutionally unassailable independence. But while they cannot exercise their independence, this deprivation does not make it futile. They can still use their independence to point out in their judgments the lawlessness of the

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31 Id., at para. 56.
regime the government has used, even abused, the legislative form to create. And that means that the government bears the costs of political accountability.

Now the obvious problem for this view of judicial independence is that it might well seem that we get rule by judges in place of the rule by the delegates of the people in accordance with the intention of the legislature. Judges will simply substitute their decisions for the delegates. In Canada, judges deny that they are in the substitution game. They have developed a sophisticated jurisprudence for substantive review according to which administrative decisions will be reviewed on a continuum of standards, ranging from the most intrusive correctness standard or substitution on the merits, through “reasonableness simpliciter,” to the least intrusive standard of patent or manifest unreasonableness.

The denial might, however, seem unconvincing the more sophisticated the jurisprudence of deference is. In particular, the idea of a standard in between correctness and patent unreasonableness seems to put judges on dangerous ground. The legitimacy of adjudication in this area rests on a distinction between review and appeal. It might seem that one can preserve this distinction by establishing a set of limited questions which require the correctness standard while using the absurdity standard for all other questions. But reasonableness, the standard which the Court said was appropriate in Baker given the importance of the decision to Baker’s future, requires judges to test the adequacy of the reasons for the decision and thus seems to require them to evaluate those reasons. This is a quite different process from seeing whether there are no reasons for the decision other than very bad reasons, the manifest unreasonableness or absurdity standard, and might seem hardly different from the correctness standard. However, without something more intrusive than the patent unreasonableness standard, judges risk appearing concerned only with upholding the formal aspect of their independent role in the legal order.

As a result, judges who are minded to uphold rather than to pay mere lip service to the rule of law sometimes experience severe tensions. For example, the Supreme Court of Canada is now rather preoccupied with the idea that whatever judges do, they should not “reweight” the factors officials have to take into account in order to demonstrate that their decisions are reasonable. Weight is, however, just a metaphor for a proper inquiry into the balance of reasons. It became part of the Canadian discussion because in Baker the majority was clearly influ-
enced by the fact that Canada had ratified, though had not incorporated by legislation, the *Convention of the Rights of the Child*,\(^{32}\) which in Article 3 requires that in administrative decisions affecting children, the “best interests” of the children be “a primary consideration.”

The partial dissent to this decision claimed to object only to this aspect of the majority’s reasoning and put the objection on classic dualist or positivist grounds — if the Charter\(^ {33}\) is not directly involved, parliament is the sole source of legal value. Thus the dissent claimed not to object to the majority’s holding that the statute itself, as well as ministerial regulations, required that the children’s interests be given “substantial weight,” nor that judges should check to ensure that officials had been “alert, alive and sensitive to” the issue of whether appropriate weight had been given.\(^ {34}\)

But in the Court below — the Federal Court of Appeal — which upheld the decision to deport, Strayer J. was clear that the most that a judge can do is check whether a relevant factor like the children’s interests has been taken into account. For a court to evaluate how that factor was taken into account is to reweigh, which is illegitimate.\(^ {35}\) Since *Baker*, the Supreme Court has retreated from its position expressed there and has adopted the view, more like that of the Federal Court of Appeal, that judges must never evaluate the way that relevant factors figure in the official’s reasoning. They can check that the right reasons were taken into account, but may not go into the balance of reasons, which is to say, reweigh the reasons. It is hardly an accident that this apparent retreat from *Baker* took place in the first major decision in the national security area given by the Supreme Court after September 11, 2001, *Suresh v. Canada (Minister of Citizenship and Immigration)*.\(^ {36}\)

In his judgment in *CUPE*, Binnie J. found that the appropriate standard of review was patent unreasonableness and that, following *Suresh*, the Court was not entitled to reweigh the factors the minister had to take


\(^{34}\) *Baker*, supra, note 30, at para. 75, per L’Heureux-Dubé J.


into account. However, he also said that while the Court could not reweigh the factors, it was

entitled to have regard to the importance of the factors that have been excluded altogether from consideration. Not every relevant factor excluded by the Minister from his consideration will be fatal under the patent unreasonableness standard. The problem here ... is that the Minister expressly excluded factors that were not only relevant but went straight to the heart of the HLDAA legislative scheme. 37

In my view, Binnie J.'s claim that he was not involved in the illicit practice of reweighing has to be treated with some skepticism. In CUPE he used language taken directly from Baker to describe what had gone wrong: the Court had “look[ed] in vain for some indication in the record that the Minister was alive to these labour relations requirements.” 38 In its place, said Binnie J., there was an “active disclaimer of any such requirement, by the Minister's senior advisor charged with the search for retired judges, who made it clear in his cross-examination the Minister's rejection of both expertise and broad acceptability as qualifications.” 39 But if Binnie J. were right that there was an active disclaimer, then this means that the minister in some sense weighed the requirements against his political objectives and found them less weighty.

Similarly, in both the Federal Court Trial Division and the Federal Court of Appeal in Baker, the judges found that the immigration officials had weighed the children's interests because they had taken into account that Baker had children. They thus seemed to think that the officials had taken Baker's Canadian-born children's interests into account because the officials thought of the existence of the children as a kind of aggravating circumstance or reason to get rid of Baker. This is of course a rather Pickwickian sense of taking interests into account. Since the children had interests and since the children were considered, therefore their interests must have been considered too. And it can be justified only by the thought that for the judges to decide how the interests should be considered involves the illicit practice of assigning the interests weight.

37 CUPE, supra, note 15, at para. 176.
38 Id., at para. 181 (emphasis added).
39 Id., at para. 182.
I suspect that the dissent in CUPE was largely fuelled by the same stance that drove the Federal Court in Baker: as long as relevant factors are taken into account, how they are to be taken into account is up to the official.\(^{40}\) It seems to follow that the only way to understand Binnie J.’s judgment is that he assigned certain factors a weight and found this weight not manifested in the balance of reasons. So much seems to be recognized in his statement that the correctness standard has something in common with the patent unreasonableness standard. “A correctness approach means that there is only one proper answer. A patently unreasonable one means that there could have been many appropriate answers, but not the one reached by the decision maker.”\(^{41}\)

What one sees then is that judges experience certain tensions as they seek to give content to their constitutional standing as the independent guardians of the rule of law. On the one hand, if they fail to give the rule of law substantive content, they will appear to be more concerned with upholding their sense of role than with doing the job that explains why they should have that role. On the other hand, as they give the rule of law content, so they run the risk of appearing to usurp the legislative role, whether this be by their claim to discern fundamental legal values that stand free of any legislative texts and which control the legislature or by their use of the same interpretative process to find controls on the authority of the administrative delegates of the legislature.

So my point is not to deny that judges will face serious tensions in this area. It is not insignificant that in CUPE three judges of the Supreme Court, including the Chief Justice, disagreed with the majority on the basis that the majority’s decision was too interventionist. Indeed, this section of my article is intended in part to illustrate that such tensions are inevitable. But this should be no comfort to the positivists, who also face tensions, as is illustrated by returning to Scalia J.

In a well known article, Scalia J. comments on the American doctrine of deference to administrative officials, the “Chevron doctrine,”

\(^{40}\) See the dissent, id., paras. 35-36, relying heavily on Suresh. Indeed, the dissent in CUPE tracks another feature of the Federal Court in Baker—that is, some doubt is expressed about whether factors that are not expressly stated in the statute to be relevant can be considered so.

\(^{41}\) Id., at para. 164.
which consists of two steps.\textsuperscript{42} To begin with, the court must determine whether Congress had a “clear” and “unambiguously expressed” intent when enacting the statute in question. If the court finds that Congress did have such an intent, that is “the end of the matter” and the court has no authority to modify or interfere with the interpretation or implementation of the statute. However, if no such intent can be discovered, the court must determine whether the administrative agency came to its decision on the basis of a “permissible construction of the statute.”\textsuperscript{43}

Scalia supports the \textit{Chevron} doctrine – the introduction of “an across-the-board presumption that, in the case of ambiguity, agency discretion is meant.”\textsuperscript{44} But he does not do so on grounds to do with agency expertise, nor with the separation of powers and the inappropriateness of judges deciding policy issues. In respect of expertise, he says that if it were true that officials were better situated to determine the purpose of legislation than judges, this would constitute “a good practical reason for accepting the agency’s view, but hardly a valid theoretical justification for doing so.” In respect of separation of powers, he argues that the courts are constantly in the business of determining policy, especially when it comes to working out what is the intention or range of permissible intentions that can be attributed to a statute, so that this task cannot be reserved to the administration.\textsuperscript{45}

Instead, his approval of \textit{Chevron} is based on the rise of the modern administrative state. The kind of statute-by-statute assessment that was common prior to \textit{Chevron} was becoming increasingly difficult to implement given the complexity of present-day administrative decision making. In addition, he contends that in the majority of cases Congress does not have a “clear” intention and it does not mean to provide an agency with discretionary powers. Instead, it simply fails to consider the matter. Because of this, \textit{Chevron} is “unquestionably better” than that which preceded it. Not only does Congress now know that statutory ambiguities will be resolved by agencies rather than courts, but these agencies will be able to deal with them with sufficient flexibility to ensure that their decisions are not “eternal” or “immutable.” Indeed, he


\textsuperscript{43} Here I rely on the quotations from Scalia, \textit{id.}, at 511-12.

\textsuperscript{44} \textit{Id.}, at 516.

\textsuperscript{45} \textit{Id.}, at 514-16.
argues that one of the great benefits of *Chevron* is that it accords agencies the space to alter their interpretations and approaches in the light of changing conditions.\textsuperscript{46}

Justice Scalia’s view of the proper role of agencies is very much the Benthamite picture of appropriate adjudication. Officials who are charged with interpreting the law have wide discretion about how to apply the law and wide discretion when it comes to interpreting the law when the content of the law is indeterminate or ambiguous. But when it comes to the second activity, the officials’ decisions are not to have any precedential force, lest these come to be regarded as a constraint on the discretion of officials in the future.

However, Scalia J. still has to make sense of his own role, *qua* judge. Here it is worth quoting at some length the link he draws between one’s “method” of interpreting statutory and constitutional documents and one’s definition of “clear” in the first step of *Chevron*.

In my experience, there is a fairly close correlation between the degree to which a person is (for want of a better word) a “strict constructionist” of statutes, and the degree to which that person favors *Chevron* and is willing to give it broad scope. The reason is obvious. One who finds more often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds less often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt. Contrariwise, one who abhors a “plain meaning” rule, and is willing to permit the apparent meaning of a statute to be impeached by the legislative history, will more frequently find agency-liberating ambiguity, and will discern a much broader range of “reasonable” interpretation that the agency may adopt and to which the courts must pay deference. The frequency with which *Chevron* will require that judge to accept an interpretation he thinks is wrong is infinitely greater.\textsuperscript{47}

Justice Scalia’s positivism thus draws him to the view that his tests for statutory meaning are likely to come up with a plain meaning of the statute and that once that meaning has been determined there is no reason for the judge to defer. Since, as he argues elsewhere in the same article, it is rare that a judge, whatever his interpretative approach, will

\textsuperscript{46} Id., at 516-17.

\textsuperscript{47} Id., at 521.
find that on his approach there is in fact “equipoise” between conflicting interpretations, one can infer that generally Scalia J. will find no reason for deference.\textsuperscript{48} However, I think we can assume he would be required to find that “if satisfied that” delegations of discretion are unambiguous delegations of authority to officials, which the legislature did not intend to have constrained other than by those constraints explicitly stated in the statute. The tension he encounters then arises out of his view of the rule of law as the rule of a system of statute-based rules with determinate content. It arises because that view requires, on the one hand, that when the statute imposes constraints, these rigidly constrain officials in accordance with the judges’ understanding of the correct interpretation of the law. On the other hand, it also requires that when that kind of constraint does not exist, officials are accorded a more or less free-wheeling discretion — they are a law unto themselves.

Justice Binnie’s approach contests both aspects of this view and does so moreover in a way that is not best described as the product of the mindset of one who “abhors a ‘plain meaning’ rule, and is willing to permit the apparent meaning of a statute to be impeached by the legislative history” and who is thus prone “more frequently [to] find agency-liberating ambiguity.” The issue is not abhorrence of the idea that there is plain meaning, but rather adoption of a regulative assumption that Parliament, the executive, and judges are committed to a rule of law project which is about the realization of fundamental constitutional values, whether written or unwritten. Judges should thus try to find that legislation is legislation that seeks to achieve its particular objectives in the light of a wider legal project. Thus legislative meaning is not a top-down communication — a “one way projection of authority,” as Lon Fuller described the positivist view. Rather, as Fuller preferred to put it, law is the product of a relation of reciprocity between ruler and ruled.\textsuperscript{49} A corollary of the view of law as a product of a value-based rule of law project is that no particular institution in legal order has a monopoly on the best understanding of law and that is why judges have reason to defer to administrative interpretations of the law of the particular administrative mandate. But they should defer only if the officials do a reasonable job of justifying their interpretation of the law or decision.

\textsuperscript{48} Id., at 520.
\textsuperscript{49} Fuller, \textit{The Morality of Law} (1969, revised ed.), at 207.
This idea of deference, which I have termed “deference as respect” in order to distinguish it from the kind of submissive deference to legislative command which is the positivist understanding of deference, was adopted by the Supreme Court of Canada in Baker as an appropriate way to characterize the relationship between judges and administrative officials. Justice Scalia is well aware of this kind of idea, though he describes it in rather harsh terms as “mealy-mouthed” deference, which does “not necessarily mean anything more than considering those views with attentiveness and profound respect, before we reject them.” And he goes on to say that if one were to try to give more force to this idea of deference, if those views would be binding if they were judged reasonable, the result would be a “striking abdication of judicial responsibility.”

Justice Scalia’s claim increases the tension just identified in his position when a judge is faced with a general privative clause. The privative clause is an unambiguous statutory command not to review administrative interpretations of the law. In the face of such a clause, a positivist judge like Scalia J. is in a dilemma. Either he can interpret the command in accordance with his textualist approach and say that this official is a law unto himself, even when it comes to interpreting the law, or he can say this particular command of the legislature can not be taken seriously.

In fact, judges of a positivist inclination have chosen the second option, along with their more common law inclined colleagues. The difference between the two groups is that the positivist judges then find that they can review on a correctness standard. In contrast, the others try to make sense of the clause as an indication of the degree of deference the legislature intended. For they are committed to showing that the legislature and the administration are involved in an endeavour to maintain the rule of law. In other words, the positivist judge thinks that the only kind of deference that is worth the name is submissive deference, submitting to the command of the legislature. When the command contradicts his understanding of his role as a judge, he finds that he can ignore that

51 Scalia, supra, note 39, at 514.
52 Scalia, supra, note 39, at 513-14.
command altogether. A substantive privative clause, however, presents no problem to him at all. All such a clause does is make explicit what judges took subjective grants of discretion to command implicitly — that official authority is unconstrained by the values of the rule of law.53

At least, the substantive privative clause should create no tension from the theoretical vantage point of a positivist judge. But qua judge, positivists have never been able to say that discretion is entirely free-wheeling. They have always said that at least discretion must be exercised in good faith, etc. And I suspect that an explicit announcement by the legislature that an official might act in bad faith, or with bias, or unreasonably, disquiets all judges. But what that disquiet shows is that positivist judges find that a commitment to the rule of law demands more of them than their legal theory permits. The requirement — understood as a requirement of legality — that decisions not be in bad faith, etc. is the thin end of the wedge of the common law’s conception of the rule of law. As my description of the path that led to Baker indicates, if such requirements are to be worth anything, if they are to provide standards to which officials are genuinely accountable, judges will find themselves engaged in the kind of value based review which positivist judges shun. Indeed, as I will now argue, it is not clear that this stance of shunning value based review is an authentic option within a common law legal order, or, for that matter, any order governed by the rule of law.54

IV. THE VERY IDEA OF LEGAL ORDER

Jeremy Waldron has recently argued that the idea of the rule of law should be understood as an instance of what Gallie called an “essentially contested concept.”55 Waldron takes the key to essential contestability to

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53 To create a tension for such a judge the statute would have to both command officials to decide in accordance with a set of explicitly stated rule of law values and command judges to avoid checking to see if the officials had so decided.

54 Will Waluchow objected that I tend to slide between “the legal order” and “legal order” in my argument. He is right but the slide is deliberate. It is intended to reflect the fact, on my Fullerian view, that any particular legal order aspires necessarily to be an ideal legal order.

reside in a combination of normativity and complexity such that debate over the idea requires participation in the contest, one where the participants try to capture the elusive ideal to which the rule of law aspires. That the idea is essentially contested should not, he thinks, lead to pessimism about participation. Even if participation cannot achieve agreement, participants in the contest can still have the hope that the “contestation — and the sense of the underlying ideal at subsequent stages — will be the better for one’s intervention.”

Waldron detects three levels of complexity when it comes to debate about the normative ideal of the rule of law, which is, he takes it, to have law in charge rather than men. There is the level at which the list of criteria or principles of the rule of law are set out, for example, Fuller’s eight principles of what he called the “internal morality of law.” Here Waldron does not think that much of a contest emerges. Controversy really begins at the second level, when the list is related to the theorist’s particular conception of how the list amounts to the law being in charge, how it responds to the challenge to “make law rule, rather than men.” The third level comes about because at issue in the contest is not only what the ideal of the rule of law consists in, for example, the positivist ideal of the rule of rules or the common law idea of the rule of principles. The contest is also about the values the rule of law serves, for example, liberty or fairness or human dignity, or even about whether the rule of law serves values at all, since some argue that the rule of law is merely the instrument of whatever values the powerful desire it to promote.

I want to bring out a feature of essential contestability that is, I think, implicit in this account. Assume that there are only two groups of judges competing within the practice of the rule of law: the democratic legal positivists and the common lawyers. They will debate their different conceptions of the rule of law. But their debate will not take place only or even mainly at a theoretical level. It is a deeply practical debate both because it is focused on the resolution of particular disputes and because the resolutions have consequences for future practice. The pract-

56 Id., at 153.
57 Id., at 153-58.
58 Id., at 157.
59 Id., at 158-59.
tice of law and the content of the rule of law are at stake in this contest. Law will be different to a significant extent depending on which group has the upper hand.

However, if this practical debate is nicely captured by the idea of essential contestability, it must be the case that at best one group can dominate for a time — there is no complete victory. Put differently, there must be something about law itself that will resist complete capture of the practice by either group. The democratic legal positivists will find that they cannot reduce law to the rule of rules — principles and values are at least in some very minimal way necessary to make sense of legal order. Similarly, the common lawyers will find that not all statutes are susceptible to being understood in the light of the values they take to be the constitutional values of legal order.

My description of the evolution of the common law of judicial review supports this feature of debate about the rule of law. In favour of the common law position is that positivist judges suppose that there are values of legality that control official decision making even in the absence of a written constitution and explicit statutory command. In favour of the positivist position is that in the absence of a written constitution common law judges will submit to an explicit legislative command to exclude the values of legality, except in the case where they (and positivist judges) will refuse to understand literally a general privative clause.

If this is right, then I think there is at least one modest victory, that is, at the level of theory. We seem to have established that for a government to rule through the medium of law is for it to submit to rule by the values of legality, as these are interpreted by judges. It follows that one view of the rule of law, the kind of positivism that says that the rule of law is a mere instrument of those who happen to be in power, is wrong.

It is, I think, very important in this regard to notice that Thomas Hobbes, the reputed founder of this kind of positivism, was in fact far from holding this view. As I have argued elsewhere,\(^6\) the tension in Hobbes’s position is evidence of the fact that someone who takes the idea of the rule of law seriously will find it difficult to stick with the

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instrumentalist accounts of the rule of law which contemporary legal positivists support.

There is, of course, no doubting Hobbes's hostility to the common law tradition and his desire to deprive judges of their authority to issue judgments whose force extended beyond the particular case. But he also suggests that a judge insults the sovereign lawmaker and is in dereliction of duty when the judge attributes an intention to the lawmaker to cause inequity. He clearly regards it as the judicial duty to bend over backwards to find a reasonable interpretation of legislation, one that will bring about equity rather than inequity. The basis for such interpretation is, he says, the judicial sense of natural law. A careful read of his catalogue of the laws of nature shows that he took them to include many of the principles that the common law of judicial review claims to be the basis of the rule of law. Further, when judges engage in this kind of rule of law interpretation, Hobbes does not understand them as imposing the controls against the sovereign; rather, they are completing the exercise of sovereignty. Hobbes generally regards the legislature, the administration, and the judiciary as involved in a partnership whose aim is to make concrete the laws of nature in the civil law to which individuals within the scope of the sovereign's authority are subject.61 And it is only this idea of partnership that can support his claim about the role of equity in interpretation of the law.

Hobbes then wants the common law's understanding of the rule of law without the common law. Moreover, he gives judges a significant role in upholding the rule of law, even to the extent of placing them under a duty to read legislation against an interpretative backdrop of the values of the rule of law. And the duty is not grounded in the tacit consent of the sovereign, in the sovereign's after the fact failure to override the judge's interpretation by statute. Rather it is grounded in the values that make legal order a legitimate project that both the sovereign as supreme judge and his staff of officials are bound to bring to realization. It is true that a sovereign has the power to override his judges and can thus enact positive law that contradicts the requirements of the laws of nature. But I think that an explicit element of Fuller's legal theory is

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61 While there is overwhelming textual evidence to support this claim, it is most strikingly advanced in the Introduction to *Leviathan*. See Hobbes, *Leviathan*, MacPherson, ed. (1985), at 81-83.
implicit in Hobbes — the more the sovereign engages in this exercise, the more his claim to govern through law is put under strain and the less his power will appear legitimate.\textsuperscript{62}

The idea of strain must be emphasized here because of a tendency in legal and constitutional theory to suppose that if there are fundamental or constitutional values of legality, there must be an ultimate guardian of these values — judges who have the authority to overrule the legislature. But it is surely a sufficient test for the fundamental nature of such a value that a ruler who deliberately flouts it puts in doubt his claim to rule through law. That nearly all democratic legal positivists object to judges relying on interpretations of the fundamental values of the unwritten constitution for review shows, I think, an appreciation of this point. These positivists do not take comfort from the fact that the legislature can and has always been able to overrule judges’ understanding of the substance of the rule of common law values. They rightly understand that a concession that there are any intrinsic values of legality that judges legitimately interpret opens the door to expansion of the list through both extrapolation and interpolation.\textsuperscript{63}

Hobbes was not of course a \textit{democratic} legal positivist. It was Bentham who attempted to expurgate legal order of values so as to clear the lines of legal communication between a democratic assembly and the people. It is Bentham, not Hobbes, who puts forward the instrumental view of the rule of law, more recently articulated in a depoliticized version by Joseph Raz: the only internal constraints on law are those that make law more effective in communicating the judgment of the commander to his subjects.\textsuperscript{64} Raz’s attempt to turn Fuller’s list of principles of legality into criteria of efficacy or instrumentality follows HLA Hart’s account of the rule of recognition in trying to make sense of the idea that the commander is not uncommanded — he too is subject to law — while avoiding any claim that might be the basis for an argument about the intrinsic values of legal order.

\textsuperscript{62} For innovative exploration of this idea, see Evan Fox-Decent, “Sovereignty’s Promise: The State as Fiduciary” (Ph.D. diss., University of Toronto, 2003).

\textsuperscript{63} In “Aspiring to the Rule of Law,” Campbell et al., \textit{supra}, note 14, at 195, I argue that Goldsworthy’s attempt in “Judicial Review, Legislative Override, and Democracy” to move away from this position undermines democratic legal positivism.

But this avoidance makes sense only if it is put on explicitly political, Benthamite grounds about the best way to design a legal order, which is to make it not only statute based but free of the common law. In the absence of these political grounds, the three levels of debate about the rule of law which Waldron identifies are detached from each other with the result that there is no satisfactory engagement with the question of how law is best understood to be “in charge.” In other words, the instrumental view of the rule of law is a radical reform proposal for legal order. The values it serves have to do with a particular conception of another essentially contested concept — democracy. And it serves those values by requiring that judges understand law as free of values other than those the legislature has seen fit to inject into law.

In the context of this article, there are two interesting results from the observation that democratic legal positivism is best understood as a radical reform proposal. The first is noted, though not in these terms, by Mary Ann Glendon in her comment on Scalia J.'s paper in *A Matter of Interpretation*. She points out that in the civil law systems Scalia J. admires there is a pull to common law reasoning in order to make sense of the idea of the rule of law in the era of the administrative state. If this pull is inevitable, it would be evidence of the fact that legal order is inherently resistant to reform along Benthamite lines. It is difficult, if not impossible, for judges to make sense of their commitment to legality or the rule of law other than by thinking of it in terms of some set of intrinsic legal values that gives content to the idea that the law is in charge.

The second result is for positivist judges in common law legal orders that have not been reformed in this way, even though these orders

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65 See Glendon, “Comment,” in *A Matter of Interpretation*, supra, note 5, at 95, 102-103. This pull to a common law methodology might well be evidence of a flaw in the dream of a completely codified system, detected by Gerald Postema in *Bentham and the Common Law Tradition* (1986) 453-59. Postema argues that Bentham’s requirement of publicity for judges’ reasons for decision will focus the attention of those subject to the law as well as of other judges on the reasons. Once public reasons for decisions are focused upon, and not the fact that the issue has been resolved, those subject to the law will come to expect that the reasons articulated for a decision on one problem of interpretation will influence judges who decide similar cases. Judges will then have to take into account the utility served by not disappointing expectations about how cases will be decided. Hence, an informal doctrine of precedent will arise, even if, as Bentham wanted, judgments are deprived by the constitution of precedential force.
have been greatly changed by the statutory regimes that created the administrative state. Such judges find themselves working within a space structured by the common law tradition. In that space, they have to cope, however reluctantly, with more than the fact that their judgments have legal force beyond the case; they also have to cope with the fact of precedents that set out a vision of the rule of law not as the rule of rules but as the rule of fundamental values. As Scalia J.'s legal theory shows, the tendency of such judges will be to try to positivise their role. In so doing, they adopt a role that was designed for a legal order other than the one in which they work. They thus fail to do their duty as judges to uphold the rule of law, a duty which is the rationale of their constitutionally guaranteed independence.

The disagreement between these two approaches is at base one about the force of practices of reason giving and it gives rise, as I have argued elsewhere, to two different conceptions of legal culture — the culture of reflection and the culture of justification. Reflection does not mean here reflective thought but reflection as mirroring. Legislation should reflect the preferences of the people and judges must interpret legislation so as to live up to this conception — law with the determinate content the people's representatives in fact intended it to have.

In contrast, within the culture of justification law is legitimate when its content is determined through a process of reasoned justification, which takes into account the fundamental legal or constitutional values of a society. Whether a decision about the law deserves respect thus depends not on whether one would have given that decision oneself, but on whether the person who gave it is able to provide an adequate justification. To a large extent, any talk about deference in terms of the degree of divergence between what one thinks is correct and the actual decision is inappropriate, perhaps more suited to positivism. The issue is adequate justification not divergence. Of course, judges and others will differ about whether a justification is adequate or not, as did the judges in CUPE. But the claim that such differences are antithetical to the rule of law stems from a positivist mindset which refuses to countenance the space of legality that exists between the certainty of the rule of rules and the arbitrary rule of men.