THREE VARIATIONS OF THE SUPREME COURT'S LEGAL MIND

by

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I. CONSTITUTIONAL THEORY AND JUDICIAL REVIEW

James Madison was remarkable in his role as Father of the Constitution and much of his achievement can be attributed to his ability to translate complicated, messy questions into beautifully coherent and logical answers. Not the least of his insights was his equation of Enlightenment Reason with Law and his consequent heavy investment in a Supreme Court that would share in a veto power over Congressional Acts.1 It is interesting to speculate what his Council of Revision,2 if not rejected,3 would have made of United States history: how Justice Marshall or Taney or Warren, a Justice Holmes or a Black, would have functioned on such a veto power. The specter of the "political thicket" would never have been raised since the Justices would have been unabashedly political animals from the beginning. One imagines them functioning, perhaps, as the Cabinet that rose through necessity rather than Constitutional mandate, but with a vital difference. The President, since he could not fire the Justices and since he could not veto Congressional acts without them, would have to listen to them. More, he would have to seduce and cajole them in much the same way as with Congress.

I wonder, for example, of the fate of the Alien and Sedition Acts, or Jefferson's Embargos, or whether Polk or Wilson would have treated Mexico so cavalierly. Madison held out high hopes for a judicial veto power. "[T]he utility," he observed, "of annexing the wisdom and weight of the Judiciary to the Executive seemed incontestable".4 Yet, the other Constitutional Convention delegates did not hesitate to contest the proposition and repeatedly defeat it.5

Left to its own devices, the Supreme Court has managed on the whole to justify Madison's faith in its "wisdom and weight". It has even managed to function, often in the face of severe criticism both externally and internally, if not as a Council of

1 J.D., Harvard University 1948; A.B., Washington Univ., St. Louis 1945. Of Counsel, Donald L. Schlapprizzi, P.C. This article is a slightly abridged version of the introductory chapter in a work-in-progress entitled The Invisible Counselors: The Case for the American Legal Mind in the Presidency.


3 Id.

4 2 FEDERAL CONVENTION at 107, 108-09, 110, 131, 130. 2 Federal Convention at 80-81.

5 Supra, note 3.
Revision, then as a significant monitor of the actions of both Congress and the Presidency.

It is clear, too, that by relinquishing the political power of membership on a Council of Revision, the Supreme Court Justices gained immeasurably in independence. This enabled them to conceive of themselves as guardians of wisdom, which they have carefully and consistently denied. Going further, in a subtle, transvaluing master-stroke of seeming self-restraint, Chief Justice Marshall in *Marbury v. Madison*, not only enunciated the Supreme Court’s ultimate power over acts of the President, and over Congress, but most importantly, rejected the possibility that Congress had any ultimate power over the Supreme Court. The last word, that immensely powerful rhetorical instrument, was preserved for the Supreme Court.

With their independence, the Justices emerged, not, as Madison imagined them, a unified definition of reason but with diverging strains of legal mindedness that, as they almost inevitably clashed with each other, developed that added strength which emerges from dialectic. Madison’s vision may have been too simple.

 Constitutional theory is heavily concentrated in the area of judicial review, and the three issues raised in *Marbury v. Madison* are still subjects of heated debate and controversy. It is remarkable how topical this opinion remains.

When Justice Marshall branded as illegal Jefferson’s suppression of Adams’s “mid-night appointments”, he not only incurred Jefferson’s undying hostility, but he formulated the doctrine that not even the President was above the “law”, which translates into “judicial law”. Much of constitutional theory concerns itself predictably with the Supreme Court side of the President/Supreme Court relationship. Relying principally upon the Supreme Court’s “diary” of opinions, analysts debate the actual or appropriate or (usually the most crucial concern) justifiable extent of judicial review of constitutional questions; occasionally in terms of its exclusivity and more often in regard to the Court’s self-restraint, actual and desired. C. Herman Pritchett, in an analysis of the Rooseveltian courtpacking scheme, inferentially concedes that Supreme Court power is self-regulating: “[The present Court] has attempted, though not always successfully, to keep in mind its own limitations as a policy-forming agency.” Joseph Tanenhaus’ treatment of the Truman seizure of the steel mills in 1952 once again deals with the self-imposed

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6 5 U.S. (1 Cranch) 137 (1803).
7 “[For President Jefferson] to withhold his [Marbury’s] commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.” Id. at 162.
8 “[T]he constitution controls any legislative act repugnant to it... It is emphatically the province and duty of the judicial department to say what the law is.” Id. at 177.
9 “If Congress remains at liberty to give this Court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.” Id. at 174.
10 Id. at 137.
11 Pritchett, The President and the Supreme Court, 49 J. Pol. 80, 92 (1949).
restraints of the Supreme Court in limiting Presidential power, either delegated by Congress or based on presidential prerogatives purportedly flowing directly from the Constitution: "... the Court has made it a bit easier for itself in insisting that extraordinary power be reserved strictly for extraordinary occasions." Tanenhaus argues that the Youngstown Sheet and Tube Co. case ushered in a theory of relativity, under which the Court, a thermometer, measures the degree of the emergency evoking presidential prerogative action or Congress' delegation of power to the President. Stephen L. Wasby, in an article concerned exclusively with the courts' treatment of the presidency as an institution, makes the point that until the Nixon litigation, judicial efforts to limit presidential action were generally limited and ineffectual, and that while "President Nixon did fare poorly, and he was restrained by the courts" the Court still exercises judicial self-restraint when reviewing presidential actions, particularly in the foreign policy areas, and when supported by Congress. An interesting approach, but still one which considers the actions of the Supreme Court in terms of its own imposed limits, is taken by P. Allan Dionisopoulos, who claims that since the early 1950's, the Court has been much less timid in imposing restraints on the President. Dionisopoulos poses a set of guidelines in judging President/Supreme Court encounters which relate mainly to the Court's assessment of the probability the President will obey the order, or, given a sufficient time lag, won't have to. Robert Heineman surveys instances of presidential/judicial confrontations and clings to a more judicially-restrained view than Dionisopoulos, i.e. that the Supreme Court is "usually no match for presidential power." But as the instances imply (e.g. Roosevelt and the New Deal, Nixon and Watergate, Truman and seizure of the steel mills), the germinal question is usually not the imposition of presidential power over, or scorn by the President of, any effort by the Supreme Court to restrain the presidency, but rather how far the Supreme Court wishes to go, or feels it must go, in self-restraint.

The common central concern of more generalized constitutional theorists, whether interpretivists or non-interpretivists, is the justification of Supreme Court power, admittedly undemocratic in a democratic society. John Hart Ely settles upon "a representation-reinforcing theory of judicial review"; i.e. the Court should confine itself to enjoining encroachments upon the democratic processes by which

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19 See, e.g., Id. at 4-5.
the majority rules. However, in considering the "representation of minorities", he is inevitably led back to the familiar Supreme Court role of substantively protecting individual rights. Michael J. Perry invites the Supreme Court Justices to stop being closet guardians of wisdom and regard themselves as legitimate custodians of America’s moral vision. And Raoul Berger, an interpretivist concentrating on the intentions of the Constitutional and Fourteenth Amendment Framers, would require the Justices to honor such intentions when considering Constitutional questions. A most interesting criticism of judicial power's base in legal formalism is that taken by Morton J. Horwitz, one of the more interesting and thoughtful progenitors of the Critical Legal Studies movement, an exciting and provocative, if highly politicized and deconstructive, re-examination of legal theory. Horwitz, concentrating on the dominance of American law by mercantile and entrepreneurial groups in the early 19th century, maintains that the "paramount social condition that is necessary for legal formalism to flourish in a society is for the powerful groups in that society to have a great interest in disguising and suppressing the inevitably political and redistributive functions of law." Regarding ante-bellum America, Horwitz's "powerful groups" were the "mercantile and entrepreneurial groups" who by a "triumph of a contractarian ideology" were "enabled . . . to broadly advance their own interests through a transformed system of private law." While noting in passing "the Bar's own separate and autonomous professional interest" in the rise of legal formalism, Horwitz unfortunately dwarfs this recognition by his overriding concern with "the successful culmination of efforts by mercantile and entrepreneurial interests . . . to transform the law to serve their interests, leaving them to wish for the first time to 'freeze' legal doctrine." Horwitz's quarrel with legal formalism and, inevitably, with the judiciary that embraced it, was that "[n]ot only had the law come to establish legal doctrines that maintained the new distribution of economic and political power, but, wherever it could, it actively promoted a legal redistribution of wealth against the weakest groups in the society. The rise of legal formalism can be fully correlated with the attainment of these substantive legal changes." The interposition of common law, posited as the application of reason, does indeed serve to disguise an essential proposition—the vesting of a portion of the sovereign power in judges, compounded in American common law by the power of judges to void legislative and executive acts.

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20 Id. at 73-104.
21 Id. at 135-179.
26 Id. at 211.
27 Id. at 258.
28 Id. at 259.
29 Id. at 254.
30 See Marbury, 5 U.S. at 137.
That the Supreme Court has the power to review presidential and congressional actions without its own actions being reviewable by the other branches (except by the drastic, unlikely method of impeachment last tried unsuccessfully with Justice Chase in 1805 by Jefferson and his Congress) is generally conceded. The extent of the Supreme Court's self-restraint would not otherwise be so ardently and obsessively debated throughout the legal community. This concern is not intended to imply that it is not important to consider how such presidents as Jefferson, Jackson, Lincoln, Franklin Roosevelt, and Nixon, rather than Supreme Court Justices, have regarded ultimate judicial review, usually after the fact and often too late to have more than a wrist-slapping effect: "... the law of the Constitution is what Lincoln did in the crisis, not what the Court said later," observes Clinton Rossiter. As Rossiter points out regarding the president's role as commander-in-chief, the Court certainly has backed off so far that its "self-restraint" virtually becomes a renunciation of its power to review. After a survey of such presidential actions as Lincoln's suspension of the writ of habeas corpus during the Civil War and Franklin Roosevelt's executive order resulting in the evacuation of some 70,000 Japanese American citizens to internment camps, Rossiter concludes:

Finally, the implications of this study for constitutional law in the atomic age should be crystal clear. As in the past, so in the future, President and Congress will fight our wars with little or no thought about a reckoning with the Supreme Court. Unquestionably it is important to consider justifications for Supreme Court sovereignty (or the lack of it), for taking the measure of Supreme Court self-restraint (or the lack of it), but, ultimately, it may be of more value simply to acknowledge that we have, and have had from the beginning, an undemocratic Supreme Court in place, and that it has functioned effectively for two hundred years because of its inestimable value to a democratic society as a stabilizing and corrective influence on the volatile majority rule of Congress and the presidency. This recognition is blurred by such historians as Robert V. Remini who, echoing the Jacksonian idolatry of an unfettered "majority rule" and ignoring the histories of South American "republics" with subservient judiciaries, continue to hyperbolize with considerable hostility the "undemocratic" nature of the American judicial system: "By the middle of the twentieth century the courts had assumed virtually unlimited power in practically all areas of law, social behavior, politics, economics, and every other field.

What has developed--particularly since the Civil War--is unrestrained judicial review, an 'imperial judiciary', so called."

32 Id. at 131.
II. TRADITIONAL CHARACTERIZATIONS OF THE SUPREME COURT'S LEGAL MIND

The Court comes as close as possible to symbolizing for each generation the intellectual power conceded to the original creators of the Constitution. Collectively the Justices represent the exercise of reason as a dominant continuing impulse in American public life. To the American people, they have never been supplanted by the academicians as the guardians of American intellectuality, for they, like the Founding Fathers, must not only think but must immediately translate thought into actions affecting millions of lives. In short, they are idealized as not only intelligent but wise because no other idea of them is tolerable. Their exercises of reason are not erasable blackboard speculations.

A legal system has much the same tenacity as more primitive codes of totems and taboos. Its difference, that it has been consciously and deliberately instituted, is less important than its equal necessity of maintaining itself through employing high priests whose word is the Law. The Law prevails only so long as the subject population has faith in the power of someone in authority to treat each legal pronouncement as revelation. This faith contains seeds of primitive awe at superhuman qualities in the law-pronouncer. In the case of kings ruling by divine right, their "greatness" is largely measured by the felt sense of their "righteousness", a tradition inherited by our presidents, while "great" Supreme Court Justices are those regarded as supremely wise. Created by a document devoted to a rule of reason (that to preserve a democratic society, the individual must be safeguarded from the democratic rule of that society), the Supreme Court has wrapped the parchment about itself and made both the parchment and itself sacrosanct, not by muttering incantations but by issuing sober exercises in the art of reasoning.34

Given this sanctity which has survived vicious attacks by presidents as diverse as Thomas Jefferson35 and Franklin Roosevelt36 (intent on protecting their own magical properties), Supreme Court Justices, unlike politically manipulated presidents, have been set free to explore the limits of their mental capabilities. It is evident that internal divergent strains of formalism, rule-skepticism and lawyer-moralism (hereafter to be defined) have, in various combinations, determined the Court's directions virtually from its beginning. The legal mind cannot be viewed simply as a logic-powered vessel moving along inexorably in a single, deep channel. From the

outside looking in, the polemics have been characterized usually as one of two, rather than as here three, extremes. Justices have been labelled radical or conservative, political or apolitical, moral or amoral, interpretivist or non-interpretivist, strict or liberal constructionist (of the Constitution, of presidential powers, of congressional powers, of aggregated federal powers, of states’ powers, of the Court’s powers), idealist or pragmatist, activist or passivist, protector of property rights or personal rights, party man or political maverick, and so on.

The problem with most of these characteristics is they often become extremely implausible when applied to the sweep of a given Justice’s career on the Court. They cloud rather than clarify any attempt at understanding the legal mind on the Supreme Court. A contemporary liberal, for example, scorns the post-Civil War laissez-faire formalist Justice Stephen J. Field for his “reactionary” economic theories, but must nevertheless applaud him for Cummings v. Missouri. Field’s majority opinion voided a Missouri statute requiring an oath of allegiance to the Constitution before a person could engage in such professions as the ministry:

... [In] the pursuit of happiness, all avocations, all honors, all positions, are alike open to every one ... in the protection of these rights all are equal before law.

And what is that same liberal to make of one of his favorites, another formalist, Justice Hugo Black, when he wished to convict a Yale Medical School professor for violating a Connecticut anti-birth control statute or validated discriminatory treatment of Japanese Americans during World War II?

III. THE SUPREME COURT’S THREE VARIATIONS: RULE-SKEPTICISM, LEGAL FORMALISM, AND LAWYER-MORALISM

The consistency with which moral, political, economic or social expectations of a Justice’s judicial behavior are frustrated leads to the conclusion that it is usually not a Justice’s faith but the way he thinks that resists fluctuation and shapes a harmonious pattern of his career. His legal mind operates between polarities of formalism and rule-skepticism (with, I suggest, an aberrant excursion into moralism by a Justice Warren), distinctions developed lucidly by H. L. A. Hart in The Concept of Law. Hart devotes considerable time to the concepts of formalism and rule-skepticism in legal thought. Regarding formalism he notes:

Different legal systems, or the same system at different times, may

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37 Id. at 321-22.
38 71 U.S. (4 Wall.) 277 (1867).
either ignore or acknowledge more or less explicitly such a need for the further exercise of choice in the application of general rules to particular cases. The vice known to legal theory as formalism or conceptualism consists in an attitude to verbally formulated rules which both seeks to disguise and to minimize the need for such choice, once the general rule has been laid down. One way of doing this is to freeze the meaning of the rule so that its general terms must have the same meaning in every case where its application is in question. To secure this we may fasten on certain features present in the plain case and insist that these are both necessary and sufficient to bring anything which has them within the scope of the rule, whatever other features it may have or lack, and whatever may be the social consequence of applying the rule in this way.42

Hart's designation of formalism as a vice may not be so predictably applicable in terms of a court dependent upon the majority decision of nine Justices. (Justice Black is a prime example of the value of a formalist on a plural court). Hart concludes:

We shall be forced by this technique to include in the scope of a rule cases which we would wish to exclude in order to give effect to reasonable social aims, and which the open textured terms of our language would have allowed us to exclude, had we left them less rigidly defined. The rigidity of our classifications will thus war with our aims in having or maintaining the rule.43

But, an inverse necessity may frequently arise to include situations within a prior tradition in order to check unreasonable social aims.

At the opposite pole of legal thinking from formalism, Hart locates ruleskepticism:

The rule-sceptic is sometimes a disappointed absolutist; he has found that rules are not all they would be in a formalist's heaven, or in a world where men were like gods and could anticipate all possible combinations of fact, so that open-texture was not a necessary feature of rules. The sceptic's conception of what it is for a rule to exist, may thus be an unattainable ideal, and when he discovers that it is not attained by what are called rules, he expresses his disappointment by the denial that there are, or can be, any rules.44

Formalism and rule-skepticism are, as Hart indicates, "the Scylla and Charybdis

42 Id. at 126.
43 Id. at 126-7.
44 Id. at 135.
of juristic theory; they are great exaggerations, salutary where they correct each other, and the truth lies between them." The inescapable conclusion that emerges from a study of Supreme Court history is that criticisms of the Court have largely failed to recognize the signal importance of extremes mediating each other and have concentrated upon the necessity of one overriding the other. Paul A. Freund observes: "There are several pitfalls in single-minded thinking ... serious risks in grasping--shall I say blowing--only one horn of a constitutional dilemma ... Single-minded decisions suffer from a loss of insights that the cross-lights of competing principles would furnish." In his entertaining treatment of Justices Black and Frankfurter, James F. Simon flirts with this conclusion: "Black’s core message was, in fact, true. The Court and the nation were stronger because Black and Frankfurter had served together. Black’s and Frankfurter’s open challenges to each other often pushed them to their best and most impassioned advocacy."

When Alexander M. Bickel, in *The Morality of Consent*, summarily disposes of Justice Black as a "liberal contractarian" (Bickel’s *bête noir*) in favor of the "pragmatic skepticism" allegedly preached by Edmund Burke and practiced by Justice Holmes (a prototypal rule-skeptic), Bickel’s argument takes on the intractability he attributes to Justice Black’s formalism. Bickel makes unfortunate use of certain crucial terms. By ascribing to Justice Black a "moral" stance, one that judges each case essentially upon a "storehouse of principles", Bickel suggests a separation of Justice Black from any norm of judicial behavior. He simply removes the formalist pole from legal-mindedness altogether and relocates it under the amorphous cover of an undefined morality. (He is more persuasive when Justice Warren, inheritor of the "frontier" lawyer-moralist tradition, rather than Justice Black, is involved). Furthermore, in the conjunction of "pragmatic" and "skepticism", Bickel is ignoring the tension between the two attitudes. Pragmatism stresses practical consequences for the purpose of explicating pre-existing legal premises while skepticism tends to minimize or completely deny their validity. This is the thrust of Justice Holmes’s pronouncement that "The life of the law has not been logic; it has been experience", which is as polarized as a legal mind can get. It may lead to its own menacing "storehouse of principles" when Justice Holmes can say

45 Id. at 144.
48 Id. at 258-59.
50 Id. at 8.
51 Id. at 3-5.
52 Id. at 8. Cf. Bickel’s earlier, more balanced assessment of Justice Black’s formalism in A. Bickel, The Least Dangerous Branch 85-98 (1962).
53 Id. at 89.
55 Bickel, supra note 52, at 8.
to his fellow traveler, Justice Frankfurter, that:

Patriotism is the demand of the territorial club for priority, and as much priority as it needs for vital purposes, over such tribal groups as the churches and trade unions. I go the whole hog for the territorial club—and I don’t care a damn if it interferes with some of the spontaneities of the other groups.56

A patriotism flirting with chauvinism seems to be a trademark of the rule-skeptics, for even they must have some place to hang their hats. The larger and more amorphous the ‘“place’’ the less committed they need to consider themselves to be.

A. Prototypal Rule-Skeptics: Justices Roger B. Taney and Oliver W. Holmes, Jr.

In most situations the rule-skeptic as Supreme Court Justice will support legislative bodies--Congress or state legislatures--because normally these bodies will concentrate upon the passage of ““patriotic”” laws; i.e. those in the national or state interest. Rarely, and only when subject to severe pressure, do they contemplate laws to protect the individual rights of citizens. In the final analysis, rule-skeptics consider themselves obliged to defer to the will of the majority ordinarily represented by elected officials, since they have little or no faith in the stored wisdom of the past. They are oriented to needs rather than rights. Rights presumably being the province of the courts, the consequences of high-calibre Justices like Taney, Holmes and Frankfurter pitting their talents against personal rights that quarrel with the ““flag’’, are extremely puzzling and disconcerting to their would-be admirers. The ultimate and, to many liberals, unpalatable realization (because of the intermingling of personal and property rights) is that the formalists on the court—the Marshalls, the Fields, the Sutherlands, the Blacks--most consistently represent that crowning virtue of the Supreme Court--defense of individual rights.

A rule-skeptic cannot bring himself to believe that any premise (and each right is impaled on a fixed premise) is necessarily valid. It is therefore hard for him (for he is inordinately proud of his intellectual integrity) to defend blindly, say, a First or Fourteenth Amendment right when it is, in his opinion, opposed by the ““national interest’’. This is more readily apparent in the case of men like Justices Holmes and Frankfurter, but it may also shed some light on the interesting puzzle of Chief Justice Taney and his Dred Scott57 decision.

1. Rule-Skeptic Chief Justice Roger B. Taney

Chief Justice Roger B. Taney, as the first ““great”” rule-skeptic to appear on the

56 BICKEL, supra note 49, at 48 (quoting Oliver W. Holmes to Felix Frankfurter, March 27, 1917, Holmes Papers (Harvard Law Library)).
Supreme Court, reflects (like Justice Felix Frankfurter who would compel public school students to salute the American flag at the expense of the First Amendment\textsuperscript{58}) the dominance in American rule-skepticism of a patriotic impulse. Taney voided the Missouri Compromise in order, so he believed, to save the sacred Union from dissolution over the slavery question.

Before the \textit{Dred Scott} case, Justice Taney generally followed the predictable route of a rule-skeptic in refusing wherever possible to substitute his premises for those of legislative bodies, which, as indicated, generally emphasize societal interests. In his \textit{Charles River Bridge v. Warren Bridge} opinion,\textsuperscript{59} Justice Taney states: "While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well being of every citizen depends on their faithful preservation."\textsuperscript{60} It is true enough, as Don E. Fehrenbacher states, that "The Taney Court, then, without renouncing any of its power of review, tended to use the power sparingly where the Constitutionality of state legislation was at stake."\textsuperscript{61} But it is to legislation generally rather than states' rights that Taney tends to defer; it is not peculiarly the state as an entity opposed to the Federal Government that invites his solicitude. In \textit{U.S. v. Gratiot},\textsuperscript{62} for example, he upheld the power of the United States over its public lands even when situated in a state, and in \textit{Holmes v. Jennison},\textsuperscript{63} he asserted the exclusive authority of the Federal Government to control foreign relations.

The primary focus when one thinks of Justice Taney is, of course, the \textit{Dred Scott} decision. Much like Justice Marshall's stand in the Burr trials, Justice Taney's opinion is regarded as a politically-motivated deviation from an otherwise laudatory judicial career. Fehrenbacher finds that "...the conception of Taney as a major prophet and successful practitioner of judicial self-restraint leads easily to the view that the \textit{Dred Scott} decision was an unfortunate aberration, a false step out of character and into the 'political thicket',"\textsuperscript{64} but concludes that the decision "represented no 'aberration'--no sharp break with a Taney Court tradition of judicial self-restraint--because that tradition is itself largely illusive."\textsuperscript{65}

When we regard Justice Taney's stance as that of a rule-skeptic instead of the shifting, subsumed one of "self-restraint", his \textit{Dred Scott} opinion is entirely consistent with the broad sweep of his judicial career. As suggested previously, the focus of the skeptic is on societal interests, often at the expense of the individual. Since this focus generally parallels that of the legislature, it masquerades as judicial

\textsuperscript{58} Minersville School District v. Gobitis, 310 U.S. 586 (1940).
\textsuperscript{60} Id. at 548.
\textsuperscript{62} 39 U.S. (14 Pet.) 526 (1840).
\textsuperscript{63} 39 U.S. (14 Pet.) 540 (1840).
\textsuperscript{64} See FEHRENBACHER, DRED SCOTT, supra note 61, at 231.
\textsuperscript{65} Id. at 234.
deference (self-restraint) toward the legislature. If, however, a paramount societal interest appears to be contrary to legislative action, the judicial rule-skeptic will consider it his patriotic duty to oppose the legislative will, as Taney did in the Dred Scott case.

Only a decent and courageous man could have met the test of the circumstances confronting Chief Justice Taney and his court. His decision was not the trivialized rationale of a pro-slavery advocate, or of "a southern gentleman", as Fehrenbacher, among others, evidently believes.6

The language in Taney's Dred Scott opinion67 illustrates a dominant characteristic in the rule-skeptical mode of thought: its use of historical detail to override the general propositions relied upon by the formalistic group. "The life of the law has not been logic; it has been experience"68 and "a page of history is worth a volume of logic",69 concludes Justice Holmes in two of his more elegant aphorisms. The historical areas of concern in Dred Scott involved the legal status of blacks and the power of Congress to legislate slavery.

Taney's threshold survey of black American history is indeed shocking to modern sensibilities. In law, is there such a thing as the unspoken word, something perhaps to go with the unwritten law? Probably not. Sooner or later, the words that might be, are said. Something of this order flashes through the reader's mind as he is asked to face the facts that Negroes were regarded as "beings of an inferior order, and altogether unfit to associate with the white race... and so far inferior, that they had no rights which the white man was bound to respect";70 that they were "treated as an ordinary article of merchandise".71 The terrifying act of Chief Justice Taney in the Dred Scott case was not his decision; after all, seven out of nine Justices sided with him. It was not even the issues he chose to confront. It was finally his words. Before the Civil War, in any New England state, apart from the fringe of abolitionists, did any white man feel that a black, free or slave, had any rights he was bound to respect? The furor over Taney's language was not due primarily to its outrageousness, its slanting, perhaps, of historical fact, but to the shock of recognition of a pervasive racism in the best of Americans that touched raw nerves.

The formalist listens to a different interior voice. There is no other way to put it. Guided by, and devoted to, basic precedent rules, he follows them to their logical conclusions. His arguments are, if less imaginative, much tidier. There may be, as well, a certain preciosity about them. Take the dissenting opinion of Justice Curtis in the Dred Scott case. It was evident to everyone that Dred Scott was a slave, but

6 Id. at 3, 234, 335-88, 559-60.
67 Dred Scott, 60 U.S. at 399-454.
68 Howe, supra note 54.
70 Dred Scott, 60 U.S. at 407.
71 Id. at 407.
since the pleadings before the Court stated only that he was of African ancestry and slave parentage and did not specifically plead him to be a slave, Justice Curtis argued the fact of his slavery had to be excluded from consideration.\textsuperscript{72}

Taney's declaration that the Missouri Compromise\textsuperscript{73} was unconstitutional ran counter to the ordinary rule-skeptical tolerance of legislation. It did so because of the overriding devotion of the rule-skeptic to the societal interest, a devotion increasingly shared in the twentieth century by many intellectuals both on and off the Court. It is hardly surprising, then, to witness a spectacular rise in Taney's reputation, which culminated in his inclusion among the twelve "greatest" Justices in a 1972 poll.\textsuperscript{74} It is even more predictable to find him idolized by Justice Frankfurter:

Eventually, Frankfurter hoped, it would become "intellectually disreputable" to see Taney predominantly as the judicial defender of slavery... Then, in an astonishing contribution to \textit{Dred Scott} folklore, he continued:

He [Taney] would probably have explained his policy on the Court in language not dissimilar to that of Lincoln's famous letter to Horace Greeley: "My paramount object in this struggle is to save the Union and is not either to save or to destroy slavery."

Frankfurter closed his lecture on Taney by placing the latter "second to Marshall in the constitutional history of our country."\textsuperscript{75}

In view of the emphasis upon individual rights made by the formalists, and the guardianship role accorded the Supreme Court as to such rights, it seems somewhat perverse for modern professors of law, history and political science to tend to favor the rule-skeptics. Of course, during the 1930's, marked by President Roosevelt's program of social reform and experimentation, the formalists, with their preachments of individual rights became the "villains" of the period. The answer may lie in the psychological realm: intellectuals generally feel easier with the more intellectualized members of the Court--with Justices Stone, Brandeis, Cardozo, Frankfurter, and, above all, with Justice Oliver Wendell Holmes, Jr.

2. Rule-Skeptic Justice Oliver W. Holmes, Jr.

Justice Holmes, appointed by Theodore Roosevelt, served on the Supreme

\textsuperscript{72} \textit{Id.} at 569-70.

\textsuperscript{73} Congressional Act of March 6, 1820 prohibiting slavery in a portion of the western territory owned by the United States. \textit{U.S. Statutes}, 3:545-548.

\textsuperscript{74} Blaustein and Mersky, \textit{Rating Supreme Court Justices}, 58 A.B.A.J. 1183 (1972).

\textsuperscript{75} FERENBACHER, \textit{DRED SCOTT}, supra note 61, at 591-92.
Court from 1902 until 1932. His tenure overlapped Justice John M. Harlan’s for
eleven years and while they might side together on a case like *Lochner v. New York*, their divergent mental processes required them to file separate dissents. Holmes was probably the most unqualifiedly rule-skeptical Justice who ever sat on the United States Supreme Court, while Justice Harlan was an exemplary formalist. In the pervasiveness of his rule-skepticism, Justice Holmes accepted, not the intelligence or even common sense of legislatures, but the folly of attempting to interpose a “better” judicial premise. In the absence of unvarnished legislative insanity, this led him to insist on the legitimacy of state or federal enactments even at the expense of individual rights—an insistence which made political labels, such as social progressive or reactionary, liberal or conservative, seem hopelessly contradictory. Justice Holmes would champion maximum hours-of-work laws, as in the *Lochner* case, and then condone a statute in *Bailey v. Alabama* making it a crime to fail to perform a labor contract. In *Meyer v. Nebraska*, his dissent would have sustained a statute forbidding the teaching of modern foreign languages in the public schools, and his majority opinion in *Buck v. Bell* sustained a Virginia law under which mentally retarded Carrie Buck was sterilized.

Justice Holmes was extremely adept at immunizing social legislation from overriding legal principles, which he regarded generally as treacherous and unreliable dogma. He was perhaps the most talented of our legal writers with a first-rate style and intelligence that he used to develop rule-skepticism into a fine art. His opinions tend to make opposing formalistic language seem club-footed and perversely stubborn. Yet, with hindsight, Justice McReynold’s majority opinion in *Meyer* has considerable power and majesty while Justice Holmes’s aphorisms in *Bailey* or *Buck* are not quite as pithy as they once might have seemed.

The problem in *Meyer* was whether or not a Nebraska statute, prohibiting the teaching of modern foreign languages through the eighth grade, violated the Fourteenth Amendment. Meyer was convicted of teaching German to an eighth grade child. Liberals still affected by the Rooseveltian period of Justices Sutherland, Butler, McReynolds and company, during which New Deal legislation was voided, are jarred by the realization that it was James C. McReynolds, in a majority opinion that reversed Meyer’s conviction, who thought “the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally . . . but the individual has certain fundamental rights which must be

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77 *Lochner*, 198 U.S. at 74-76 (Holmes, J., dissenting).
78 219 U.S. 219 (1911) (Holmes, J., dissenting).
79 262 U.S. 390 (1923) (Holmes, J., dissenting).
80 274 U.S. 200 (1927).
81 262 U.S. at 396.
82 219 U.S. at 245.
83 274 U.S. at 205.
respected.'\textsuperscript{84} Meanwhile, Justice Holmes, putting his best "patriotic" foot forward, felt that "it is desirable that all the citizens of the United States should speak a common tongue... Youth is the time when familiarity with a language is established and if... a child would hear only Polish or French or German spoken at home I am not prepared to say it is unreasonable to provide that in his early years he shall hear and speak only English at school."\textsuperscript{85} The rule-skeptical concentration on patriotism and the societal interest is also apparent in Holmes's \textit{Buck} tough-minded opinion involving the sterilization of Carrie Buck, the feeble-minded mother of a feeble-minded daughter, as well as the feeble-minded daughter of a feeble-minded mother:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices... in order to prevent our being swamped with incompetence. It is better for all the world, if... society can prevent those who are manifestly unfit from continuing their kind... Three generations of imbeciles are enough.\textsuperscript{86}

Justice Holmes lays bare the bones of a Constitutional dilemma in his \textit{Lochner} dissent\textsuperscript{87} to the voiding of a New York statute that limited a baker’s working day to ten hours: is the United States Constitution (not just \textit{any} constitution) "made for people of fundamentally differing views"\textsuperscript{88} even when those differing views conflict with Constitutionally-mandated principles of individual rights? Justice Holmes, gauging the open-ended "fundamental principles as they have been understood by the traditions of our people and our law",\textsuperscript{89} says yes, "A reasonable man might think [a baker’s ten-hour day] a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work."\textsuperscript{90}

The "reasonable man" is that brilliant concept, fictional of course, without which the law could hardly continue to function. It is essentially the creation of the rule-skeptical turn of mind in its suspicion of control by inflexible premises. But it is rarely a persuasive argument to the formalist, as Justice Peckham, who wrote the majority opinion in \textit{Lochner},\textsuperscript{91} so clearly reveals. At the threshold, the legal mind, whether formalistic or rule-skeptical, is faced with the Fourteenth Amendment under which no state can deprive a person of life, liberty or property without "due" process of law. "The right to purchase or sell labor," says Justice Peckham, "is part

\textsuperscript{84} Meyer, 262 U.S. at 401.
\textsuperscript{85} Id. at 412.
\textsuperscript{86} Buck, 274 U.S. at 207.
\textsuperscript{87} Lochner, 198 U.S. at 74.
\textsuperscript{88} Id. at 76.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id. at 52.
of the liberty protected by this amendment, unless there are circumstances which
exclude the right." Justice Holmes, of course, resorts to "circumstances". The
statute, he claims, is a health measure. At least a "reasonable" man could find it to
be a health measure. This is not really the issue and both judges, knowing it, continue to play out the farce. Peckham says that it simply is not a health measure but only pretends to be. Peckham is probably right. The legislation is rather more social and economic in intent. Holmes, not much of a masquerader, throws off the disguise; the "health" measure is really "a first installment of a general regulation of the hours of work."

The critical area in the case involves the subsequent development of a rationale by which the formalists can sustain eminently fair, just and desirable legislation without violating their sacred sense of individual rights. How, they question, can there be liberty of contract, liberty to sell as well as buy labor, if the seller is handcuffed? With a curious sleight-of-hand, then, the formalists restore "liberty" of contract by also tying the labor purchaser's hands behind him, as if to say, "Only if all our hands are tied can we bargain freely." Indeed, there is no liberty to sell labor if one has to give it away. By the time of West Coast Hotel Co. v. Parrish some 32 years later, Chief Justice Hughes, although still flirting with the health mask, speaking for a predominantly formalistic court, had no problem in sustaining a state law providing women workers with a minimum wage. In NLRB v. Jones & Laughlin Steel Corp., he made it clear that, for a formalist, without equality of treatment, there could be no liberty.

Perhaps the most interesting exposure of Justice Holmes's rule-skepticism is in that most provocative of American legal arenas--freedom of speech and the First and Fourteenth Amendments which guard it. Freedom of speech, after all, offers to the rule-skeptical mind a conundrum. If the rule-skeptic prizes and holds inviolable any premise, it has to be freedom of speech, since it involves the right of any premise to be questioned and disputed. At the same time a premise itself, how can it be held immune from suspicion? A Justice like Justice Black whose formalism holds the First Amendment most dear is in much better shape than, say, a Justice Holmes, who tends to waffle over the First Amendment--unless it collides with his sense of patriotism: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight . . . ."

92 Id. at 53.
93 Id. at 76.
94 Id. at 58.
95 Id. at 76.
96 300 U.S. 379 (1937).
97 301 U.S. 1 (1937).
98 Id. at 33.
There is no situation in which the interests of national security and individual rights are more on a collision course than in the area of free speech. There is no situation in which the rule-skeptical mind is doubled back upon itself in greater agony. Justice Cardozo once remarked in a different context that danger invited rescue, and the old warrior Justice Holmes, leaping astride his white horse, could never resist his country’s siren call, even if it meant trampling the First Amendment.

B. Prototypal Legal Formalists: Justices John Marshall, John M. Harlan, Charles E. Hughes, and Hugo L. Black

By way of contrast, it is no accident that the Supreme Court Justices most obviously partisan toward individual rights have exhibited the clearest examples of formalism. These include Justices Marshall, Harlan, Hughes, and Black. The primary rule governing a society as a whole is its urge to survive and this hardly requires formalization. However, the indifference of a society and its rulers to the needs and desires of its constituent individuals can, and has, led to its destruction. From this recognition the sense of individual rights has evolved in the symbiotic form--societal and individual claims feeding on each other. The creation of rules establishing each individual right is highly artificial--and emotional. Individual rights are ultimately a matter of faith. The freedom of a person to speak or write, the right of a person not to be arbitrarily deprived of his property, are pronouncements made into scripture, not by God but by men, and faithfully enforced by men. Fierce adherence to rules inevitably smacks of dogmatism, a particularly unpalatable word to intellectuals, leading those like Justices Holmes and Frankfurter to its hazardous counterpart, rule-skepticism, that judicial attitude which on the Supreme Court maintains, in effect, “Let Congress do it.” I say, hazardous, because Congress, society’s survival mechanism, has little or no interest in creating the premises for the protection of individual rights. It will profess interest only when their absence threatens society’s very existence, as in the various civil rights enactments.

1. Formalist Chief Justice John Marshall

Among the Justices, great or otherwise, Chief Justice John Marshall has a unique status. He is credited in a vague way with being one of those founding fathers who set the United States on its path toward supremacy among nations. Yet, of course, he was despised and feared by Jefferson, who referred to “the rancorous hatred which Marshall bears to the Government of his country” 100 and to “the cunning and sophistry within which he is able to enshroud himself.” 101 He was to Jefferson the menace of a judge gone mad: “The judiciary of the United States is the subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric.” 102

100 11 JEFFERSON 140 (letter to James Madison, May 23, 1810).
101 Id.
102 12 JEFFERSON at 177-78 (letter to Thomas Ritchie, December 25, 1820).
Jefferson's tune is to be echoed by strong-willed presidents succeeding him and the refrain is much the same. Protesting the curbing of presidential power by the Supreme Court, the claim is made that the "will of the people" (a euphemism for the presidential will) is being thwarted. So it is that Marshall's resistance to the arbitrary exercises of presidential power in such instances as Marbury v. Madison and the Aaron Burr and associates treason trials most offended Jefferson. This resistance, however, more than a partisan effort to bedevil Jefferson, reflects the vision of a formalist legal mind applying itself to premises suggested by a Constitutional structure. Marshall meant it when he declared in 1803:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected . . . The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.¹⁰³

The striking nature of Marshall's performance becomes clear when he is compared to the cluster of Justices who preceded him in the ten years before he was appointed Chief Justice by John Adams in 1801. These men were hardly to be regarded lightly in terms of intelligence and breadth of legal training. They included such outstanding people as John Jay, James Wilson, John Blair and Oliver Ellsworth. Yet the Supreme Court during this period gives the impression of treading water, of forming no coherent philosophy, and of relying as much on common law and European jurisprudential precedents as on the newly formed Constitution that strained to bound from the wings to front center stage. One of the problems of the early Court that Marshall swiftly diagnosed and eliminated was the habit of each Justice rendering his own majority opinion. The resulting cacophony made it impossible to create a consistent body of principles around which future decisions might cohere. In Chisholm v. Georgia,² for example, Justice Iredell pontificated at length³ on the observations of a Lord Somers in a 17th century English case concerning "the general remedy by petition to the King"⁴ while Justice Wilson delivered an elaborate essay on the nature of statism and sovereignty through the ages⁵ (e.g., the Ephori of Sparta and Hottoman's Francogallia).⁶ At the same time Justices Blair⁷ and Cushing,⁸ anticipating Marshall but submerged in the gaggle of opinions, thought the point should turn not "on the various European confederations [but] on the Constitution of the United States . . ."⁹

¹⁰³ Marbury, 5 U.S. at 176.
¹⁰⁴ 2 U.S. (2 Dall.) 419 (1793).
¹⁰⁵ Id. at 437-49.
¹⁰⁶ Id. at 439.
¹⁰⁷ Id. at 457-61.
¹⁰⁸ Id. at 459.
¹⁰⁹ Id. at 450-53.
¹¹⁰ Id. at 466-69.
¹¹¹ Id. at 450.
Overall, what made Marshall succeed in enforcing basic Constitutional precepts at a period when they might easily have been rhetorical (as was the Bill of Rights until after the Civil War) was his compelling faith in the formalizing process itself, his faith that the judicial declaration of Constitutional principles as fundamental and paramount made them so even when contradictory to state laws, laws of Congress, or prevailing political trends. It was not that Marshall, after *Marbury v. Madison*, ever again dealt with the unconstitutionality of a Congressional act. He did not. It was the unequivocal invocation of this power, as well as his delineation of the various powers of Congress, particularly in the regulation of commerce, that made the difference. Rules, bland on paper, spring to life only when it is established that they are, in fact, ruling.

Chief Justice Marshall’s devotion to individual rights is obscured when one considers property interests since the word “property” red-flags so many twentieth century sensibilities. While personal rights still fire the liberal imagination, property rights slide off as a class attribute. To Marshall these referred not so much to the possession of property as to the “right to possess what one has worked for”. Rugged individualism or *Nixon Agonistes* if you like but a concern in any event, in the face of popular pressures, that governments should not, except in extremis, be permitted to unmake the self-made man. Once a property right is vested in a person, said Marshall, the government, even in the name of the public welfare, cannot divest the right. After all, the Constitution went out of its way to forbid the states to impair contract obligations; the vesting of property rights was not Marshall’s invention. So, in *Fletcher*, although the people of Georgia had been defrauded of lands by their state legislature, Marshall would not permit a later legislature to rescind the titles of innocent purchasers. When a New Hampshire legislature tried to amend the 1769 corporate charter of Dartmouth College so as to control the private college, Marshall said no. The fierce and unyielding commitment of Marshall and his fellow formalists to individual rights has dignified and illuminated Supreme Court history at the same time that property rights have been the source of much bitterness.

2. Formalist Justice John M. Harlan

Justice Harlan, an earlier prototype of Justice Hugo Black, is a prime example of a formalist Justice who, if considered simply on political or moral terms, or property rights affirmation, can only be regarded as puzzling, perverse and unpredictable. Serving on the court from 1877 until 1911, after appointment by President

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112 *Marbury*, 5 U.S. at 137.
117 *U.S. Const. art. I, 10.*
118 10 U.S. at 87.
Hayes, he appears to the contemporary mind to be, at the same time, champion and enemy of liberalism. From a slave-holding background he became the stoutest defender of equal rights for blacks in the early days of the Fourteenth Amendment. In the Civil Rights Cases,\textsuperscript{120} he dissented from the majority opinion that permitted denying accommodations for blacks in hotels, theaters and railroads. He opposed the majority view in \textit{Plessy v. Ferguson}\textsuperscript{121} that states under their "police power" could provide "equal but separate" railway carriages for blacks and whites--the "separate but equal" doctrine that prevailed until 1954, a period of 58 years.\textsuperscript{122} Harlan's dissent is a primer for civil rights advocates: "But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."\textsuperscript{123}

Justice Harlan felt that after the adoption of the Fourteenth Amendment, none of the rights enumerated in the federal Bill of Rights could any longer be impaired or destroyed by a state.\textsuperscript{124} Lying at the heart of Harlan's (and later Justice Black's) running dispute with the Court majority was its reliance on "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."\textsuperscript{125} To Harlan's fierce insistence that the individual must be protected from the clutch of such ambiguity, Justice Matthews, in his \textit{Hurtado}\textsuperscript{126} majority opinion anticipating Justices Holmes and Frankfurter, counters: "[A]ny legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."\textsuperscript{127}

It is terribly difficult for the rule-skeptical frame of mind to subscribe to the inviolability of the written word, however solemnized, and the formalist is equally reluctant, once having committed himself to a given Constitutional "shall" or "shall not", to acknowledge extenuating circumstances. The problem, so often, in settling a formalist once and for all in a groove is that, having accorded such a Justice an inflexible set of principles, he is then assumed, unjustly, to be dominated by the moral or political flavor surrounding his decisions. To be specific, since Justice Harlan's devotion to individual rights was so unequivocal, and since he fought for them against the majority of the Court, he is regarded as one of the earlier "great"

\textsuperscript{120} 109 U.S. 3 (1883).
\textsuperscript{121} 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).
\textsuperscript{123} \textit{Plessy}, 163 U.S. at 559 (Harlan, J., dissenting).
\textsuperscript{125} \textit{Hurtado}, 110 U.S. at 535.
\textsuperscript{126} \textit{Id.} at 519.
\textsuperscript{127} \textit{Id.} at 537.
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liberals. Yet this view must blindly disregard his antagonistic and (from the liberal point of view) reactionary attitude, in the name of those same individual rights, toward the struggle of labor unions for recognition. In the 1895 Debs case, he sided with the majority to sustain a federal injunction against railway strikers and punishment of union leaders. Adair v. United States found him striking down a Congressional act against "yellow dog" contracts: "[T]he employer and the employee[e] have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

The ultimate thrust of Justice Harlan's mind was not, then, toward moralism but toward a legal formalism operating from a sense of what followed from given rules contained in the Bill of Rights. For Justice Harlan, individual rights, except in extremis, were not to be tampered with by public pressures.

3. Formalist Chief Justice Charles E. Hughes

The entry upon the Supreme Court scene of Charles Evan Hughes, first from 1910 to 1916 as an Associate Justice appointed by President Taft and again from 1930 to 1941 as Chief Justice by courtesy of President Hoover, marks once again a formalistic reliance upon Constitutional premises of individual rights and their priority over social necessity. This emphasis in the embattled Hughes Court of the 1930's is highlighted by the Court's struggle with President Franklin Roosevelt's emergency programs triggered by the Depression, a struggle which tends to obscure the recognition of Justice Hughes as an ardent supporter of civil liberties. Hughes wrote the majority opinion in Bailey v. Alabama, declaring a statute, which made failure to perform a labor contract a criminal offense, violated the Thirteenth Amendment prohibition against involuntary servitude. In McCabe v. Atchison, Topeka & Santa Fe Ry. Co., he found a state law authorizing intrastate carriers to provide sleeping and dining cars for white persons only, a denial of equal protection. In Stromberg v. California, a Hughes opinion declared a statute unconstitutional which made display of a red flag a crime. In Near v. Minnesota, he struck down a statute seeking to restrain "malicious, scandalous and defamatory" newspapers and magazines. And in NLRB v. Jones & Laughlin Steel Corp., he endorsed a validating view of the National Labor Relations Act and the union movement in general.

130 208 U.S. 161 (1908).
131 Id. at 175.
132 219 U.S. at 227.
133 235 U.S. 151 (1914).
134 283 U.S. 359 (1931).
135 283 U.S. 697 (1931).
136 301 U.S. at 1.
The tarring of the Hughes Court with Franklin Roosevelt's brush, in retrospect, hardly seems to justify the calumny heaped upon the Court by the liberals of the 1930's. The crisis was, of course, an economic one and economic solutions by their very nature demand broad, steamrolling movements that tend to leave flattened, paper-thin individuals in their wake. The "war" against poverty, like any national fight for survival, brings enormous pressure to bear upon the individual and his suddenly "trivialized" concerns. Economic crises, in particular, offer, as Marxist theorists well know, great opportunities for reshuffling social and economic hierarchies.

The stress on the Constitution during the 1930's was not so much the primal one of national survival threatening to overwhelm individual rights; it was rather concerned, in the name of that national interest, with the expansion of presidential power to an alarming degree. Not only did that expansion seem ominous to a large number of thoughtful people at the time, but it seems even more so now that the Nixonian experience has been absorbed.

Probably the most "infamous" anti-New Deal decision of them all, one of the so-called "Black Monday" cases of May 27, 1935, was the Schechter Poultry decision. Yet the Court agreed unanimously. Chief Justice Hughes was joined not only by Justices Butler, Roberts, Van Devanter, Sutherland and McReynolds but by Justices Stone, Brandeis and Cardozo. The National Industrial Recovery Act was unconstitutional, Hughes declared, because "the discretion of the President in approving or prescribing codes (of fair competition), and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code making authority thus conferred is an unconstitutional delegation of legislative power."

Since New Deal days, it has become commonplace to split Supreme Court decisions into those relating to economic rights and those pertaining to personal liberties, and to attempt to classify Justices on the basis of this distinction. The results have been, to put it charitably, unsatisfactory--distinguished more by what consequentially appeared to be aberrant judicial behavior than devotion to an accredited norm. When the deviations are compared with what "truths", if any, a particular Justice holds to be self-evident (in other words, the range of his formalism, or lack of it), they are revealed not as deviations after all, but as exclusions from a consistent intellectual system. It is, consequently, far easier for a property rights champion like McReynolds to protect civil liberties, as in Meyer, where Holmes is impelled to deny them. When Justice Brandeis maintains that the "rights of property and liberty of the individual must be remoulded from time to time to meet the changing needs of society"., the rule-skeptic will translate this to demand a pervasive inertia of the

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138 Id. at 542.
139 See 262 U.S. at 401, 412.
Court in the face of legislation. What a society needs is normally equated by a rule-skeptic with what a society’s elected representatives say it needs.

4. Formalist Justice Hugo L. Black and His Rule-Skeptic Adversary, Justice Felix Frankfurter

Any polarized view of Supreme Court activities must, inevitably, simplify patterns of thought woven from the minds of nine men. Yet, if the Supreme Court can be conceived, metaphorically, as a seesaw with formalism weighting one end and rule-skepticism the other, no two Justices can be more illustrative than Hugo L. Black and Felix Frankfurter. The number of occasions in which one dissented from the other is extraordinary.41 Going further, as Justice Frankfurter’s diaries acknowledge,42 the tensions between them encompassed far more than differences of legal opinions and invaded intimate areas of personality.

There are attendant ironies. While Justice Frankfurter fiercely preached judicial self-restraint and detachment, to the point of alienating himself from his old liberal friends, he catapulted himself front and center into New Deal politics.43 Justice Black, on the other hand, leaving behind a life of combative trial litigation and political wars in the Senate, supercharging into the judicial arena, assiduously avoided any involvement with entanglements outside the Court. “Black’s public sensations were purely as his work made them” comments John B. Frank. “His personal life continued with a small group of family, a few friends, and the ever lengthening list of clerks.”44

The effort to draw a universal lesson from Justice Frankfurter’s highly charged deference to the will of others, exhibited as an intellectual exercise while at the same time backstage he was infiltrating the (a Frankfurter phrase) “political thicket”,45 emerges as an interesting transvaluation. It suggests as Justice Frankfurter’s trigger an immigrant’s innocent and abiding trust in the “people’s” legislature rather than, in imitation of his idol, Justice Holmes, a deep, dark distrust of human passions, particularly one’s own.46

The “war” between Justices Frankfurter and Black is prefaced, ironically enough, by harmony in the 1940 Gobitis47 case. Frankfurter, at the time of his appointment the previous year, was expected to be the leader of the liberal wing of the Court. The presumption of such liberality led all of the Justices, excepting only

141 See Simon, Antagonists, supra note 47, particularly at 120-29, 170-83.
142 See, e.g., Felix Frankfurter, From the Diaries of Felix Frankfurter, with biographical essay and notes by Joseph P. Lash, 174, 275, 286-87 (1975).
143 Id. at 75.
144 See Friedman & Israel, supra note 76, at 2345.
146 See Frankfurter, Diaries, supra note 142, at 77.
147 Gobitis, 310 U.S. at 586.
Justice Stone, and including Justices Black, Douglas and Murphy, to vote with him to compel public school students to salute the American flag in violation of their religious beliefs. "The wisdom of training children in patriotic impulses," he declared, "... is not for our independent judgment."\(^{148}\)

Justice Stone's refusal to agree bothered Frankfurter so much that he sent Stone a five-page letter.\(^{149}\) But Stone's dissent was only the tip of the iceberg. Frankfurter's \textit{Gobitis} opinion shocked his liberal friends and sent out irreversible shock waves. When, shortly after \textit{Gobitis}, on a visit to the White House, he murmured to Eleanor Roosevelt, "The flag, the flag," she "did not presume to question the Justice's legal scholarship and reasoning, but there seemed to be something wrong with an opinion that forced little children to salute a flag when such a ceremony was repugnant to their conscience."\(^{150}\) Several years later, Black, Douglas and Murphy publicly admitted their error by reversing \textit{Gobitis in Barnette},\(^{151}\) a second flag-salute case.

Expressions such as "judicial restraint" are misleading when Justice Frankfurter confronts a situation like the \textit{Adamson}\(^{152}\) case in which he refuses to make the federal privilege against self-incrimination effective against the states via the Fourteenth Amendment. In reaction to Justice Black's insistence that the first eight Amendments to the Constitution were incorporated into the Fourteenth, and thus applicable to state laws, Frankfurter's "search" for a becoming modesty in the exercise of judicial power is derailed in favor of that judge ideally endowed with impeccable scholarship and infinite wisdom. Frankfurter picks his way through the minefields of "canons of decency and fairness which express the notions of judgment of English speaking peoples"\(^{153}\) and "the idiosyncrasies of a merely personal justice,"\(^{154}\) and arrives triumphantly at the "right" decision. The concept of judicial restraint is further compromised by the rejection of those "legal forms ... of the Eighteenth Century"\(^{155}\) (Bill of Rights) in favor of "a scheme of ordered liberty."\(^{156}\)

Justice Black is not about to let Frankfurter rest content on the horns of his intellectual dilemma:

This decision reasserts a constitutional theory ... that this court is endowed by the Constitution with boundless power under "natural law" periodically to expand and contract constitutional standards to

\(^{148}\) \textit{Id.} at 598.

\(^{149}\) \textit{FRANKFURTER, DIARIES, supra} note 142, at 69.

\(^{150}\) \textit{Id.} at 70. For other adverse liberal reactions see \textit{Id.}, at 69-70.


\(^{152}\) \textit{Adamson v. California}, 332 U.S. 46 (1947) (Frankfurter, J., concurring).

\(^{153}\) \textit{Id.} at 67.

\(^{154}\) \textit{Id.} at 68.

\(^{155}\) \textit{Id.} at 66.

\(^{156}\) \textit{Id.} at 65 (quoting \textit{Palko v. Connecticut}, 302 U.S. 319, 325 (1938)).
conform to the Court's conception of what at a particular time constitutes "civilized decency" and "fundamental liberty and justice." . . . I think that . . . the "natural law" theory of the Constitution . . . degrade[s] the constitutional safeguards of the Bill of Rights and simultaneously appropriate[s] for this Court a broad power which we are not authorized by the Constitution to exercise. 157

The paradox—that both Justice Frankfurter and Justice Black are vehemently celebrating judicial restraint while directly contradicting each other—is resolved fairly easily. Frankfurter, patronizing "Eighteenth Century" sanctions 158 restrains himself from second-guessing contemporary legislative bodies or law enforcement officers. Black, on the other hand, is fiercely partial to the "wisdom" of those eighteenth century men and their Constitutional package and resists substituting his judgment for theirs. 159 It is tempting, in view of the constancy of human nature (at least as we have divined it from Aristotle on), to prefer Black's trust in the intellectual integrity of Madison, Wilson and company rather than in the typical state legislator. Black was at least as willing as Frankfurter, and probably more unequivocally so (he made no distinction between unwise and unreasonable), to defer to legislative judgments when the superior wisdom of the Founding Fathers (i.e. a clear Constitutional mandate) did not intervene. In the 1963 Ferguson 160 case, he will comment, "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." 161 Earlier, in 1945, he had affirmed that "Representatives elected by the people to make their laws, rather than judges appointed to interpret these laws, can best determine the policies which govern the people. That at least is the basic principle on which our democratic society rests." 162 Black was prepared to insist that the "balancing" or "weighing" doctrine "plainly encourages and actually invites judges to choose for themselves between conflicting values, even where, as in the First Amendment, the Founders made a choice of values, one of which is a free press." 163 Bugging and other eavesdropping cases compelled him, as specifically mandated by the Fourth Amendment, to make a judicial determination of "reasonableness". On the side opposing Justice Douglas, Justice Black felt that any kind of eavesdropping was not a search or seizure restricted by the Fourth Amendment. 164

Where the Constitution did not explicitly forbid or command, Justice Black was perfectly prepared to be a guardian of wisdom and to assess the "reasonableness" of a legislative or executive act—to do his own "weighing". Since the Fifth

157 Id. at 69-70.
158 Id. at 66.
159 See, e.g., Dennis v. United States, 341 U.S. 494 (1951) (Black, J., dissenting).
161 Id. at 729.
Amendment did not contain an "equal protection" clause, it was possible for Black in the Korematsu case (horrifying and confounding his civil libertarian fans) to "curtail the civil rights of a single racial group" by weighing them against that most "pressing public necessity", the waging of war. "[T]he military authorities," concluded Black, "considered [in excluding Japanese Americans from certain West Coast areas during World War II] that the need for action was great, and time was short. We cannot--by availing ourselves of the calm perspective of hindsight--now say that at that time these actions were unjustified." In a state tax case, Black argued that the tax should stand against the charge of violating the interstate commerce clause, since it was not shown to be unreasonable in amount for the privilege claimed.

The Bill of Rights represented to Justice Frankfurter a collection of ambiguous aphorisms that required nothing less than the highest standard of judicial wisdom (which he defined, simply, as his wisdom) to set right. The inevitable consequence was, of course, to make him the most intransigent adversary of Justice Black's push not only to enshrine the first eight Amendments in the American legal canon, but to incorporate them in the Fourteenth Amendment. It seems odd for an intellectual like Frankfurter to defer to the "wisdom" of local school board members, but this is what his rule-skepticism finally came down to in such cases as Gobitis.

It was not as though Justice Black's "incorporation" theory was novel. It had been pursued earlier by a pair of bright, energetic and persistent Justices, mainly under the Fourteenth Amendment clause relating to privileges and immunities of United States citizens, which seemed even more potentially expansive at the time than due process. What, at first blush, would seem more privileged and immune than a citizen's protections under the first eight Amendments? This was how Justice Harlan saw it and the way Justice Field saw it.

While it may offend some observers with a sense of its rigidity or force Justice Black into an occasional cul-de-sac, Black's method of handling the Fourteenth Amendment possesses the virtues of logical consistency and realization of Frankfurter's dream of judicial humility and detachment. It is consistent because it can blend personal and economic liberties. After all, the Fourteenth Amendment in its mandate (that no state shall "deprive any person of life, liberty or property, without due process of law") sets up no dichotomy. In re-defining rights under the due process clause to be simply those enumerated in the first eight Amendments, Black

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165 Korematsu, 323 U.S. at 214.
166 Cf. Simon, supra note 47, at 155.
167 Korematsu, 323 U.S. at 216.
168 Id. at 223-24.
170 See Twining, Hurtado, supra note 124.
171 See Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) (Field, J., dissenting); Munn v. Illinois, 94 U.S. 113 (1877) (Field, J., dissenting).
eliminated the logically impossible necessity of explaining why deprivation of life or liberty rights violated due process when denial of property rights did not. This intellectual dilemma triggered in other Justices gadfly notions of "preferred freedoms" so detested by Frankfurter\(^1\) and "natural law" due process excursions so despised by Black.\(^2\) It fostered "judicial balancing" between personal rights and national security, and the "penumbra" conceit developed by Justice Douglas\(^3\) to catch any vagrant personal freedoms that might otherwise slip through the constitutional net.

Justice Black’s insistence on strait-jacketing the Fourteenth Amendment with ties to the Bill of Rights is based upon a number of recognitions, each of which is simple enough by itself, and ends in a simple enough result, but like a Dickens plot, they produce along the way by innumerable combinations, an exceedingly complex structure. A primal recognition is that the smaller the governmental entity the more the individual has to fear from its uncontrolled power, essentially because intolerance flares with intimacy. This explains to a large degree the virtual non-existence of Bill of Rights cases prior to the Civil War. The federal government, before the sophisticated communications network of the twentieth century, was a place distant from most citizens more intent upon wrenching rights from states.

The Fourteenth Amendment contains some very general language. Obviously, *due process* is a term already employed in the Bill of Rights but it was general there, too, and hard to reduce to unequivocality, although debt-ridden intellectuals like John Quincy Adams, still steeped in the Lockean faith (and hardly one of those ruthless nineteenth century entrepreneurs Horwitz accuses of corrupting American contract and tort law to suit their propertied self-interest\(^4\)) had no trouble with embracing property as one of the "inalienable" rights:

> This I take to be the origin of Government. It is founded on persons and on property. And if Democracy is founded exclusively on persons and not on property, I fear it will follow the tendency of its nature and degenerate into ochlocracy and Lynch Law, burning down convents and hanging abolitionists or gamblers, without Judge or Jury, without fear of God to restrain, and without remorse to punish.\(^5\)

Other clauses of the Bill of Rights are somewhat different. They state themselves more specifically and forcefully. Unless an imperative is unequivocal and so simply stated as to be not readily misunderstood, it cannot be an imperative at all. But the first eight Amendments, apart from the due process clause, are so

\(^1\) See Kovacs v. Cooper, 336 U.S. 77 (1949) (Frankfurter, J., concurring); see also Ullman v. United States, 350 U.S. 422 (1956).
\(^2\) See Adamson, 332 U.S. at 69-70; Griswold, 381 U.S. at 511-13.
\(^3\) Griswold, 381 U.S. at 483.
\(^4\) Horwitz, supra note 25.
\(^5\) S. Bemis, John Quincy Adams and The Union 60-61 n.23 (1956).
unequivocal and so simply stated that they are, if anything in American society is, commandments. They are to be obeyed, even in extremity, much as God was to be obeyed when he ordered Abraham to sacrifice his son Isaac, not for logic's sake, but to prove his faith in even an illogical God. The Constitution when it is unequivocal and simply stated is the American political deity.

*Due process of law,* a vague and ambiguous term, can attain the force of a commandment only when its content is linked to a Constitutional unequivocality. This cannot be done historically or rationally because the door is then opened for equivocal arguments by various guardians of wisdom. What Justice Black wanted was a Constitutional mandate that seals the Fourteenth Amendment within its clauses and makes it inviolable. Only by excluding tentative rights can those that are given be mandated. There is no room for shadows around the sun. There is no room for balancing of interests. There is not even room for current ""superior"" wisdom or hindsight experience. There is room only for the Constitutional given, when it is given clearly--clearly, at least, even to a not particularly ""reasonable"" man.

Divorcing himself from any Bill of Rights imperatives, Justice Frankfurter cannot finally insulate himself from passing upon the reasonableness of legislation and, in so doing, cannot avoid, however much he may swear allegiance to humility and disinterestedness, acting as a guardian of wisdom. ""The indispensable judicial requisite is intellectual humility,"" he will say and then proudly avow, ""they (the Founding Fathers) set apart a body of men, who were to be depositories of law, who by their disciplined training and character and by withdrawal from the usual temptations of private interest may reasonably be expected to be as free, impartial, and independent as the lot of humanity will admit,"" or, ""One does not have to inhale the self-adulatory bombast of after-dinner speeches to affirm that all the interests of man that are comprised under the constitutional guarantees given to life, liberty, and property are in the professional keeping of lawyers."" However repellent the idea of guardians of wisdom may be to modern liberalism's emphasis on equality, the Founding Fathers (at least Madison and James Wilson) might still applaud any suggestion that, whatever their rhetoric, Supreme Court Justices have in fact, by and large played out the Platonic vision, usually manifested by a contentious combination of formalism and rule-skepticism. Undeniably the self-deprecation is necessary. The Supreme Court is fearfully undemocratic--ultimately responsible, despite the underlying pressures of public opinion and personal histories, to the bent of its Justices' minds. Many of the seeming paradoxes of legal thinking in a Frankfurter are resolved when the democratic and flag-waving rhetoric is pushed to one side. Then we might well have Frankfurter saying, ""I don't believe that the Founding Fathers were that much wiser than an elite

twosome of like-minded people such as Holmes and me.’” And Black, in positing the Founding Fathers and their Bill of Rights as wiser than he (or a Frankfurter or Holmes), was creating his own form of rhetoric. He was not a guardian of wisdom in the abstract but, in due deference, of the Founding Fathers.

Once the thinking of a Justice can fairly be said to be slanted toward formalism or rule-skepticism, trends in his decision-making become predictable. Formalists like Justices Marshall and Black, simply by openly referring to their “storehouse of principles”, tend to expand Supreme Court power while rule-skeptics like Justices Holmes and Frankfurter restrict it. Formalists are watchdogs of legislative and executive power, while rule-skeptics prefer to look the other way. Formalists are devoted to a vision of pre-existing (Constitutional) individual rights and believe that society must defer to these rights, while rule-skeptics are inclined to bend the individual’s needs to meet those of the society—Holmes's “territorial club”.

It is apparent that a phrase like “strict constructionist” becomes meaningless since it depends upon whose power is being constricted. A formalist may strictly construe Constitutional powers of Congress, a state legislature, or a President, while a skeptic may strictly construe the powers of the Supreme Court itself or the individual citizen. Just as clearly, to speak of Federal power on the one hand and states’ rights on the other becomes a hollow rhetorical exercise. In the defense of his concept of individual rights, a formalist like Justice George Sutherland would no more indulge state legislatures than he would Congress.\footnote{See, e.g., Ribnik v. McBride, 277 U.S. 350 (1928); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (Sutherland, J., dissenting).}

C. Prototypal Lawyer-Moralists: Justices Joseph Story and Earl Warren

The basic tension that has developed in the Supreme Court is between the formalists and the rule-skeptics and expresses itself principally in preferences for individual rights or public necessity. This dichotomy has been complicated by the introduction of a hybrid form of legal-mindedness that fuses with morality to dispute the validity of either of the purer forms. It essays, in effect, to undermine the basic underpinning of reason itself, and surfaces early in Supreme Court history with, surprisingly enough until his devotion to “natural law” is considered, Justice Joseph Story.

1. Justice Joseph Story’s Cloak of Formalism

Justice Story was appointed to the Supreme Court by Madison in 1811 and served until 1845. He is of additional interest in being on both the Marshall and Taney courts. Charles Warren concludes that within five years of his appointment, Story had become an “ardent supporter” of Justice Marshall’s “constitutional
doctrines' While this was generally so, he was far from being Marshall's clone. Story, the Justice's Justice, the Harvard Law professor, the author of Story's Commentaries, was, to begin with, a master logician from whose premises flowed inexorable conclusions of the supremacy of the national judiciary and extensive applicability of the English common law to American jurisprudence. Typical opinions are Martin v. Hunter's Lessee, in which the Supreme Court's appellate jurisdiction over state courts in constitutional matters was declared, and Swift v. Tyson's pronouncement (overruled in 1938), that federal courts were not bound by state court decisions regarding "general common law". If Story's mind stopped here, he could be regarded as safely tucked away in the classical mode of legal formalism. But it does not stop. It proceeds to curious and exotic declarations of faith in a morality above and beyond the formalist's sacred law and this brands it as that hostile form of legal-mindedness I call lawyer-moralism—which requires a more extended analysis.

2. An Analysis of the Term "Lawyer-Moralism"

I am persuaded by an analyst like Alisdair MacIntyre that a shared sense of community is indispensable to any plausible concept of morality. However, the selection of a set of virtues calls for more than a prayerful insistence (uniting, as MacIntyre points out, such thinkers as disparate as Kant, Kierkegaard, Hume and Aristotle) upon truthfulness, justice, courage, promise-keeping and the like, and in this we need to refer, not to some startlingly new and original insight, but to an old one that may, by its very familiarity, have become too obvious. I am referring to the idea, most dramatically exemplified by Hobbes, that morality is based upon, and justified by, man's desire for survival. H.L.A. Hart describes it this way:

... it is the tacit assumption that the proper end of human activity is survival, and this rests on the simple contingent fact that most men most of the time wish to continue in existence. The actions which we speak of as those which are naturally good to do, are those which are required for survival.

That reason, man's primary tool of survival, should displace survival itself as the philosophical justification for morality, is readily understandable. "For virtue," says Cicero, "is reason completely developed." When reason fails to secure immortality, the turn to faith or feeling also becomes understandable. The opposition to Hobbes, despite grudging admiration from philosophers, is, I suspect, due to

181 C. Warren, The Supreme Court in United States History 419 (1924).
182 14 U.S. (1 Wheat.) 304 (1816).
184 See Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).
187 Hart, supra note 41, at 187.
188 Cicero, De Legibus 347 (C. Keyes trans. 1928).
his limiting sense of the concept of survival. It is disagreeable to regard man as someone marshalling all of his resources simply to preserve his animal existence.\textsuperscript{189}

But the singular contribution of Hobbes to moral inquiry was his taking into account the dual aspects of man's mind, both reason and passion, and subordinating them to his overriding instinct for survival. In so doing, he has had to walk the narrow road between Aristotelian deification of reason on the one hand and Nietzsche's glorification of the self-mastering will and G.E. Moore's of intuition on the other. If we expand the sense of survival beyond physicality into the realm of MacIntyre's 'practices',\textsuperscript{190} it sits more comfortably in modern sensibilities. What we are concerned with is not merely our physical survival but the survival of those attachments (to village, country, baseball, physics, painting, law, liberty, justice, etc.) one or more of us prizes perhaps more than life.

What then of emotivism and the possibility of infinite individual choices? We consult Hobbes. There is no chance of the survival of any practice when it becomes infinitely fragmented, except in a community of one. As Hobbes insists, survival depends upon our making peace,\textsuperscript{191} and not only, I would add, with our bodies but in those practices we can prize jointly. This we must do because we do not choose to live as societies of one.

I suggest, then, that morality is that human element, lodged in reason, instinct and will, that is concerned with the survival of man in his chosen practices. Particular virtues are those manifestations of human behavior that have proved conducive to particular survivals. The American legal mind, exclusive of the lawyer-moralist, is itself a moral practice, predominantly concerned with preserving the priority (even exclusivity) of legal-mindedness with (like the Enlightenment itself) its heavy dependence upon reason, over any other of man's survival mechanisms, while the lawyer-moralist prefers other moral practices based upon faith; an intuitive, emotive sense of 'right' and 'wrong', natural over Constitutional rights.

3. Natural Law and Lawyer-Moralism

The 'natural law' concept has blurred perceptions of the very existence of lawyer-moralism as a continuing factor in Supreme Court legal-mindedness. John Hart Ely, for example, relying upon a classical, Blackstonian definition ('dictated by God himself'),\textsuperscript{192} concludes that 'The idea [of natural law] is a discredited one in our society, however, and for good reason . . . It has thus become increasingly evident that the only propositions with a prayer of passing themselves off as 'natural law' are those so uselessly vague that no one will notice . . . The concept has

\textsuperscript{189}Hobbes, supra note 186.
\textsuperscript{190}MacIntyre, supra note 185.
\textsuperscript{191}Hobbes, supra note 186.
\textsuperscript{192}Ely, supra note 18, at 48.
consequently all but disappeared in American discourse." While this death notice may be true of the classical and Christian natural law schools (an announcement vigorously disputed by Peter J. Stanlis), it is difficult to dismiss summarily the continuing influence of the "modern" natural law or "natural rights" tradition, which surfaced in the seventeenth century with Hobbes, Hume, and Locke. This tradition was eloquently distinguished by H.L.A. Hart from classical natural law:

the classical exponents [of natural law] . . . conceived of survival . . . as merely the lowest stratum in a much more complex and far more debatable concept of the human end or good for man. Aristotle included it in the disinterested cultivation of the human intellect, and Aquinas the knowledge of God . . . Yet other thinkers, Hobbes and Hume among them, have been willing to lower their sights; they have seen in the modest aim of survival the central indisputable element which gives empirical good sense to the terminology of Natural Law . . . .

This simple thought has in fact very much to do with the characteristics of both law and morals, and it can be disentangled from the more disputable parts of the general teleological outlook in which the end or good for man appears as a specific way of life about which, in fact, men may profoundly disagree. Moreover, we can, in referring to survival, discard, as too metaphysical for modern minds, the notion that this is something antecedently fixed which men necessarily desire because it is their proper goal or end . . . . it is not merely that an overwhelming majority of men do wish to live, even at the cost of hideous misery, but this is reflected in whole structures of our thought and language, in terms of which we describe the world and each other.195

Archibald Cox would make a fundamental Supreme Court division between "belief in the supremacy of natural law and its survival into our own time" and "the logically inconsistent conviction . . . that the people, expressing themselves through the majority, have the right to work their will." And Robert H. Bork, a lawyer-moralist who masquerades as a formalist and a rule-skeptic believes that "Neuhaus is entirely correct in saying 'human behavior is stubbornly entangled with beliefs about right and wrong. Law that is recognized as legitimate is therefore related to--even organically related to, if you will--the larger universe of moral discourse that helps shape human behavior.'"199
4. Lawyer-Moralist Justice Joseph Story

Much of Justice Story’s judgment was based on unabashed “moral” precepts that from time to time jostled his dearly cherished common law. He held on circuit in *La Jeune Eugenie* that the slave trade was contrary to the law of nations on the ground it “was a breach of all the moral duties, of all the maxims of justice, mercy and humanity.” Yet his ruling was “in direct conflict with established international law, and with several decisions of the English Courts.” Indeed, when the question came up again several years later, this time in the Supreme Court, it was the opinion of Justice Marshall, the formalist, that “whatever might be the answer of a moralist”, international law did not consider the slave trade piracy.

And Justice Story would say of the Cherokee cases of 1831 and 1832 that the subject touched “the moral sense of all New England.” Justice Marshall, arguing lack of Supreme Court jurisdiction because the Indians were not a foreign nation, permitted the State of Georgia to assert sovereignty over Indian lands in Georgia even though these lands were the subject of Federal treaties. “If the Courts,” Marshall could not resist adding, “were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined.” Story had no trouble at all in indulging his sympathies and dissented.

The *Cherokee Nation* cases are interesting in a number of respects. They suggest that the New England conscience encompassed a far more general terrain than black slavery, that the Constitution was highly vulnerable to the notion of nullification, and, finally, that Story had to disagree with Marshall when the moral element of a case became sufficiently intense. A line, clear in the context of the shifting, ambiguous demarcations that divide legal thinking, separates the moralism of Story (which embraces premises ultimately grounded in concepts of “natural” or “moral” law) from the formalism of Marshall which resists them in favor of an indigenous Constitution.

5. Lawyer-Moralist Chief Justice Earl Warren

The pre-eminent example of a lawyer-moralist is, of course, Chief Justice Earl

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200 United States v. La Jeune Eugenie, 26 Fed. Cas. (2 Mason 409) 832 (1822).
202 2 WARREN, supra note 181, at 45.
204 *Id.* at 121.
207 2 WARREN, supra note 181, at 210.
Warren. Alexander Bickel offers a telling observation:

The assault upon the legal order by moral imperatives was not only or perhaps even most effectively an assault from the outside. As I have suggested, it came as well from within, in the Supreme Court headed for fifteen years by Earl Warren. When a lawyer stood before [Warren] arguing his side of a case on the basis of some legal doctrine or other . . . the chief justice would shake him off saying, "Yes, yes, yes, but is it . . . right? Is it good?" . . . The Warren Court took the greatest pride in cutting through legal technicalities . . .

And Anthony Lewis gravely concludes, "Earl Warren was the closest thing the United States has had to a Platonic Guardian, dispensing law from a throne without any sensed limits of power except what was seen as the good of society. Fortunately he was a humane, honorable, democratic Guardian . . ."

Bickel describes Warren's Court as "in its heyday . . . Hugo Black write large." This conclusion is presumably based upon Bickel's preceding conclusions that "[M]ost of life is seen in moral rather than prudential terms. None of the pragmatic skepticism so salient in the Whig model infects the Constitution of the contractarian. This was Justice Hugo Black's Constitution, a storehouse of principles, inflexible and numerous.''

The problem with conflating Justice Black and the Warren Court is that they simply will not accommodate each other. While Black's primer admittedly was the United States Constitution (and, more particularly, the collection of commandments known as the first eight Amendments), it hardly takes a leap of the imagination to regard the Warren Court as guided by persuasions that might, in any given instance, supersede the American "storehouse of principles", whether derived from Justice Black's Constitution or, in an earlier tradition, the English common law. The lumping of Black and Warren has a debilitating effect on Bickel's overriding argument (an apologia for the court lives and minds of Justices Holmes and Frankfurter) in favor of the rule-skeptical branch of the legal mind, for it fails to give at least some credit to formalism for honoring the rule of reason and thereby preserving the life of the legal mind as much as rule-skepticism. Rule-skepticism and formalism are united in their impatience with feeling states as criteria for legal judgments and with the rejection of legal-mindedness by lawyer-moralism for the sake of a "higher" morality of judicial decision-making. Without too much strain, Warren evokes memories of that nineteenth century New Hampshire judge who said, "It is our duty to do justice between parties; not by any quirk out of Coke and

\footnotesize{209} Bickel, supra note 49, at 120-21.
\footnotesize{211} BICKEL, supra note 49, at 9.
\footnotesize{212} Id. at 8.
Blackstone--books that I never read and never will."

A lawyer-moralist such as Warren, to put it bluntly, retains the trappings of his legal training only to cover his moral tracks. He may masquerade, quite successfully, as a formalist, since, after all, the Bill of Rights is a frozen slice of "natural rights".

Impediments to those who seek to categorize Chief Justice Warren arise from the paradox that while Warren refused, in classical rule-skeptical tradition, to recognize the necessary validity of pre-existing legal rules, he substituted, in the formalistic mode but completely alien to it, a set of ethical commandments ("fighting faiths"), the antithesis of rule-skepticism. Unlike the formalists and rule-skeptics, who are willing to sacrifice anything else to preserve the Law, the lawyer-moralist might very well jettison even the Law to save his intuitive, ethical commandments, euphemized under the label of "the right". This creates doubt that Warren was "result-oriented", a familiar accusation. Confusion arises from the thwarted normal expectation of a result evolving from legal precedents or, in any event, the Law's preservation. It is assumed there is no guiding premise at all. As G. Edward White suggests, Warren's results flowed indifferently over the Law from his ethical premises.

For Chief Justice Warren, any human life worth living depended upon the survival of the practice of righteousness, upon faith in such ethical standards as common decency and fairness and equality, and upon a society's ability to apply them. Frankfurter is at his patronizing worst when he labels Warren "undisciplined by adequate professional learning and cultivated understanding."

Yet it is understandably difficult for Frankfurter to attribute any significant judicial value to Warren's "commitments to decency, fairness, equality, integrity, and honesty." If the Supreme Court is conceded to be, as it generally is, the citadel of reason filtered through a doctrinal integrity of reasoning, there is justification in Frankfurter's antagonism to the substitution of ethically-inspired commandments.

Meanwhile, Justice Black, the formalist, divorces himself from the suggestion that the Warren Court is himself "writ large" in a typical dissenting opinion. The case is Griswold v. Connecticut, decided in 1965 (Frankfurter had left the Court in 1962), in which Warren joined Douglas and the majority in a perfect example of an ethical imperative created from whole cloth. Douglas manufactured his famous conceit that the First Amendment had "a penumbra where privacy is protected from governmental intrusion", a gray area introduced into First Amendment interpre-

214. See A. Lewis, Revolutionary Justice, N.Y. Times, July 4, 1982, 7, at 1, col. 2 (city ed.).
217. Lewis, supra note 214.
220. Griswold, 381 U.S. at 479.
221. Id. at 483.
tation that offended Black deeply. The idea that, through emanations, protection from invasion of privacy became a First Amendment fiat, so provoked Black that he fingered the hidden, unmentionable pulse of the Suprême Court—Platonism.\textsuperscript{222} Black was impelled also to reject the concurring majority views of Justices Harlan and White and what he considered their astonishingly naked and inexcusable profession of Supreme Court power, purportedly validated by "natural justice".\textsuperscript{223}

While both lawyer-moralists and rule-skeptics have no hesitation in leapfrogging the Constitution, their purposes have nothing in common. Ethical considerations of Warren may almost casually transcend the national interest while Frankfurter inevitably must wave his flag.

From the vantage point of a liberal, Justice Black, for a so-called First Amendment absolutist, seems curiously constrained in some of his decisions, especially when Justices Warren and Douglas, free as birds, are to be found on the other side. The constraint, of course, is Black’s formalism that insists upon adhering to his "storehouse of principles" without expanding or elaborating them to suit the occasion. Whether it is the 1964 Bell\textsuperscript{224} sit-in case or Adderley v. Florida,\textsuperscript{225} a student demonstration on jail grounds, or the Amalgamated Food\textsuperscript{226} case of 1968 involving picketing of a shopping center, or the library sit-in case of 1966, Brown v. Louisiana,\textsuperscript{227} Black, intransigent on First Amendment rights as he reads them, refuses nevertheless to mount a promiscuous invasion of public property rights. He rejects the idea that "groups that think they have been mistreated or that have actually been mistreated have a constitutional right to use the public's streets, buildings, and property to protest whatever, wherever, whenever they want, without regard to whom such conduct may disturb."\textsuperscript{228} Warren and Douglas have no trouble finding the "whenever" and "however" to be implicit in the First Amendment to prevent "the custodian of the public property in his discretion (from deciding) when public places shall be used for the communication of ideas . . . For to place such discretion in any public official . . . is to place those who assert their First Amendment rights at his mercy."\textsuperscript{229}

Chief Justice Warren’s lawyer-moralism is fine-tuned in a 1964 pronouncement: "[W]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable."\textsuperscript{230} Given nothing else, given a situation of first instance, given no history of Supreme Court treatment of the question, Warren's conclusion that each person is entitled to a vote

\textsuperscript{222} Id. at 526-27.
\textsuperscript{223} Id. at 511-13.
\textsuperscript{224} Bell v. Maryland, 378 U.S. 226 (1964).
\textsuperscript{226} Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).
\textsuperscript{228} Id. at 162.
\textsuperscript{229} Adderley, 385 U.S. at 54.
of equal weight seems not only eminently fair but a logical application of the equal protection provision of the Fourteenth Amendment. However, Justice Harlan did not think so:

These decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional "principle" and that this Court should "take the lead" in promoting reform when other branches of government fail to act.231

Warren represents, to most lawyers and their fellow-travelers, whether they admire his results or not, a direct threat to the validity of Supreme Court Justices acting as "guardians of wisdom" in our society. To them, wisdom is the negating of even the suspicion of arbitrary or intuitive or whimsical judgment unanchored by consultation with the combined intelligences and experiences of prior legal minds.

Justice Douglas, after Chief Justice Warren’s death on July 9, 1974, praises Warren for his integrity, for his devotion to the "little person", and then makes this curiously tangential statement:

I do know that the Republican Convention in 1948 was a great disappointment to him. I do believe that a Warren-Dewey ticket would have beaten Truman. I do know that Earl Warren went to Chicago with considerable influence and expectations. He was undone; and some of the things done to him were inexplicable. But never would he talk about it. He carried no grudge. He was a man without grudge. He stood high above the crowd.232

Earl Warren, however "high above the crowd", never made it to his mountain, the White House, but he did make the White House come to him. In the final analysis, he was less a Chief Justice than a President presiding over Madison’s pet lost cause, a Council of Revision. His special brand of legal-mindedness, a dispute with the rule of reason itself, presents a serious threat to the special grace and inviolability of the Supreme Court.

IV. CONCLUSION

It is tempting in the struggle between Supreme Court rule-skepticism and formalism to come down on one side or the other. Yet upon reflection, given a Court containing, for example, a Justice Frankfurter and a Justice Black, one should not unqualifiedly endorse either contingent. For while Frankfurter’s stance, based upon

231 Id. at 624.
a denial of Constitutional absolutes, became increasingly distasteful to liberals as he was driven to prefer legislative judgments over those of the Founding Fathers in any contest between national interests and personal rights, it operated at the same time to remind one how intransigent a completely formalistic court might be. We need only to propel Frankfurter onto the Court in the 1930’s to realize what a darling of the liberals he might have remained if he had arrived during the New Deal years. The history of the United States Supreme Court vividly exemplifies H.L.A. Hart’s observation that formalism and rule-skepticism are “[t]he Scylla and Charybdis of juristic theory; they are great exaggerations, salutary when they correct each other, and the truth lies between them.”

It was important for the Court in its humble origins, when it had to struggle to assert both its independence and its value, to have a marshalling force to crystallize its values and unify its strength. It was necessary for Chief Justice Marshall to submerge internal discordances and to present a single voice to the public at large as the voice of the Court. But with his success at validating the Court and his triumph in asserting judicial supremacy, it became important to allow the Justices not only to argue privately among themselves but to bring their dialectical struggles into the visible Supreme Court law, for the dialectic itself fashions the ultimate strength of the Court and, at the same time and perhaps even more importantly, creates a self-regulating restraint upon arbitrary and capricious exercises of power. The tension between the formalistic and rule-skeptical views—the constantly reshuffled majority and minority opinions preserve and expand the vitality of the Court. Without the differing views of reasonable men, the Supreme Court would seem to have as little chance of surviving as the democratic body politic itself.

This, however, is not to invite into the dialectic that aberrant form I have termed “lawyer-moralism”. It is, simply, too disruptive in its antagonism to the supremacy of judicial law which is the most vital premise shared by formalists and rule-skeptics. For the nature of morality tells us a great deal about the nature of judicial law. Morality viewed as the preference in each case for a given practice informs us that the difficulty in fusing the concepts of morality and judicial law lies not only in the confidence of judges that judicial law is the only morality (for this is a confidence shared by any preferred practice) but in the general American recognition that judicial law is the preferred practice. We are not under man, but under God and law. The Constitution, not a clutch of “natural” moralities, is what the Supreme Court says it is. The placing of judicial law, a morality among moralities, in a position of preeminent American power seems to oppose it to morality itself. The problem is compounded by the equation of law with reason. This inevitably encourages a contrasting coupling of feelings and instincts with a “true” morality.

The greatest fear entertained by most Americans in regard to the Supreme

233 Hart, supra note 41, at 144.
Court, most virulent at times of presidential elections, is that the Justices, appointed by a politician, the President, will be politically motivated. But the history of the Court, as Charles Warren points out in a discussion of Justice Story, has indicated otherwise: "In Story's case, as in so many instances in the history of the Court, there was shown the utter futility of the expectations, frequently entertained by politicians, that the judicial decisions of a Judge would accord with his politics at the time of appointment to the Supreme Bench." And Anthony Lewis says of the Burger Court, with its six new Republican Justices:

When Warren E. Burger succeeded Earl Warren as chief justice of the United States in 1969, many expected to see the more striking constitutional doctrines of the Warren years rolled back or even abandoned. And what has happened to those controversial Warren Court doctrines? They are more securely rooted now than they were in 1969, accepted by the Burger Court as the premises of constitutional decision-making in those areas.

This resistance to partisan motives on the part of Justices is, of course, salutary. It speaks of a devotion to the purpose which the Court was designed to perpetuate—the rule of reason, rather than of topical passions. Such a devotion would appear to be natural to the formalists and rule-skeptics who have generally guided the Court. It is just as apparent that even more inappropriate and possibly even more dangerous than the rule of a transitory political passion on the Supreme Court is the persistent ethical code of the lawyer-moralist.

Finally, it is noteworthy that in the many instances where these conflicts are not starkly presented, it has been possible for the Supreme Court to relax into a not necessarily desirable unanimity or near unanimity. In these instances it is possible for the formalists to regard the pre-existing rule as sufficiently ambiguous and therefore alterable, for the rule-skeptics to consider the consequences of adhering to a premise as too trivial (immaterial) to merit a fuss, for the moralists to find in a premise based on reason a sufficient core of moral faith.

234 [Warren, supra note 181, at 420.]

235 A. Lewis, Forward to The Burger Court: The Counter-Revolution That Wasn't at vii (V. Blasi ed. 1983).