

## Morton Horwitz Wrestles with the Rule of Law

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**S**urely one of the most widely cited book reviews in the American legal academy is Morton Horwitz's review in the *Yale Law Journal* of E. P. Thompson's *Whigs and Hunters: The Origin of the Black Act* and *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, coauthored by Thompson.<sup>3</sup> As of summer 2008, this six-page review had been cited 132 times.<sup>4</sup> This is quite a tribute to a brief book review that was published more than three decades ago.<sup>5</sup>

Horwitz's review is famous for criticizing Thompson's statement, at the conclusion of *Whigs and Hunters*, that the rule of law is "an unqualified human good."<sup>6</sup> Horwitz's criticism is important as a key statement within the critical legal studies movement in its first decade,<sup>7</sup> along with a skeptical

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<sup>3</sup> Morton J. Horwitz, "The Rule of Law: An Unqualified Human Good?" *Yale Law Journal* 86 (1976–77): 561–66, reviewing E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon Books, 1975), and Douglas Hay, Peter Linebaugh, John G. Rule, E. P. Thompson, and Carl Winslow, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Pantheon Books, 1975).

<sup>4</sup> See, e.g., Marc O. DeGirolami's excellent essay, "Faith in the Rule of Law," *St. John's Law Review* 82 (2008): 573–607.

<sup>5</sup> Horwitz's choice of title may be one explanation. We have elsewhere noted the importance of a catchy title in eliciting citations. See Balkin and Levinson, "How to Win Cites and Influence People," *Chicago-Kent Law Review* 71 (1996): 843–69.

<sup>6</sup> Thompson, *Whigs and Hunters*, 266.

<sup>7</sup> The formal beginning of critical legal studies is usually assigned to a conference held in 1977. See, e.g., Mark Tushnet, "Critical Legal Studies: A Political History," *Yale Law Journal* 100 (1991): 1515–44; John Henry

essay on rights published around the same time.<sup>8</sup> It is also important for its take on Marxist debates about the rule of law, in which Thompson's book was an important event. Interestingly enough, Horwitz is critical of Thompson for engaging in *too much* "reductionism" that simply "expose[s] the mystifying functions of the law and [strips] away its claim to class neutrality."<sup>9</sup> His complaint is that legal historians, including Thompson, must do more than simply "pile on evidence of the hypocritical character" of claims by partisans of "the rule of law" to its "political neutrality."<sup>10</sup> Even a radical legal historian, therefore, should be willing, indeed eager, to note the extent to which *on occasion* recourse to the law can indeed lead to the protection of the vulnerable and downtrodden against those with far more power and social status. Thus, Horwitz notes (and praises) some "extraordinary passages" in which Thompson "brilliantly elaborates the neo-Marxist conception of legal ideology as an autonomous instrument of social control,"<sup>11</sup> which means, among other things, that law, to be effective, must "seem to be just" and go beyond the "exclusive" service of the ruling class.<sup>12</sup> Thus Horwitz in no way scoffs at legal arguments and the possibility that they might in fact, at least on occasion, do genuine good with regard to serving the interests of the vulnerable and the downtrodden.

Still, even as he praises Thompson for showing how law can appear to be just and beneficial to subordinate groups, Horwitz nevertheless criticizes (and gains citational fame regarding) what he calls a "surprising and disturbing" turn in the argument: Thompson criticizes those "modern Marxists" who have ostensibly "overlooked [the fact] that there is a difference between arbitrary power and the rule of law." Although Thompson endorses the necessity of exposing "the shams and inequities which may be concealed beneath the law," he goes on immediately to add that "the rule of law itself, the imposing of effective inhibitions upon power

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Schlegel, "Notes toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies," *Stanford Law Review* 36 (1984): 391–411.

<sup>8</sup> Morton J. Horwitz, "Rights," *Harvard Civil Rights–Civil Liberties Law Review* 23 (1988): 393–406.

<sup>9</sup> Horwitz, "The Rule of Law," 565.

<sup>10</sup> *Ibid.*, 566.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*, quoting Thompson, *Whigs and Hunters*, 263–65.

and the defence of the citizen from power's all-intrusive claim, seem to be an unqualified human good. To deny or belittle this good is, in this dangerous century when the resources and pretensions of power continue to enlarge, a desperate error of intellectual abstraction."<sup>13</sup>

Horwitz famously responded that "I do not see how a Man of the Left can describe the rule of law as 'an unqualified human good.'"<sup>14</sup> He conceded that law "undoubtedly restrains power." Yet, speaking as a child of the New Deal and American legal realism, Horwitz argued that "it also prevents power's benevolent exercise." Law might "create formal equality—a not inconsiderable virtue—but it *promotes* substantive inequality by creating a consciousness that radically separates law from politics, means from ends, processes from outcomes." The promotion of procedural justice by devotees of the rule of law "enables the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage," not to mention "ratif[ying] and legitimat[ing] an adversarial, competitive, and atomistic conception of human relations."<sup>15</sup> "[W]e should never forget," Horwitz states in his concluding paragraph, that "a 'legalist' consciousness that excludes 'result-oriented' jurisprudence as contrary to the rule of law also inevitably discourages the pursuit of substantive justice." Law is an "unqualified human good" "[o]nly if Hitler, Stalin, and all of the other horrors of this century have forced us finally to accept the Hobbesian vision of the state and human nature. . . ."<sup>16</sup> That vision, of course, poses the Leviathan state, with an all-powerful sovereign ruler, as the only way of overcoming the disaster of the state of nature, which offers the promise only of lives that are "nasty, brutish, and short."<sup>17</sup> The implicit argument is that the more optimistic John Locke is a better guide than the dour and fearful Hobbes.

Horwitz's implicit preference for Locke over Hobbes might have brought some rueful pleasure to his thesis adviser, Louis Hartz, famous for

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<sup>13</sup> Ibid., 655, quoting Thompson, *Whigs and Hunters*, 266.

<sup>14</sup> Ibid., 566.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Thomas Hobbes, *The Leviathan*, ed. Michael Oakeshott (1651; Oxford: Basil Blackwell, 1960), 82.

asserting Locke's dominant role in American liberal thought.<sup>18</sup> But Horwitz's rejection of law as "an unqualified human good" also echoes another dominant presence in the Harvard government department during Horwitz's (and Levinson's) presence there as graduate students: Judith Shklar. In some ways a critical legal theorist *avant le lettre*, Shklar's 1964 book *Legalism* emphasized the centrality of Alexis de Tocqueville's observation: "If [lawyers] prize freedom much, they generally value legality still more: they are less afraid of tyranny, than of arbitrary power."<sup>19</sup> She noted that "the main thrust of legalist ideology is toward orderliness, and formalism can readily reinforce an inherent preference for authority. . . . It cannot be repeated often enough that procedurally 'correct' repression is perfectly compatible with legalism."<sup>20</sup> Only a conception of "law" conjoined with justice—so that one could confidently assert that an unjust law is not law at all—can escape this critique, and Shklar argued that modern legal culture had relentlessly separated law, as an analytical concept, from morals (or justice). She made no effort to undo that separation, only to emphasize its intellectual consequences.

Shklar's point was that the relationship between law—or the rule of law—and justice is inevitably contingent. Likewise, Horwitz's debate with Thompson largely boils down to his rejection of Thompson's claim that the rule of law is an *unqualified* human good. Thompson insisted that whether or not law produced injustice in any individual case (or class of cases), a system of law as a whole promoted a more just and humane civilization. It helped to restrain arbitrary power because the power of the strong, mediated "through the forms of law, is something quite distinct from the exercise of unmediated force."<sup>21</sup> Moreover, even if a subordinating hegemon regularly used law as an ideological mask, this use simultaneously required the hegemon to justify itself and hold itself accountable through law.<sup>22</sup> "[T]he inhibitions upon power imposed by law," Thompson wrote, "seem to me a

<sup>18</sup> See Louis Hartz, *The Liberal Tradition in America* (New York: Harcourt, Brace, 1955).

<sup>19</sup> Alexis de Tocqueville, *Democracy in America*, ed. Phillips Bradley (New York: Knopf, 1951), 1:275, quoted in Shklar, *Legalism* (Cambridge, MA: Harvard University Press, 1964), 15.

<sup>20</sup> Shklar, *Legalism*, 16–17.

<sup>21</sup> *Ibid.*, 266.

<sup>22</sup> *Ibid.*

legacy as substantial as any handed down from the struggles of the seventeenth century to the eighteenth, and a true and important cultural achievement. . . .”<sup>23</sup> Horwitz’s view, by contrast, is that we can never regard a legal system as unqualifiedly a good thing. The rule of law might sometimes advance justice, but just as often it will mask and justify what we should recognize as oppression. Everything depends on the circumstances and the historical context.

Perhaps this helps to explain why Horwitz (like Levinson) was one of the hundreds of signatories of an advertisement that appeared in the January 13, 2001, *New York Times* that protested, “[a]s teachers whose lives have been dedicated to the rule of law,” against the Supreme Court’s egregious decision in *Bush v. Gore*.<sup>24</sup> “By stopping the vote count in Florida, the United States Supreme Court used its power to act as political partisans, not just judges of a court of law. . . . [W]hen a bare majority of the U.S. Supreme Court halted the recount of ballots under Florida law, the five justices were acting as political proponents for candidate Bush, not as judges.”<sup>25</sup>

Levinson, though, almost immediately expressed ambivalence about signing the ad: he doubts that his life can easily, if at all, be described as “dedicated to the rule of law.” This suggests a far greater measure of “faith” in the rule of law than he possesses.<sup>26</sup> At the very least, he has spent much of his own career teaching his students the importance of analytically separating law from political morality or justice, perhaps because he has emphasized in his own constitutional law courses (and casebook) the place of chattel slavery within American law.<sup>27</sup> And, given his origins as a

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<sup>23</sup> Thompson, *Whigs and Hunters*, 265.

<sup>24</sup> 531 U.S. 98 (2000).

<sup>25</sup> See Jack M. Balkin and Sanford Levinson, “Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of *Bush v. Gore*,” *Georgetown Law Journal* 90 (2001): 188 n. 62. Levinson’s doubts as to his own signing of the ad can be found at *ibid.*, 195–96.

<sup>26</sup> See DeGirolami, “Faith in the Rule of Law.”

<sup>27</sup> See Paul Brest, Sanford Levinson, Jack M. Balkin, Akhil Reed Amar, and Reva B. Siegel, *Processes of Constitutional Decisionmaking: Cases and Materials*, 5th ed. (New York: Aspen, 2006); Jack M. Balkin and Sanford

political scientist, he is uncertain that one can so radically separate, at least without much nuanced discussion, the roles of “political partisans” and “judges of a court of law.”<sup>28</sup>

Of course, one rarely has much say in the precise wording of political advertisements one is asked to sign. One should not draw too much from the advertisement about Horwitz’s views on the “essentially contested” notion of “the rule of law,”<sup>29</sup> or even whether Horwitz considers himself a lifelong devotee. But it does raise the question of how Horwitz has treated the idea, in light of his criticisms of Thompson, and key events of the early twenty-first century, beginning, of course, with *Bush v. Gore*.

The rule of law is an important element in both volumes of Horwitz’s magisterial work, *The Transformation of American Law*. The central thesis of volume 1 is that during the nineteenth century an “instrumental conception” of law replaced the earlier notion that law expressed “the moral sense of the community”; instead, law was increasingly recognized as “simply reflective of the existing organization of economic and political power.”<sup>30</sup> A “flexible, instrumental conception of law,” Horwitz argued, “was necessary to promote the transformation of the postrevolutionary American legal system.”<sup>31</sup> This conception, in turn, later gave way to what Horwitz called “legal formalism”: a vision of law that attempted “to place law under the banner of ‘science’” and therefore “to separate politics from

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Levinson, “Thirteen Ways of Looking at *Dred Scott*,” *Chicago-Kent Law Review* 82 (2007): 49–95.

<sup>28</sup> See, for further discussion and elaboration of the difference between an inescapable “high politics” and a perhaps more escapable “low politics,” Jack M. Balkin and Sanford Levinson, “Understanding the Constitutional Revolution,” *University of Virginia Law Review* 87 (2001): 1045–104.

<sup>29</sup> An unusually fine overview of the various conceptions attached to the notion of the rule of law can be found in Richard H. Fallon Jr., “‘The Rule of Law’ as a Concept in Constitutional Discourse,” *Columbia Law Review* 97 (1997): 1–56.

<sup>30</sup> Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, MA: Harvard University Press, 1977), 253.

<sup>31</sup> *Ibid.*, 54.

law, subjectivity from objectivity, and laymen's reasoning from professional reasoning."<sup>32</sup>

Horwitz's most extended treatment of the rule of law, however, is found near the conclusion of volume 2 of *Transformation*, focusing on the years 1870–1960, and in particular, his chapter on “Legal Realism, the Bureaucratic State, and the Rule of Law.”<sup>33</sup> It might equally have been titled “The Harvard Law School Confronts Legal Realism, the Bureaucratic State, and the Rule of Law”: the chapter focuses almost exclusively on two Harvard deans, Roscoe Pound and James M. Landis, and Louis Jaffe, the great professor of administrative law at Harvard, with a sidelong glance at former Harvard professor Felix Frankfurter. Rereading it some sixteen years after its initial 1992 publication, what we find most striking is Horwitz's reticence in offering his own views about what “the rule of law” should mean in a post-realist age dominated by the modern bureaucratic state. No doubt this is partly because Horwitz is writing as an historian; it is, however, also partly because his position on the question is complicated, like that of anyone whose views about political concepts are sensitive to shifts in historical circumstances.<sup>34</sup>

The chapter begins with an analysis of Landis's “joyous celebration of the virtues of ‘expertness’ in justifying the growth of the administrative state.”<sup>35</sup> The focus on expertise allowed legal scholars to abandon the implausible “delegation theory of administrative law that had legitimated the extent of bureaucratic power during the previous fifty years.”<sup>36</sup> As critics of

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<sup>32</sup> *Ibid.*, 257.

<sup>33</sup> Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), 213–46.

<sup>34</sup> Two of the blurbers on the back cover of the initial Harvard University Press book did not see Horwitz as agnostic on these issues: Kermit Hall praises Horwitz for “so wisely argu[ing that] our failure to learn the hard historical lessons that politics shapes law denies our own generation the opportunity to make effective moral choices through the law.” Stanley N. Katz praises Horwitz's second volume as “a dramatic story and a tract for our times,” suggesting that it contains important normative lessons about law as well as a bracing good tale.

<sup>35</sup> Horwitz, *Transformation I*, 216.

<sup>36</sup> *Ibid.*

the New Deal, not all of them mossbacks, recognized, this required acknowledging Congress's ability to delegate legislative power to administrative agencies, which would be left free to do whatever they thought best. Even some supporters of the New Deal agreed that Congress had engaged in "delegation run riot"<sup>37</sup> in the National Recovery Administration. Landis could hardly deny the importance of delegation, but he wanted to shift the conversation to what he believed *really* legitimized the administrative state: the professional training of bureaucrats themselves. It presumably made all the difference in the world to whom the power was being delegated, a point overlooked in formalistic discussions about Congress's power to delegate at all.

In this, Landis was an apt student of his professor, Felix Frankfurter, who had been an early devotee of the so-called Wisconsin idea, according to which the disciplined intelligence of the university (and its graduates) would be joined with the institutions of the modern (and expanding) state.<sup>38</sup> Even in 1912, Frankfurter was emphasizing to Learned Hand the importance of creating "permanent administrative tribunal[s]" because of his faith in the reality of disinterested expertise. "[W]e are singularly in need in this country of the deliberateness and truthfulness of really scientific expertise."<sup>39</sup>

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<sup>37</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

<sup>38</sup> See Charles McCarthy, *The Wisconsin Idea* (New York: Macmillan, 1912). Frankfurter had supported Teddy Roosevelt in the 1912 presidential race in part because Woodrow Wilson had criticized expert commissions in favor of more direct rule by ordinary Americans. See Sanford Levinson, "The Democratic Faith of Felix Frankfurter," *Stanford Law Review* 25 (1973): 432–33.

<sup>39</sup> Felix Frankfurter to Learned Hand, Sept. 23, 1912, quoted in Levinson, "The Democratic Faith," 433. Indeed, he justified to Learned Hand his decision to return to Harvard, which had offered him a teaching position, on the basis that it would offer an unusually fecund training ground for experts. "I have long thought," he wrote Hand, "that juristically, the Wisconsin idea should be nationalized, and that it was up to the Law School to do it." Frankfurter to Hand, June 28, 1913, quoted in *ibid.* Furthermore, as he wrote Herbert Croly, the Harvard Law School gave him a forum for "influencing year by year the dominant mind in the legal profession in a country which necessarily to such a large degree is governed by the legal profession."



In the legal universe of James Landis and Felix Frankfurter, to be “governed by the legal profession” was not the same thing as submitting to the “rule of law,” at least in the traditional sense; Frankfurter’s vision, spelled out in a letter to Learned Hand, was that the task of the modern law professor was “to help fashion a jurisprudence adequate to our industrial and economic needs; in fact, to mediate between sociological economics and statesmanship.”<sup>40</sup> Social science would assist in this mediation. Frankfurter was also taken by Frederick W. Taylor’s teachings regarding scientific administration.<sup>41</sup> Frankfurter spelled out his ideas in an article in the *Bulletin of the Taylor Society* on “The Manager, the Workman, and the Social Scientist.”<sup>42</sup> It is “the social scientist . . . who gives his life to the disinterested study” of questions facing society. Indeed, in a world of conflicting interests, where labor and management will necessarily represent their own parochial interests, “[t]he public can be represented only by the dedication of the service of the social scientist.”<sup>43</sup> The role of the gifted lawyer trained in a transformed Harvard Law School would be to design the constitutional order of a new administrative state; among other things, this new order would free disinterested social scientists to make wise and benevolent social policies under the very loose guidance of Congress.

Landis was far more than Frankfurter’s epigone, but he shared many of the views of his coauthor and former teacher. For Landis, modern

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Frankfurter (“FF”) to Croly, undated, in Learned Hand Papers, box 104, folder 2, Harvard Law School Library, quoted in *ibid.* A 1922 *New Republic* article on “The Public Profession of the Law” declared that “the law, more than any other profession, ‘moulds the economic life and the government of the country,’ [and] the Bar must be equipped by the quality of its intellectual outlook, its humility, its insight and its ideals to guide the country into ways which make the good life possible.” “The Public Profession of the Law,” *New Republic* 24 (1922): 354, quoted in Levinson, “The Democratic Faith,” 435 n. 31.

<sup>40</sup> Frankfurter to Hand, June 28, 1913, quoted in *ibid.*, 433.

<sup>41</sup> See F. W. Taylor, *The Principles of Scientific Management* (New York: Harper and Brothers, 1911); Samuel Haber, *Efficiency and Uplift: Scientific Management in the Progressive Era, 1890–1920* (Chicago: University of Chicago Press, 1964).

<sup>42</sup> Harlow M. Person, “The Manager, the Workman, and the Social Scientist,” *Bulletin of the Taylor Society* 3, no.1 (1917): 1–7.

<sup>43</sup> *Ibid.*, quoted in Levinson, “The Democratic Faith,” 434.

administrative law represented an opportunity to liberate the well-trained experts to serve the public interest relatively unfettered by judicial oversight. Part of Landis's opposition to the judiciary was his faith in expertise; but part, no doubt, was based on his well-founded "belief that the men who composed our judiciary too often held economic and social opinions opposed to the ideas of their time."<sup>44</sup>

Landis might well have thought that he was carrying on not only Frankfurter's mission but also that of Roscoe Pound, his predecessor as dean of Harvard Law School. Pound had, after all, been one of the leading academic critics at the turn of the century of "mechanical jurisprudence"<sup>45</sup> and called for its replacement by "sociological jurisprudence." Yet Pound did not share Landis's embrace of the expert-oriented administrative state. Instead, he warned of "the idea of administrative absolutism," by which "a highly centralized administration set up under complete control of the executive" would create its own rules free of judicial review.<sup>46</sup> Pound in effect identified Landis (and Frankfurter?) with "the jurists of Soviet Russia," who scoffed at the very idea of the rule of law.<sup>47</sup> Pound derisively labeled "as far as possible from what the facts are or are likely to be" the vision "of a scientific body of experts pursuing objective scientific inquiries."<sup>48</sup>

For Horwitz, Pound's concerns exemplify his "fear of social change" and his return to a "faith in a traditional court-centered rule of law idea."<sup>49</sup> Even so, Horwitz structures the debate between Landis and Pound as one

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<sup>44</sup> Horwitz, *Transformation I*, 215, quoting Landis, *The Administrative Process* (New Haven, CT: Yale University Press, 1938), 33–34. Although Landis was referring to an earlier period of American history, he remained skeptical of a judiciary still dominated by adherents of the old order.

<sup>45</sup> Roscoe Pound, "Mechanical Jurisprudence," *Columbia Law Review* 8 (1908): 605–23.

<sup>46</sup> Horwitz, *Transformation I*, 220, quoting Roscoe Pound, "Report of the Special Committee on Administrative Law," *ABA Annual Report* 63 (1938): 343.

<sup>47</sup> Horwitz, *Transformation I*, 220, quoting Pound, "Report," 343.

<sup>48</sup> Horwitz, *Transformation I*, 220, quoting Pound, "Report," 344.

<sup>49</sup> Horwitz, *Transformation I*, 220.

between “scientific” and “legalist” approaches to administrative law,<sup>50</sup> and the narrative arc of the rest of the chapter is the steady movement, at least at Harvard, away from Landis’s 1938 exuberance about the possibilities of expert administration toward a far greater respect for the virtues of judicial oversight and the rule of law. The key legislative event was the passage of the quasi-constitutional Administrative Procedures Act, enthusiastically embraced by now-Justice Frankfurter. But changes were also occurring in the wider culture, signified by Friedrich von Hayek’s ringing attack on the modern bureaucratic state in *The Road to Serfdom* (1944) and a loss of faith in the earlier Frankfurter’s vaunted “disinterested expertise.” “After 1946,” Horwitz writes, “political attacks on the regulatory state and intellectual challenges to social science claims of objectivity marched hand in hand. Every triumph of proceduralism occurred at the expense of professionalism.”<sup>51</sup>

At this point in Horwitz’s chapter, Louis Jaffe moves to stage center, and his story, too, is one of gradual disillusionment with the kinds of claims Landis had earlier made. Writing in 1955, Jaffe argued that there exists no “autonomy of systems of expert judgment,” and he endorsed Justice Jackson’s warning “against the loose application of the concept of expertness.”<sup>52</sup> Moreover, Horwitz notes that during the 1950s there occurred what Balkin has labeled “ideological drift”:<sup>53</sup> McCarthy-era oppression, some of it involving outrageous uses of administrative power, led to the rediscovery of rule-of-law values. “McCarthyism had begun,” writes Horwitz, “to undermine the New Dealers’ *cavalier attitude* toward the rule of law in the administrative state.”<sup>54</sup> Probably the most important affirmation of traditional rule-of-law values on the Left was Charles Reich’s famous article “The New Property.”<sup>55</sup> In an earlier era, Reich’s arguments for procedural protections might well have resonated with conservatives who defended property rights as essential to protect individual autonomy against

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<sup>50</sup> Ibid., 221.

<sup>51</sup> Ibid., 235.

<sup>52</sup> Ibid., 240, quoting Louis Jaffe, “Judicial Review: Question of Law,” *Harvard Law Review* 69 (1955): 277.

<sup>53</sup> Jack M. Balkin, “Ideological Drift and the Struggle over Meaning,” *Connecticut Law Review* 25 (1993): 869–91.

<sup>54</sup> Horwitz, *Transformation I*, 241 (emphasis added).

<sup>55</sup> Charles Reich, “The New Property,” *Yale Law Journal* 73 (1964): 733–87.

an overweening state. Now, the left was speaking up for the defense of a “new” property in government licenses, entitlements, and jobs.

Through an historical dialectic, the New Deal had produced a welfare state, and in a welfare state, the need for procedural guarantees to protect welfare entitlements had now become connected to Progressivism. In other areas of law, proceduralism promised to protect criminal defendants and voters in rotten boroughs. One of the primary “accomplishments” of the Progressive Era had been the creation of a regime of juvenile justice. It was freed from most traditional legal constraints in the name of “expert” intervention in the lives of juveniles who needed help. Now this system was, if not dismantled, then at least subjected to harsh critique and the reinvoation of rule-of-law limits and procedural rights.<sup>56</sup> Indeed, by 1980 John Hart Ely would offer the canonical defense of judicial review as a method of promoting liberal values by protecting process.<sup>57</sup>

One can easily infer that Horwitz himself believes that some New Dealers went too far—were too “cavalier”—in dismissing notions of the rule of law that had been (falsely) viewed as ineluctably linked to the politically conservative beliefs of the New Deal critics. But he offers little by way of an argument about the optimal role for rule of law in the modern state; he certainly does not repudiate his critique of Thompson over a decade earlier. He remains attentive to the interplay between wider political views and one’s particular attitude toward the rule of law. He ultimately concludes the chapter with the following, somewhat cryptic, paragraph:

<ex>This association of the expansion of welfare rights with widening procedural guarantees shattered the traditional Dicean connection between conservatism and proceduralism in the administrative state. It is one prominent reason why conservatives such as Professor Scalia began to re-emphasize the distinction between old and new property through resistance to expanding procedural guarantees. In the process, conservatives began to see what James Landis had always understood—that there has always been a

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<sup>56</sup> One of Levinson’s first publications was “The Rediscovery of Law,” *Soundings* 57 (1974): 318–37, detailing the rejection of professional expertise by many critics and the concomitant embrace of judicial authority.

<sup>57</sup> John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980).

trade-off between substance and procedure, and that one man's due process [or rule of law] is another man's delay [and stifling of needed innovation].<sup>58</sup><ex>

Horwitz next considered the values behind the rule of law (and, in particular, rights discourse) in his admiring study of the Warren Court, aptly titled *The Warren Court and the Pursuit of Justice*.<sup>59</sup> The tone of this book is scarcely that of a detached historian. Throughout, Horwitz offers multiple reasons why the Warren Court was worthy of admiration. It was "the first to attempt to redeem the promises of the Civil War Amendments for black citizens."<sup>60</sup> "[F]or the first time, democracy became the foundational value in American constitutional discourse."<sup>61</sup> The Warren Court was "the first Supreme Court in history to champion the legal position of the underdog and the outsider in American society."<sup>62</sup> Finally, "For the first time in American history the Supreme Court demonstrated its concern and support for the weak and the powerless, the marginal and the socially scorned."<sup>63</sup>

It is worth noting, though, that none of these reasons to admire the Warren Court focuses specifically on its fidelity to the rule of law. Indeed, as Horwitz explains, "the Warren Court liberals shared a vision of law that the Legal Realists of the 1920s and 1930s had incorporated into New Deal legal consciousness."<sup>64</sup> This vision assumed that legal meanings changed with varying circumstances, and that, in Justice Brennan's words, "The genius of the Constitution . . . rests . . . in the adaptability of its great principles to cope with current problems and current needs."<sup>65</sup> In this progressive vision, law is "a malleable instrument of social policy,"<sup>66</sup> and it is "impossible not to

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<sup>58</sup> Ibid., 246.

<sup>59</sup> Morton J. Horwitz, *The Warren Court and the Pursuit of Justice* (New York: Hill and Wang, 1998).

<sup>60</sup> Ibid., xi.

<sup>61</sup> Ibid., xii.

<sup>62</sup> Ibid., 13.

<sup>63</sup> Ibid., xii.

<sup>64</sup> Ibid., 114.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

incorporate one's deepest values into constitutional interpretation."<sup>67</sup> The Warren Court rejected the Weschlerian fantasy of "neutral principles" associated with Justice Frankfurter (and Frankfurterian critics of the Warren Court such as Philip Kurland).<sup>68</sup> Although Justice Hugo Black clung to the fiction of a Constitution whose meaning was fixed and unalterable from the time of the founding, even Black "was less dogmatic about changing constitutional meanings earlier in his career."<sup>69</sup>

Horwitz's vision of the Warren Court seems consistent with his view of the rule of law as merely a *qualified* (or contingent) human good. However much rights discourse was a favored trope of the Warren Court, one should be vigilant against embracing it too easily, since that same discourse might, in the wrong hands, be employed to limit human equality and violate human dignity. The Warren Court was good because it used law not for the benefit of the powerful but for the benefit of the powerless and the underdog. Law is beneficial to the extent that it is informed by and sustained by the proper values—a value-free application of law in controversial situations being, in any case, a phantom.

Nevertheless, the Warren Court liberals' vision of law as a flexible instrument of social policy conflicted with an earlier Progressive Era (and New Deal) assumption that social policy should be articulated primarily by the political branches, to which courts would routinely defer. The Warren Court, by contrast, made considerable amounts of social policy through

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<sup>67</sup> Ibid., 115. One should also note in this context Morton J. Horwitz, "The Constitution of Change: Legal Fundamentalism without Fundamentalism," *Harvard Law Review* 107 (1993): 30–117. He was the first legal historian to be selected by the editors of the *Harvard Law Review* for the signal honor of writing the introduction to the annual review of the Supreme Court's handiwork. The major theme of the article is that the American conception of the "Constitution as fundamental law" has often entailed the "notion that fundamental law is timeless and unchanging," but this "view . . . cannot be reconciled either with twentieth-century constitutional practice or with modern theories of law, language and consciousness." Ibid., 34. Frank Michelman's contribution to this volume explores further some of the themes and tensions in Horwitz's article.

<sup>68</sup> Ibid. On Kurland, see Balkin and Levinson, "Understanding the Constitutional Revolution," *Virginia Law Review* 87 (2001): 1085–90.

<sup>69</sup> Horwitz, "The Constitution of Change," 114.

judicial review: through the incorporation doctrine, through the First Amendment, and especially through the equal protection clause. The twin notions of law as an instrument of social policy and judicial deference came apart during the Warren Court era: the Court's liberals recognized that they could not respect a substantive conception of democracy without holding state and local governments to account: for racism, for voting policies that effectively limited the suffrage, and for denying basic human rights.

Moreover, the Supreme Court's role during the Warren Court era was somewhat different from that of the Roosevelt Court. The Roosevelt Court sought to legitimate federal regulation of the economy. The Warren Court was tasked with imposing the liberal values of the national political coalition on local and regional majorities, particularly in the South. It is important to recognize that in the Warren Court era, judicial review was largely directed at outliers in the states; although some federal laws were indeed invalidated, none was of major importance. Otherwise, as in the case of the Roosevelt Court, deference to Congress, and to administrative agencies, by and large remained the norm. Exemplary in this regard is the *O'Brien* case, where the Court (by a vote of 7–1) upheld the prosecution of Mr. O'Brien for burning his draft card on the fanciful ground that the administration of the Selective Service Act would be impeded if persons did not have such cards in their possession. And of course, the Warren Court was eager to justify the expansion of Congress's regulatory powers in the Civil Rights Act of 1964 and the Voting Rights Act of 1965, reading the commerce clause and the enforcement clauses of the Reconstruction Amendments generously to expand federal power against states, local governments, and private citizens.<sup>70</sup> One might also mention in this context a far more obscure case, *Hannah v. Larch*,<sup>71</sup> in which Chief Justice Warren, over the dissents of Justices Black and Douglas, upheld the practices of the Civil Rights Commission even though the commission refused to apply conventional due process norms in its investigations of abuses of power by southern police officials. The Court happily allowed relatively unfettered

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<sup>70</sup> See *Katzenbach v. McClung*, 379 U.S. 294 (1964).

<sup>71</sup> 363 U.S. 420 (1960). See Sanford Levinson, "Trials, Commissions, and Investigating Committees: The Elusive Search for Norms of Due Process," in *Truth v. Justice: The Morality of Truth Commissions*, ed. Robert I. Rotberg and Dennis Thompson, 211–34 (Princeton, NJ: Princeton University Press, 2000).

trial in the court of public opinion where vindicating the civil rights of African Americans was concerned.

Even though the Warren Court's activism is overstated, the Supreme Court did use its power regularly against state and local governments, overturning many prior decisions. In doing so, the majority of that Court repeatedly rejected calls for judicial restraint identified with such New Dealers as Felix Frankfurter or Robert Jackson (who, of course, had famously defined the New Deal as a struggle against "judicial supremacy"). Moreover, as noted earlier, part of the Warren Court's rights revolution, as in the famous *Gault* case,<sup>72</sup> explicitly rejected expertise-centered justifications for the expansive powers of government officials in the juvenile justice system. (A few years later, in the early Burger Court, holdovers from the Warren Court would protect procedural rights of welfare recipients in *Goldberg v. Kelly*,<sup>73</sup> again rejecting claims of expertise in the name of procedural rights.)

In *The Transformation of American Law*, Horwitz describes how the values of proceduralism and judicial review of administrative action became necessary when faith in expertise proved insufficient. In *The Warren Court and the Pursuit of Justice*, Horwitz notes how judicial elaboration of rights became necessary to achieve the promises of democracy. In each case, progressives came to embrace rule-of-law values and rights discourse—as applied by the federal judiciary—to rein in and limit the political branches, whether the issue in question was overzealous experts, captured administrative agencies, the forces of McCarthyism, or the legacies of Jim Crow.

Yet in these books, Horwitz does not claim that the rule of law itself (or rights consciousness) is an unqualified human good. It remains merely an instrumental good, valuable to the extent that it produces just results. The question begged, however, is to what extent one can be a fair-weather soldier and a sunshine patriot for the rule of law and its underlying values.

That problem arose most clearly at the beginning of the twenty-first century, first with the disputed election of 2000, which brought George W.

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<sup>72</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>73</sup> 397 U.S. 254 (1970).



Bush to power, and then, even more ominously, with the actual policies of the Bush administration. As Jane Mayer demonstrated in her book *The Dark Side*,<sup>74</sup> the highest-ranking officials within that administration eagerly created a regime of secrecy, domestic surveillance, discretionary detention, CIA black sites, and torture, all of them justified by assertions of emergency in a potentially endless “war on terror.” Carl Schmitt, though uncited, appeared to become the jurisprudential godfather of the Bush administration.<sup>75</sup> As we have seen, Horwitz signed a newspaper ad denouncing the decision in *Bush v. Gore* for its failure to live up to the rule of law; we have little doubt that he opposed the Bush administration’s detention, interrogation, and surveillance regime as well.

What further complicates matters is that in *Bush v. Gore* the Supreme Court did not simply announce that George W. Bush had won the presidency. Rather, it offered a lengthy opinion that looked, at least on the surface, like professional legal reasoning based, whether ironically or not, on a number of Warren Court precedents involving the importance of equality in voting rights. It may have been bad legal reasoning, but that in and of itself hardly constitutes a violation of the rule of law, especially given the long history of Supreme Court decision making. Many legal decisions—including some of the seminal decisions of the Warren Court—were castigated by eminent academics for the paucity of their legal reasoning, at least in conventional terms. Indeed, for several years in the early 1960s, the annual forewords of the *Harvard Law Review* were devoted to angry attacks, often by veterans of the New Deal wars, on the shoddiness of the Court’s attempts to justify its newfound “activism.” Whatever the rule of law is for Horwitz, it *can’t* be a level of judicial opinion writing that gets unalloyed praise from the elite legal academy for meeting the ostensible standards of “judicial craft.”<sup>76</sup>

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<sup>74</sup> Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2008).

<sup>75</sup> See Sanford Levinson, “Torture in Iraq and the Rule of Law in America,” *Daedalus*, Summer 2004, 5–9, reprinted in *In the Name of Democracy: American War Crimes in Iraq and Beyond*, ed. Jeremy Brecher, Jill Cutler, and Brendan Smith, 180–86 (New York: Metropolitan Books, 2005).

<sup>76</sup> For an attack on the “craft” tradition, see Richard Posner, “The Material Basis of Jurisprudence” (critique of Herbert Wechsler), in *Overcoming Law*

Similarly, the Bush administration did not claim that it was going outside the law or undermining the rule of law in any way. Rather, it was equipped with a cadre of bright, ambitious, and talented lawyers who were eager to explain, in often mind-numbing detail, why the administration's torture and detention policies were perfectly consistent with international and domestic law, or with precedents set by other wartime presidents like Abraham Lincoln,<sup>77</sup> Woodrow Wilson, or Franklin D. Roosevelt. These lawyers, armed with all the tools of contemporary legal culture, were happy, as John Yoo was, to argue why what the administration was doing was not "real" torture, which required pain equivalent to organ failure, and to carefully distinguish waterboarding, which was permissible, from the gouging out of eyes or the slicing off of limbs, which was not. But Yoo was also quick to explain that even if the administration's practices constituted "real" torture, the president as commander in chief had the constitutional prerogative to ignore any laws, domestic or foreign, that impeded achieving

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(Cambridge, MA: Harvard University Press, 1995), 70–80. Posner suggests that "homogeneity of outlook and of values [is] the real motor of" of an ostensible consensus that provides the "comfortable illusion of analytical rigor" that undergirds the notion of legal craft. *Ibid.*, 76. As one of us has pointed out, Posner has adopted a skepticism toward law in some respects indistinguishable from critical legal studies, but without its leftist or egalitarian politics. See Sanford Levinson, "Strolling down the Path of the Law (and toward Critical Legal Studies?): The Jurisprudence of Richard Posner," *Columbia Law Review* 91 (1991): 1221–52. In fact, Posner may be far more disdainful of the rule of law than Horwitz, first, because of his jurisprudential theory, which celebrates an unabashed "pragmatism," and, second, because of his willingness to discard or balance away procedural protections and substantive rights to conduct the war on terror. See Richard Posner, *How Judges Think* (Cambridge, MA: Harvard University Press, 2008); *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford: Oxford University Press, 2006). Indeed, to the extent that Posner's arguments for loosening civil liberties protections or even authorizing torture are based on the judgments of experts about what necessity requires, we might compare him to James Landis in his most ebullient period, while Horwitz might find himself far more comfortable with Roscoe Pound's criticisms of rule by experts.

<sup>77</sup> See in particular Michael Stokes Paulsen, "The Constitution of Necessity," *Notre Dame Law Review* 79 (2005): 1257–98.

victory. If the Bush administration violated the rule of law, it did not violate the rule of lawyers.

In each of these cases, opponents nevertheless insisted that the Bush administration had violated the rule of law and the values of legality. But that accusation, even if accepted, does not begin to describe the problem that a scholar like Horwitz faced in contrast, say, to Georgetown law professor Martin Lederman, a former lawyer in the Office of Legal Counsel who takes the duty of fidelity to law with the utmost seriousness and a complete lack of cynicism. For someone like Horwitz, the problem ran far deeper: it was that the Bush administration had co-opted the progressive vision of law itself—not to mention the importance of strong and energetic executive leadership. It was, after all, Teddy Roosevelt who championed the “stewardship” theory of presidential leadership; Frankfurter had championed Roosevelt’s Bull Moose campaign and, of course, had been a notable contributor to Herbert Croly’s *New Republic*. And it was Croly who touted the rise of Roosevelt as a release from the narrow-mindedness of “government by lawyers” and an acknowledgment “that the national principle involve[s] a continual process of internal reformation.”<sup>78</sup> In an extremely interesting recent essay on the rise of the presidency as the locus of transformative power, Yale political scientist Stephen Skowronek quotes the late nineteenth-century historian Henry Jones Ford, who wrote that the work of the presidency was “the work of the people breaking through the constitutional form.”<sup>79</sup> There was, of course, no guarantee that such an exuberant notion of presidential power would not be turned to decidedly non-progressive ends.

If law is properly considered a flexible instrument of social policy, why should the law not bend when faced with an emergency? Wasn’t this

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<sup>78</sup> See Herbert Croly, *The Promise of American Life* (1909; Indianapolis: Bobbs-Merrill, 1965), 136, 168. See generally Stephen Skowronek, “The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive,” *Harvard Law Review* (forthcoming), for an unusually interesting overview of the similarities and differences between the Progressive Era’s conception of presidential power and that championed by latter-day fans of the “unitary executive.”

<sup>79</sup> *Ibid.*, quoting Henry Jones Ford, *The Rise and Growth of American Politics: A Sketch of Constitutional Development* (New York: Macmillan, 1898), 293.

the all-important lesson taught by a canonical New Deal case, *Home Savings and Loan v. Blaisdell*?<sup>80</sup> If one takes seriously the contemporary mantras of “text” and “history,” then it is difficult indeed to justify the “mortgage moratorium” passed by the Minnesota legislature against the firm command of Article I, Section 10, of the Constitution that states shall pass no laws impairing the obligation of contracts. In *Blaisdell*, Chief Justice Hughes offered a notable defense of a “living Constitution,” downplaying the requirements of textual formalism and fidelity to original intent, given the emergency and challenge to America posed by the Great Depression.

Moreover, if one should constantly reinterpret law so as to safeguard important values, why are security and safety not the most important values of all? This, of course, was the message Franklin Roosevelt conveyed in his egregious Order 9066 placing Japanese resident aliens and even Japanese American citizens in what Justice Owen Roberts labeled “concentration camps.” Consider also Arthur M. Schlesinger Jr.’s defense of Lincoln and Roosevelt as war leaders who routinely bent legal rules to serve the national interest.<sup>81</sup> “These two Presidents,” Schlesinger writes, “remained faithful to the spirit, if not the letter, of the Constitution: acting on the spirit to save the letter.”<sup>82</sup>

The problem of the early twenty-first century is not that the Bush administration merely flouted the rule of law, but that it did so in the name of a twisted version of the progressive vision of legal flexibility and adaptability that, in at least some of its instantiations, Horwitz admired greatly. There was no one so adaptable in their usages of law, one might think, as John Yoo and David Addington. Each could have quoted John Marshall on the necessity to “adapt” the Constitution to the “great crises of

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<sup>80</sup> 290 U.S. 398 (1934). See Sanford Levinson, “Constitutional Norms in a State of Permanent Emergency,” *Georgia Law Review* 40 (2006): 719–36, noting the general difficulty of getting a solid leverage point from which to critique the Bush administration and including an extended analysis of *Blaisdell*.

<sup>81</sup> Arthur M. Schlesinger Jr., “War and the Constitution: Abraham Lincoln and Franklin D. Roosevelt,” in *Lincoln, the War President: The Gettysburg Lectures*, ed. Gabor Borritt, 147–78 (New York: Oxford University Press, 1994).

<sup>82</sup> *Ibid.*, 178.

human affairs”<sup>83</sup> and, had they wished, cited at least some decisions of the New Deal and post–New Deal eras as offering models of just such adaptation. Together, Yoo and Addington collapsed the very distinctions that Horwitz had objected to in his critique of Thompson: “law from politics, means from ends, processes from outcomes.” This was a dark parody of the progressive vision of law that Horwitz celebrated in his books.

The events of the early twenty-first century offer a complicated lesson. On the one hand, they show why the values behind the rule of law are as important as ever to restrain arbitrary power and violations of human dignity, especially when that power is disguised through the forms and practices of legal reasoning. On the other, they seem to show that mere adherence to legal formalities and the discourse of professional legal culture may not prevent arbitrariness, seizures of power, violations of human dignity, brutality, or even torture. Legal formality, or, we might say, adherence to legal “grammar,” is not the same thing as respect for the rule of law, except by stipulative definition. The rule of law, rather, seems to be a vague and abstract political value that seeks to restrain arbitrariness (however defined) and promote human dignity (again however defined) through a set of regular legal procedures that limit discretion and require reasoned justification. These political values may not be respected even if the forms of legal discourse are respected.

Nevertheless, this account of the rule of law as a political value that transcends legal grammar and legal practice might still not be enough for Horwitz. Rather, what we see in *Transformation* and in the Warren Court book is something different: a progressive vision of law that argues that law should flexibly serve moral progress and should always be grounded in just values. If law is not in the service of these ends, it is not a human good; or perhaps more correctly, because it so often does not serve these values, it cannot be an unqualified human good.

This answer, however, brings us back to Hobbes and the need to maintain order in a world of moral disagreement. The difficulty with the progressive vision that law should be applied flexibly to serve what is just and good is that people disagree—often violently—about these values; they also disagree about who is really oppressed and treated unjustly, even about

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<sup>83</sup> *McCulloch v. Maryland*, 17 U.S. 316, 407, 415 (1819).

who is really an outsider and who is elite or privileged. In the era of globalization, these differences of opinion appear ever more ominous. But even among our fellow countrymen, moral dissensus abounds. Horwitz, no doubt, has watched with rueful amusement as the conservative movements of the past two decades have eagerly adopted the language of dispossession, anti-hierarchy, and victimization traditionally associated with the egalitarian Left. A Marxist theory of history might purport to explain who is *really* history's underdog and who is merely an opportunistic poseur. But in a post-Marxist era where interest groups, ethnicities, and religions vie for the title of who has been treated the most unjustly and who is least privileged, grievances and claims of oppression seem to emanate from all directions. The one constant appears to be the steady accumulation of more power by governments claiming to act in the name of the people and to keep them safe from unspecified harms of unspecified duration. In this world the political values of the rule of law might yet have some purchase, whether the goods they offer are qualified or not. The challenge for contemporary legal scholarship—which has inherited a deeply instrumental conception of law<sup>84</sup>—is whether we can find an adequate language to synthesize that realist and critical conception with the affirmative political values of the rule of law. Morton Horwitz's struggles with the rule of law are also our own.

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<sup>84</sup> Brian Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (New York: Cambridge University Press, 2006); *Balanced Realism on Judging: Beyond the Formalist-Realist Divide* (Princeton, NJ: Princeton University Press, forthcoming).