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***JUSTICE ACCUSED AT 45: REFLECTIONS ON ROBERT COVER'S
MASTERWORK***

Sanford Levinson^{*}
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ABSTRACT

We raise some questions about the timeliness and timelessness of certain themes in Robert Cover's masterwork, *Justice Accused*, originally published in 1975. Our concern is how the issues Cover raised when exploring the ways antislavery justices decided fugitive slave cases in the antebellum United States, played out in the United States first when Cover was writing nearly fifty years ago, and then play out in the United States today. The moral-formal dilemma faced by the justices that Cover studied when adjudicating cases arising from the Fugitive Slave Acts of 1793 and 1850 was whether judicial decision-makers should interpret the law in light of the antislavery values of many northern constituencies or instead defer to laws that reflected the moral values of politicians eager to compromise on slavery to preserve a bisectional consensus. The moral-formal dilemma the justices of Cover's own time faced when adjudicating cases arising out of the Civil Rights Movement and Vietnam War was whether they should interpret the law in light of the liberal moral values of their class. The moral-formal dilemma many contemporary Americans in institutions far remote from courts are facing is whether to follow the letter of the law and retain the basic structure of constitutional law in the United States when doing so threatens to warp the constitutional fabric, undermine the political regime, and risk an environmental catastrophe that could easily leave humans near extinction.

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One delight of this symposium is our mutual reengagement with the extraordinary work of Robert Cover. We pay special attention to *Justice Accused: Antislavery and the Judicial Process*, published in 1975—when Cover was only thirty-two.¹ This is the work of a precocious late-twenty-year-old analogous to Schubert quartets written at a comparable age (or even earlier). *Justice Accused* is a brilliant book by any standard. Rereading the text only deepens the sense of unfathomable loss the academy, and Cover's numerous communities, experienced when he was taken from us at such a young age. He would be only seventy-eight today, leaving us to imagine what he might have written had he been allowed to reach the age when scholars write *magnum opera*. Instead, we must rest content with the dazzling achievements during his two decades as a member of the legal academic community.

We raise some questions about *Justice Accused*, not to criticize magnificent and audacious scholarship motivated by the most pressing moral concerns, but to consider the timeliness and timelessness of certain themes explored in that masterwork. Our concern is how the issues Cover raised when exploring the ways antislavery Justices decided fugitive slave cases played out in the antebellum United States, in the United States when Cover was writing, and in the United States today. Cover's opus was a work of the Great Society, even if the text discusses the American judiciary of more than a century before.² He conceived and wrote this project in the immediate aftermath of the Civil Rights Movement and at the height of the protests against the Vietnam War. Both events prompted questions about the interplay between law and morality.³ Americans from Abraham Lincoln to Martin Luther King considered whether immoral laws should be viewed as laws at all. They pondered whether, from a strictly positivist perspective, the most unjust edicts that meet certain procedural requirements are equal in legal status to the most just decrees. Are we, as moral agents within the legal community,

¹ ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (Yale Univ. Press 1975).

² For a good discussion of the Great Society, see AMITY SHLAES, *THE GREAT SOCIETY: A NEW HISTORY* (Harper Perennial 2019).

³ See, e.g., Ronald Dworkin, *On Not Prosecuting Civil Disobedience*, N.Y. REV. BOOKS (June 6, 1968), <https://www.nybooks.com/articles/1968/06/06/on-not-prosecuting-civil-disobedience>.

obligated to obey those unjust laws, or is civil disobedience justified when the cause is great enough?⁴

These questions raise concerns about all legal systems and concerns specific to legal systems in particular times and places. Great minds have pondered the relationship between law and morality. Thomas Aquinas, almost a millennium ago, insisted that, to be deemed laws at all edicts must be consistent with God's will.⁵ More than two millennia ago, Socrates expounded on the duty of moral agents to obey unjust laws.⁶ Henry David Thoreau, almost two hundred years ago, offered an American rebuttal to Socrates when he went to jail rather than pay taxes that he believed supported a slaveholding republic.⁷ Great thoughts about the relationship between law and morality, the examples of Socrates and Thoreau indicate, are frequently, if not always, mediated by the jurisprudential choices thinkers face in their time and in their regime. The Civil Rights Movement and Vietnam War presented issues of law and morality distinctive to the Great Society as well as those grappled with by ancient Greeks, medieval scholars, and American abolitionists.

The relationship between law and morality is always the relationship between a particular notion of morality and particular laws. Civil Rights and Vietnam War protestors objected to specific legal rules in the name of moral views that were not universally shared by their contemporaries. Public opinion surveys taken during the Great Society found distinct cleavages between affluent, well-educated citizens and poorer, less-educated citizens on fundamental moral questions.⁸ Legal elites were particularly likely to hold liberal

⁴ See Abraham Lincoln, Address Before the Young Men's Lyceum of Springfield, Illinois (1838), in 1 COLLECTED WORKS OF ABRAHAM LINCOLN, 108, 108-15 (Roy P. Basler ed., 1953). See also Martin Luther King, Jr., Letter from a Birmingham Jail, in AMERICAN POLITICAL THOUGHT: FOUR HUNDRED YEARS OF IDEAS AND IDEOLOGIES 406, 406-16 (Sue Davis ed., 1996).

⁵ THE POLITICAL IDEAS OF ST. THOMAS AQUINAS: REPRESENTATIVE SELECTIONS 26 (Dino Bigongiari ed., 1953).

⁶ See generally THE COLLECTED DIALOGUES OF PLATO: INCLUDING THE LETTERS (Edith Hamilton & Huntington Cairns eds., 1961).

⁷ HENRY DAVID THOREAU, CIVIL DISOBEDIENCE (1849), reprinted in THE PORTABLE THOREAU (Carl Bode ed., 1964).

⁸ HERBERT MCCLOSKEY & ALIDA BRILL, DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES 243-44 (1983) [hereinafter DIMENSIONS OF TOLERANCE]; Herbert McClosky, *Consensus and Ideology in American Politics*, 58 THE AM. POL. SCI. REV. 364-65 (1964) [hereinafter *Consensus and Ideology*].

opinions on civil rights and liberties typical of affluent, well-educated citizens.⁹ Meanwhile, the moral values that inspired civil disobedience to protest Jim Crow were shared by African-Americans who had been enslaved and then oppressed throughout American history and liberal activists, many of whom came from very privileged families. The relationship between law and morality in Cover's time was the relationship between the morality of liberal conceptions of equality and laws that had previously been interpreted as sanctioning a caste system in the United States under the guise of federalism.¹⁰

The sharp divide between white elites who supported liberal racial equality, a white proletariat in the north who were ambivalent, and a white population in the south committed to Jim Crow played important roles when an almost entirely affluent, highly educated, white male judiciary during the 1960s and 1970s considered what Cover described as "the moral-formal dilemma."¹¹ This dilemma occurs when Justices consider whether "moral values . . . outweigh[] interests and values served by fidelity to the formal system when such values seem[] to block direct application of the moral or natural law propositions."¹²

When adjudicating cases arising from the Fugitive Slave Acts of 1793¹³ and 1850,¹⁴ the Justices Cover studied faced the moral-formal dilemma of whether judicial decision-makers should interpret the law in light of the antislavery values of many northern constituencies or defer to laws that reflected the moral values of politicians eager to compromise on slavery to preserve a bisectional consensus. That consensus, as Kermit ("Kim") Roosevelt suggests, regarded the most pressing constitutional commitment to maintain a national union that recognized the legitimacy of slavery in states where slavery was lawful and the concomitant duty of "free" states to return fugitives escaping bondage in their "home" state.¹⁵ When adjudicating cases arising out of the Civil Rights Movement and Vietnam War, Justices of Cover's time faced the moral-formal dilemma of whether they should interpret the law in light of the moral values of their class.

⁹ See *Consensus and Ideology*, *supra* note 6, at 247.

¹⁰ See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹¹ COVER, *supra* note 1, at 199.

¹² *Id.* at 197.

¹³ Fugitive Slave Act of 1793, 1 STAT. 302 (1793) (repealed 1864).

¹⁴ Fugitive Slave Act of 1850, 9 STAT. 462 (1850) (repealed 1864).

¹⁵ See generally KERMIT ROOSEVELT III, *THE NATION THAT NEVER WAS: RECONSTRUCTING AMERICA'S STORY* (forthcoming Apr. 2022).

Strong class divisions emerged during the 1960s over the Vietnam War. For example, Justices might write into law the values typical of an increasing number of their fellow affluent, highly educated Americans who, during the early 1970s, regarded the conflict in southeast Asia as exemplifying American imperialism.¹⁶ Alternatively, they could defer to laws that reflected the moral values of less affluent citizens, many of whom accepted the official narrative that the United States was either assisting an oppressed group abroad or engaging in a fight against the spread of communism that threatened human flourishing across the globe.¹⁷

Times change. The Great Society is over. The most powerful political movement of the present regards white men as the main victims of discrimination.¹⁸ Wars as unsuccessful as Vietnam go largely unprotested, perhaps because they are fought by poor volunteers, few of whom even aspire to upper-middle class status.¹⁹ Courts are no longer what Ronald Dworkin labeled the “forum of principle”²⁰ in which liberal, better educated, and more affluent citizens could make their constitutional visions the official law of the land.²¹ Most Americans now regard the federal judiciary as just another site for ordinary politics.²² Appointments to the judiciary are viewed as just another spoil attached to winning elections, even as Justices traverse the country giving unconvincing speeches proclaiming that the Supreme Court is staffed by the only nine persons in the United States unswayed by ideological and partisan

¹⁶ See William L. Lunch & Peter W. Sperlich, *American Public Opinion and the War in Vietnam*, 32 W. POL. Q. 21, 38 (1979) (noting sharply diminished support for the war in Vietnam about persons who had attended graduate school).

¹⁷ *Id.*

¹⁸ Charles M. Blow, *White Male Victimization Anxiety*, N.Y. TIMES (Oct. 10, 2018), <https://www.nytimes.com/2018/10/10/opinion/trump-white-male-victimization.html>.

¹⁹ Jacob Weisberg, *Rough Draft*, SLATE (Mar. 22, 2006), <https://slate.com/news-and-politics/2006/03/the-gross-unfairness-of-an-all-volunteer-army.html>.

²⁰ Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981).

²¹ LUCAS A. POWE, JR., *THE SUPREME COURT AND THE AMERICAN ELITE 1789-2020* (2021).

²² See Robert Barnes, *Supreme Court's Job Approval Rating Dipped Over Last Year, Poll Finds*, WASH. POST (July 28, 2021), https://www.washingtonpost.com/politics/courts_law/supreme-court-approval-gallup/2021/07/27/a1f9e4a6-ef24-11eb-81d2-ffae0f931b8f_story.html.

considerations.²³ Political liberals regularly rail against the Supreme Court, with a six-justice majority of conservative Republican Justices who are rolling back major liberal accomplishments such as the Voting Rights Act of 1965²⁴ and any significant protection of reproductive rights for women.²⁵ The most recent polling data indicates that only a slim majority of Americans now “approve” of the Court; however, that 54% figure is only reached because roughly two-thirds of the Republicans sampled like the current Court.²⁶

As times change, so does the moral-formal dilemma. The Civil Rights Movement and the anti-War movement, at least as viewed by the academy in the 1960s, presented the moral-formal dilemma in pure form. Jim Crow laws were unjust. Young men were being drafted to fight an immoral war, kill those who some considered “freedom fighters,” and risk their lives for an unworthy cause.²⁷ Restrictions on civil rights marches, anti-war protests, and draft resistance were unconstitutional efforts to stymie efforts at greater racial equality or attempts to block American participation in a disastrous war. Every respectable ethicist and every decent lawyer, at least as defined by the bulk of the academy, understood that morality and law were opposed.²⁸

²³ See Joan Biskupic, *Stephen Breyer Worries About Supreme Court's Public Standing in Current Political Era*, CNN (Apr. 6, 2021), <https://www.cnn.com/2021/04/06/politics/stephen-breyer-harvard-speech/index.html>; Chandelis Duster, *Justice Amy Coney Barrett Says Supreme Court is 'Not a Bunch of Partisan Hacks'*, CNN (Sept. 13, 2021), <https://www.cnn.com/2021/09/13/politics/amy-coney-barrett-supreme-court-not-partisan/index.html>; Ariane de Vogue, *Justice Samuel Alito Says Supreme Court is Not a 'Dangerous Cabal'*, CNN (Sept. 30, 2021), <https://www.cnn.com/2021/09/30/politics/samuel-alito-notre-dame/index.html>.

²⁴ *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

²⁵ See, e.g., *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021); *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021).

²⁶ *Public Views of the Supreme Court Turned More Negative Before News of Breyers Retirement*, PEW RSCH. CTR. (Feb. 2, 2022), <https://www.pewresearch.org/politics/2022/02/02/publics-views-of-supreme-court-turned-more-negative-before-news-of-breyers-retirement>.

²⁷ See Philip Converse & Howard Schuman, *Silent Majorities and the Vietnam War*, 222 SCI. AM. 17, 25 (1970) (noting greater tendency of those who attended elite universities to oppose the Vietnam War).

²⁸ See generally DAVID HALBERSTAM, *THE BEST AND THE BRIGHTEST* (1973). This is almost certainly true concerning support for the Civil Rights Movement, even if Robert Bork stood out for his denunciation of the public accommodations section of the Civil Rights Act of 1964—calling them an “evil” that trenched on the protected liberty interests of business owners to accord service only to those they wished to serve. Robert H. Bork, *Civil Rights—A Challenge*, NEW REPUBLIC, Aug. 31, 1963,

The sole question in the academy was whether laws widely agreed to be immoral should be respected and obeyed.

In polarized times, this elite consensus disappears. One feature of much contemporary civil disobedience—consider illegal protests at abortion clinics or a public willingness to disobey state bans on abortion—is that the moral debate is marked by good faith disagreement on both sides. Morally decent people disagree on the morality of terminating a pregnancy. Activists on both sides find both the “Scalia” compromise²⁹ and the *Casey* compromise³⁰ to be unattractive. Pro-choice and pro-life activists in this environment face the same moral-formal dilemma. Proponents and opponents of legal abortion must decide the extent to which the Constitution reflects the values they cherish. They must then determine whether they have obligations to respect the Constitution or official decisions interpreting the Constitution that either fail to protect all women from exercising their fundamental right to reproductive choice or fail to prevent the wholesale slaughter of the unborn.

Constitutional times cycle.³¹ Donald Trump and the contemporary Republican party may be providing Americans with a new variation on the moral-formal dilemma grappled with by nineteenth century Justices in fugitive slave cases and twentieth century Justices in civil rights cases. Broad agreements exist among the intelligentsia that Donald Trump lacked any of the qualities

at 21, 23. The Vietnam War was more complex. Major architects of the movement included distinguished academics such as McGeorge Bundy, the former Dean of the Faculty at Harvard and M.I.T.’s Walt Rostow. Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L. J. 489 (1945) [hereinafter *The Japanese American Cases*] (Former Yale Dean Eugene Rostow (Walt’s brother), a committed proponent of racial justice, also actively supported the War.); Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833 (1972) [hereinafter *Great Cases Make Bad Law*] (That being said, most students of Cover’s generation were distinctly antagonistic to the War and firmly rejected the “leadership” of such elders as Bork or the Rostows.).

²⁹ *Planned Parenthood Se. Pa. v. Casey*, 505 U.S. 833, 979 (1993) (Scalia, J., concurring in part & dissenting in part). This is an approach that leaves each state free to determine how abortion should be regulated.

³⁰ *Id.* at 869-79 (opinion of O’Connor, Kennedy and Souter, JJ.); *id.* at 920-22 (Stevens, J., concurring in part & dissenting in part); *id.* at 926 (Blackmun, J., concurring in part & dissenting in part). This approach makes abortion legal throughout the nation, but heavily regulated in ways that impose what many view as “undue burdens” on vulnerable women.

³¹ See generally JACK M. BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME* (2021).

necessary in a president³² and that the Republican Party has gone off the constitutional democracy rails.³³ Nevertheless, following the pattern of autocratic “wannabees” across the globe, Trump and Republicans often rely on democratic forms when seeking to subvert American democracy.³⁴ The moral-formal dilemma many Americans in institutions far remote from courts are facing is whether to follow the letter of the law and retain the basic structure of constitutional law in the United States³⁵ even when doing so threatens to warp the constitutional fabric, undermine the political regime, and risk an environmental catastrophe that could easily leave humans near extinction.³⁶

I. THE MORAL-FORMAL DILEMMA: 1850

Bob (Cover), whom both of us were privileged to know slightly³⁷ did not stress civil disobedience by civilians, regardless of how important that concern was to the body politic at the time. He did not focus substantial attention on the abolitionists many scholars claim provided the intellectual underpinnings for the post-Civil War

³² See Sanford Levinson & Mark A. Graber, *The Constitutional Powers of Anti-Publican Presidents: Constitutional Interpretation in a Broken Constitutional Order*, 21 CHAP. L. REV. 133, 140-45 (2018).

³³ See generally THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2016).

³⁴ For the memorandum from Trump's attorney, John Eastman, to then Vice President Mike Pence instructing him on what actions to take on January 6, 2021 so that Trump could “legally” overturn the 2020 presidential election, see *Trump Lawyer's Memo on Six-Step Plan for Pence to Overturn the Election*, CNN POL. (Sep. 21, 2021, 8:20 AM), <https://www.cnn.com/2021/09/21/politics/read-eastman-memo/index.html>. See, e.g., ROSALIND DIXON & DAVID LANDAU, *ABUSIVE CONSTITUTIONAL BORROWING: LEGAL GLOBALIZATION AND THE SUBVERSION OF LIBERAL DEMOCRACY* (2021); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018).

³⁵ See generally SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (Oxford Univ. Press 2008) (discussing what Levinson believes to be the baneful consequences of following the letter of the political structures outlined in the Constitution of the United States).

³⁶ See Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 UNIV. PA. L. REV. 707, 729-38 (2009) (noting “excessive fidelity” may cause constitutional crises).

³⁷ Levinson primarily through the aegis of the Shalom Hartman Institute of Jewish Philosophy in Jerusalem, and Graber through the aegis of Yale Hillel in New Haven.

Amendments.³⁸ Instead, Cover directed a laser-like focus on the distinctive obligations and conduct of a particular group of American judges, including members of the United States Supreme Court. These Justices sat during the early national and Jacksonian eras,³⁹ which many scholars maintain created a constitutional order distinct from the regime inaugurated in 1789.⁴⁰ Cover did not write about a random sample of judicial actors. The subjects of *Justice Accused* are what social scientists call a “stratified sample.”⁴¹ All were “anti-slavery” men who publicly manifested, in one way or another, their abhorrence of human bondage as a practice.⁴² Cover’s interest laid in the tension between his subjects’ opposition to slavery and their commitment to maintaining the law of the land that appeared to condone slavery.⁴³

Cover’s different treatment of John Marshall, Roger Taney, and Joseph Story, the leading figures with James Kent in American constitutional law prior to the Civil War, illustrates his selection bias. Marshall and Taney play only very minor roles. Marshall was a willing participant in the practice of enslaving others. Paul Finkelman recently demonstrated that Marshall owned, bought, and sold enslaved persons.⁴⁴ Happily embedded in “the peculiar institution,”⁴⁵ the “Great

³⁸ See, e.g., RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT* (2021); WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1998); JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951); Howard J. Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, 50 WIS. L. REV. 131 (1950).

³⁹ The early national period is conventionally understood to have run from the ratification of the 1787 Constitution to the 1820s. The Jacksonian Era is conventionally understood to have run from the 1820s until the Civil War. See, e.g., 1 HOWARD GILLMAN ET AL., *AMERICAN CONSTITUTIONALISM* 93-231 (3d ed., Oxford Univ. Press 2022).

⁴⁰ See, e.g., GERARD N. MAGLIOCCA, *ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES* (2007); GERALD LEONARD & SAUL CORNELL, *THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS’ CONSTITUTION, 1780S-1830S* (Cambridge Univ. Press 2019) (arguing that a regime emphasizing *herrenvolk* democracy based on white supremacy had become nationally triumphant).

⁴¹ See Monroe G. Sirken, *Stratified Sample Surveys with Multiplicity*, 67 J. AM. STAT. ASS’N 224 (1972).

⁴² See generally COVER, *supra* note 1.

⁴³ *Id.*

⁴⁴ PAUL FINKELMAN, *SUPREME INJUSTICE: SLAVERY IN THE NATION’S HIGHEST COURT* 31 (Harv. Univ. Press 2018).

⁴⁵ *Id.* at 3.

Chief Justice”⁴⁶ no more experienced a moral-formal dilemma when adjudicating slavery issues than did the slaveholding enthusiast, North Carolina Justice Thomas Ruffin, who wrote the most unequivocal and unsparing delineation of the legal meaning of being an enslaved person in *State v. Mann*.⁴⁷ Marshall’s discussion in *The Antelope* of victims of the international slave trade, which Congress banned for American citizens but was still legal when engaged in by the nationals of other countries, distinguishes between the roles of the “jurist” and the “moralist.” Only one conclusion is possible for the conscientious “jurist.”⁴⁸ Nothing in Marshall’s history indicates any identification with the moralist opposed to human bondage. Whatever feelings Marshall had about the rigors of legal fidelity, the Virginia slaveholder, in slave cases, felt none of the psychological and emotional tension—what Cover, in *Justice Accused*, labels “dissonance.”⁴⁹

Taney’s infamous opinion in *Dred Scott v. Sandford*⁵⁰ exhibits the same Marshallian sensibilities on slavery.⁵¹ Taney insisted that Justices should be guided by the law rather than by contemporaneous morality.⁵² But the decision Jackson’s Chief Justice made with respect to the citizenship status of free Blacks and the right to bring slaves into American territories was consistent with the racist and pro-Southern sentiments Taney expressed throughout his career.⁵³ Marshall and Taney may have occasionally written what appear to be anti-slavery sentences.⁵⁴ So did Thomas Jefferson.⁵⁵ None of these towering

⁴⁶ *Id.* at 27.

⁴⁷ 13 N.C. 263, 264-68 (1829). See generally MARK V. TUSHNET, *SLAVE LAW IN THE AMERICAN SOUTH: STATE V. MANN IN HISTORY AND LITERATURE* (2003). For several *North Carolina Law Review* articles from a March 2009 symposium detailing Ruffin’s active participation in slavery, see Eric L. Muller, *Judging Thomas Ruffin and the Hindsight Defense*, 87 N.C.L. REV. 757 (2009); Laura F. Edwards, *The Forgotten Legal World of Thomas Ruffin: The Power of Presentism in the History of Slave Law*, 87 N.C.L. REV. 855 (2009); Sally Greene, *State v. Mann Exhumed*, 87 N.C.L. REV. 702 (2009); James A. Wynn, Jr., *State v. Mann: Judicial Choice or Judicial Duty*, 87 N.C.L. REV. 991 (2009).

⁴⁸ *Antelope*, 23 U.S. 66, 121-22 (1825).

⁴⁹ COVER, *supra* note 1, at 227-38.

⁵⁰ 60 U.S. 393 (1856).

⁵¹ *Id.* at 399-454.

⁵² *Id.* at 426.

⁵³ MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 82 (Cambridge Univ. Press 2006).

⁵⁴ See, e.g., FINKELMAN, *supra* note 44, at 7-8; *Antelope*, 23 U.S. at 120.

⁵⁵ See, THOMAS JEFFERSON, *THE DECLARATION OF INDEPENDENCE*, reprinted in *THE PORTABLE THOMAS JEFFERSON* 235, 238-39 (Merrill D. Peterson ed., 1975).

figures in American constitutionalism ever acted as if they were committed to incorporating these critiques into the official constitutional law of the land.⁵⁶

Cover's Justices were not personally entwined with human bondage; they condemned that practice. In fact, many had connections with prominent abolitionists. Joseph Story is a central figure in *Justice Accused*.⁵⁷ Unlike Marshall or Taney, the Massachusetts Justice had no illusions about the reality of chattel slavery. In *United States v. La Jeune Eugenie*,⁵⁸ Story, sitting as a circuit judge, declared with great passion and at considerable length that the international slave trade

necessarily carries with it a breach of all the moral duties, of all the maxims of justice, mercy and humanity, and of the admitted rights, which independent Christian nations now hold sacred in their intercourse with each other. What is the fact as to the ordinary, nay, necessary course, of this trade? It begins in corruption, and plunder, and kidnapping. It creates and stimulates unholy wars for the purpose of making captives. It desolates whole villages and provinces for the purpose of seizing the young, the feeble, the defenceless, and the innocent. It breaks down all the ties of parent, and children, and family, and country. It shuts up all sympathy for human suffering and sorrows. It manacles the inoffensive females and the starving infants. It forces the brave to untimely death in defence of their humble homes and firesides or drives them to despair and self-immolation. It stirs up the worst passions of the human soul, darkening the spirit of revenge, sharpening the greediness of avarice, brutalizing the selfish, envenoming the cruel, famishing the weak, and crushing to death the broken-hearted. This is but the beginning of the evils. Before the unhappy captives arrive at the destined market, where the traffic ends, one quarter part at least in the ordinary course of events perish in cold blood under the

⁵⁶ See Paul Finkelman, *Jefferson and Slavery: "Treason Against the Hopes of the World,"* in JEFFERSONIAN LEGACIES 181-82 (Peter S. Onuf ed., 1993); FINKELMAN, *supra* note 44, at 26-111, 172-218.

⁵⁷ See COVER, *supra* note 1, at 238-43.

⁵⁸ 26 F. Cas. 832, 845-46 (C.C.D. Mass. 1822) (No. 15,551).

inhuman, or thoughtless treatment of their oppressors. Strong as these expressions may seem, and dark as is the colouring of this statement, it is short of the real calamities inflicted by this traffic. All the wars, that have desolated Africa for the last three centuries, have had their origin in the slave trade. The blood of thousands of her miserable children has stained her shores, or quenched the dying embers of her desolated towns, to glut the appetite of slave dealers. The ocean has received in its deep and silent bosom thousands more, who have perished from disease and want during their passage from their native homes to the foreign colonies. I speak not from vague rumours, or idle tales, but from authentic documents, and the known historical details of the traffic, — a traffic, that carries away at least 50,000 persons annually from their homes and their families, and breaks the hearts, and buries the hopes, and extinguishes the happiness of more than double that number.⁵⁹

Milder, but still thoroughly heartfelt according to the evidence, was Story's colleague John McLean, another subject of *Justice Accused*.⁶⁰ McLean, who was seeking the Free Soil Party's presidential nomination and would later seek the Republican Party's nomination for the presidency,⁶¹ commented when charging an Ohio jury in his capacity as a circuit judge that slavery "is admitted, by almost all who have examined the subject, to be founded in wrong, in oppression, in power against right."⁶²

The comments quoted above did not explain or justify Story's or McLean's votes in most fugitive slave cases. In 1842, the year of *Prigg v. Pennsylvania*,⁶³ Story wrote to a friend, "You know full well that I have ever been opposed to slavery. But I take my standard of

⁵⁹ *Id.* at 845-46.

⁶⁰ See COVER, *supra* note 1, at 243-49.

⁶¹ See Rachel Shelden, The Availability of John McLean: Presidential Politics and Slavery on the Supreme Court (Feb. 25, 2022) (unpublished manuscript) (on file with author).

⁶² COVER, *supra* note 1, at 246.

⁶³ 41 U.S. 539 (1842).

duty as a judge from the Constitution.”⁶⁴ *Prigg* was on point. As Story indicated, a deal is a deal. The price of the Constitution was paid by accommodations for slavery. The Fugitive Slave Clause, Story wrote, “constituted a fundamental article, without the adoption of which the Union could not have been formed.”⁶⁵ That was the Constitution to which he had sworn a solemn oath of obedience. Like Donald Rumsfeld’s later comment about wars and armies, judges must be faithful to the Constitution they swore loyalty to, not to a fictive constitution they might have preferred.⁶⁶

One can hardly read *Prigg* without recognizing that Story believed, not fancifully, that the survival of the Union was at stake. Some abolitionists called for “No Union with Slaveholders,”⁶⁷ but they were not relevant politically.⁶⁸ Far more important were similar rumblings of disunion emanating from South Carolina.⁶⁹ The realization of that vision was only eighteen years away. Story scorned the uncouth Andrew Jackson, but he (and Daniel Webster) shared the former President’s commitment to preventing conflicts over slavery from disrupting the national union.⁷⁰ Preserving the Union was the most compelling of interests, the satisfaction of which demanded what would otherwise be objectionable, or even “rotten,” compromises.⁷¹

McLean, in *Prigg*, dissented from Story’s arguably tendentious reading of what the Constitution commanded in fugitive slave cases, but the Ohio jurist shared Story’s commitment to maintaining fidelity

⁶⁴ COVER, *supra* note 1, at 119 (quoting Letter from Joseph Story to Ezekiel Bacon (Nov. 19, 1842), in *LIFE AND LETTERS OF JOSEPH STORY: ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND DANE PROFESSOR OF LAW AT HARVARD UNIVERSITY* 430, 431 (William W. Story ed., 1851)).

⁶⁵ See *Prigg*, 41 U.S. at 611.

⁶⁶ Helmut Sonnenfeldt & Ron Nessen, *You Go to War with the Press You Have*, BROOKINGS (Dec. 30, 2004), <https://www.brookings.edu/opinions/you-go-to-war-with-the-press-you-have> (“As you know, you go to war with the Army you have. They’re not the Army you might want or wish to have at a later time.”).

⁶⁷ See HENRY MAYER, *ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION OF SLAVERY* 326 (St. Martin’s Griffin 1998).

⁶⁸ See FORREST A. NABORS, *FROM OLIGARCHY TO REPUBLICANISM: THE GREAT TASK OF RECONSTRUCTION* 128-29 (Univ. Mo. Press 2017).

⁶⁹ See WILLIAM W. FREEHLING, *THE ROAD TO DISUNION: SECESSIONISTS AT BAY 1776-1854* 211-86 (Oxford Univ. Press 1990).

⁷⁰ See GERALD T. DUNNE, *JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT* 304-06 (Simon & Schuster 1970).

⁷¹ See AVISHAI MARGALIT, *ON COMPROMISE AND ROTTEN COMPROMISES* 55 (2009) (discussing slavery as a rotten compromise the Union made).

to law when law clashed with morality.⁷² Much like his successors, McLean maintained that the constitutional text or precedents handed down by earlier Courts were the sole guides for judicial decision making. To look to moral values not embedded in these legal materials was the equivalent of civil disobedience by judges who were bound by oath not to engage in civil disobedience. On the ground of judicial duty, McLean fully, even if not cheerfully, enforced the Fugitive Slave Law of 1850,⁷³ which was even more iniquitous than the 1793 law.⁷⁴ His 1853 opinion on circuit in *Miller v. McQuerry*⁷⁵ echoed Justice James Iredell's concurrence in *Calder v. Bull*,⁷⁶ which viewed any reliance on "natural law" or "natural rights" as dangerous in a world where there was simply insufficient agreement on what these terms really meant concretely.⁷⁷ McLean insisted that "judges cannot explore"⁷⁸ such questions as natural law and right, which might certainly counsel against legitimizing slavery.⁷⁹ "With the abstract principles of slavery," the Ohio jurist wrote, "courts called to administer this law have nothing to do. It is for the people, who are sovereign, and their representatives, in making constitutions, and in the enactment of laws, to consider the laws of nature, and the immutable principles of right."⁸⁰ Judges "look to the law and to the law only. A disregard of this, by the judicial powers, would undermine and overturn the social compact"⁸¹ that depended on public officials

⁷² *Prigg v. Pennsylvania*, 41 U.S. 539, 658-74 (1842) (McLean, J., dissenting).

⁷³ Fugitive Slave Act of 1850, 9 Stat. 462 (repealed 1864). The Fugitive Slave Act of 1850 established and empowered federal "commissioners" to order the "rendering" of alleged fugitives back to their purported home state. *Id.* at 462-63. The magistrates were paid \$5 if they found in the alleged fugitives favor, but received \$10 if they accepted the slave-catcher's assertions as to the identity of the alleged fugitive. *Id.* at 463. Section 7 of the act prohibited "any person" from "willingly obstruct[ing], hinder[ing], or prevent[ing]" the return of a fugitive. *Id.* at 464. This included "harbor[ing] or conceal[ing]" a fugitive in order to "prevent the discovery and arrest of such person." *Id.* Those found guilty in a federal court of violating the Act were "subject to a fine not exceeding one thousand dollars, and imprisonment not exceeding six months." *Id.*

⁷⁴ Fugitive Slave Act of 1793, 1 STAT. 302 (repealed 1864). The 1793 act capped the potential fine at \$500 and imprisonment not to exceed one year. *Id.* at 302.

⁷⁵ 17 F. Cas. 335 (C.C.D. Ohio 1853).

⁷⁶ 3 U.S. 386 (1798).

⁷⁷ *Id.* at 398-99 (Iredell, J., concurring).

⁷⁸ *Id.* at 339.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

adhering to whatever deals the framers made in 1787 and implementing subsequently enacted laws passed under the terms set out in the Constitution as interpreted by the Supreme Court.

The social realities of the moral-formal dilemma that Story and his fellow judges on the state and federal benches faced in the years before the Civil War were not truly analogous to the moral-formal dilemma that the civil rights movement presented to Justices on the Warren and Burger Courts. Story revered Chief Justice Marshall and had good relationships with other politically active slaveholding southerners.⁸² Prominent slaveholders, from Story's perspective, were wrong about slavery, but they were wrong about slavery in the way each of the authors of this essay think the other author is wrong about the need for fundamental textual constitutional reform.⁸³ Decent people make good-faith mistakes about moral and constitutional matters all the time. Not to share civic space with people who hold mistaken moral beliefs means one will wind up in a country of one, which may have been Thoreau's ideal.⁸⁴ Story's attitude towards slaveowners reflects then-Senator Joseph Biden's attitude toward segregationists when he first joined Congress.⁸⁵ Southern representatives were people you could make deals with, even if they were terribly wrong on racial matters.⁸⁶

Most readers of *Justice Accused* were not so tolerant. They regarded such claims as "the Smiths are really good people, even if they own slaves or are white supremacists," as the moral equivalent of statements like "the Smiths are really good people, even if they are Nazis bent on exterminating Jews" or the actions of silent critics of Nazis who nonetheless are more than willing to betray Jews-in-hiding, like Anne Frank—perhaps an analogue in some way to a fugitive slave. Some Northern liberals celebrated the devoted segregationist North

⁸² See JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 43-44, 54, 262 (1971).

⁸³ See, e.g., LEVINSON, *supra* note 35; Mark A. Graber, *Running Cars, Constitutions and Metaphors into the Ground*, 18 GOOD SOC'Y 35 (2009).

⁸⁴ See THOREAU, *supra* note 7, at 121 ("[A]ny man more right than his neighbors constitutes a majority of one . . .").

⁸⁵ See Marcus Witcher, *Why Joe Biden Had to Work with Segregationists*, WASH. POST (June 28, 2019), <https://www.washingtonpost.com/outlook/2019/06/28/why-joe-biden-was-right-work-with-segregationists>.

⁸⁶ *Id.*

Carolina Senator Sam Ervin's efforts to bring down Richard Nixon.⁸⁷ Nevertheless, no one who supported Martin Luther King wholeheartedly venerated proponents of Jim Crow in the way Story wholeheartedly venerated Marshall. The moral formal-dilemma that the civil rights movement raised was the relationship between the law and evil, not the relationship between the law and good-faith moral errors—or even between the law and moral blindness.

II. THE SOVEREIGNTY DILEMMA: ARE WE ONE?

The moral-formal dilemma is one aspect of what we might refer to as the “sovereignty dilemma.” If one recognizes the presence of a sovereign authorized to issue binding commandments, then on occasion that sovereign will almost certainly command what one believes is unjust. The principle “the king can do no wrong” legally controls when the law and morality clash. As Thomas Hobbes argued, the whole point of a sovereign is to bring arguments about justice to an end by establishing an authority vested with the power to make performative utterances that offer dispositive resolutions to ethical quandaries.⁸⁸ One need not read Hobbes to be informed about this sovereign power. A central episode in the Bible is the *Akeda*, the binding of Isaac.⁸⁹ God commands Abraham to sacrifice his son, a commandment that Abraham is altogether willing to obey even if, at the last moment, a ram suddenly appears to take the place of Isaac.⁹⁰ God, as sovereign, Abraham acknowledges, could legally do no wrong, even when his edicts are unfathomable.⁹¹ The ways of the sovereign may be beyond human understanding, but that does not make them less binding. This version of the moral-formal dilemma was quite familiar to Bob Cover, who was noteworthy for being one of the first major professors at an elite law school to draw heavily from Jewish materials for his scholarship.⁹²

⁸⁷ See James R. Dickson, *Sen. Sam Ervin, Key Figure in Watergate Probe, Dies*, WASH. POST (Apr. 24, 1985), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/stories/ervinobit.htm>.

⁸⁸ See SHELDON S. WOLIN, *POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT* 214-56 (2016).

⁸⁹ *Genesis* 22:1-19.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 11-13, 19-23 (1983).

Hovering over any modern discussion of the *Akeda* is the Danish philosopher Søren Kierkegaard and his notion of the “teleological suspension of the ethical.”⁹³ Kierkegaard discussed the willingness to suspend “ordinary” ethical norms, including the teachings of “natural law” or “right reason,” in favor of the overriding “teleological duty” to obey the sovereign’s commands.⁹⁴ If one is a certain kind of revolutionary, the “teleological suspension of the ethical” refers as well to the power of the immanent commands of the historical *zeitgeist*.⁹⁵ For the religious, the sovereign is God. The original basis of much political authority was “Divine right.” Rulers were chosen by God. Kings were expected to obey God, just as the people were expected to obey their rulers—no questions asked. Saul’s loss of monarchical authority was directly traceable to his apparent unwillingness to carry out the Divine commandment to slay Agog, the Amalekite king.⁹⁶

The actual command given to Saul regarding the fate of the Amalekites was, “Now, go and strike down Amalek, and put under the ban everything that he has, you shall not spare him, and *you shall put to death man and woman, infant and suckling, ox and sheep, camel and donkey.*”⁹⁷ Robert Alter in his commentary on Kings I observes that “[t]he ‘ban’ . . . one of the cruelest practices of ancient Near Eastern warfare, is an injunction of total destruction—of all living things—of the enemy.”⁹⁸ Perhaps because of Alter’s qualms about such a genocidal order, he notes that “there is at least some margin of ambiguity as to whether the real source of this ferocious imperative is God or the [false?] prophet [Samuel] who claims to speak on His behalf.”⁹⁹ Still, whatever the answer to that question, God is reported to “repent that I made Saul king, for he has turned back from Me, and My words [to commit genocide] he has not fulfilled.”¹⁰⁰ The divine

⁹³ SOREN KIERKEGAARD, FEAR AND TREMBLING AND THE SICKNESS UNTO DEATH 67 (Walter Lowrie trans., Princeton Univ. Press 1941).

⁹⁴ *Id.* at 64-77.

⁹⁵ For a withering analysis of such submission to historical “necessity,” see generally ALBERT CAMUS, THE REBEL: AN ESSAY ON MAN IN REVOLT (Vintage Books 1956).

⁹⁶ See 1 *Samuel* 15, in 2 THE HEBREW BIBLE: PROPHETS 234, 234-39 (Robert Alter trans., 2019).

⁹⁷ *Id.* at 15:3, 234 (emphasis added). God “repents” of his having named the obviously squishy Saul as king. *Id.* at 15:10-11, 234.

⁹⁸ *Id.* at 235 n.3.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 15:11, 234.

sovereign apparently demands absolute commitment to formal divine law, even when that law defies any reasonable human notion of morality. The New Testament echoes the Hebrew Bible on divine sovereignty. Saul of Tarsus, or Saint Paul, in his Letter to the Romans, crisply writes, “Let everyone be subject to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God.”¹⁰¹

The discovery, population, and creation of new countries in the New World took place when the locus of sovereignty was shifting. During the sixteenth century, Thomas More, a devout Catholic, suffered death by remaining loyal to Rome and papal sovereignty when rejecting Henry VIII’s claim to regal sovereign authority.¹⁰² As Hilary Mantel emphasizes in her historical-fiction study of that period, More was not hesitant to demand the lives of those he deemed heretics against the teachings of Rome.¹⁰³ He died for his beliefs in papal sovereignty, just as he had put to death others who dared to locate sovereignty elsewhere.¹⁰⁴ By the seventeenth and eighteenth centuries, More’s assertions of papal sovereignty, Henry VIII’s assertions of regal sovereignty, and all other variations on divine sovereignty were widely discredited.¹⁰⁵ By 1800, especially in the United States, the controversy between More and Henry VIII was anachronistic.

“Popular sovereignty,” which might be described as the unbridled rule by the people, had replaced divine sovereignty, whether understood as the rule of Rome or the rule of kings.¹⁰⁶ For some, the “voice of the people” was equivalent to “the voice of God.”¹⁰⁷ “Vox populi, vox Dei” (the voice of the people is the voice of God) captured the new sovereignty,¹⁰⁸ even as that expression was originally used sarcastically to criticize the *chutzpah*¹⁰⁹ involved in substituting mere

¹⁰¹ *Romans* 13:1.

¹⁰² See WILL DURANT, *THE REFORMATION* 555-58 (MJF Books 1957).

¹⁰³ See generally Hilary Mantel, *Wolf Hall* (2009).

¹⁰⁴ *Id.*

¹⁰⁵ For the rise of popular sovereignty, see EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* (W.W. Norton & Co. 1988).

¹⁰⁶ See generally *id.*

¹⁰⁷ *Id.* at 13.

¹⁰⁸ See Christian G. Fritz, *Out from Under the Shadow of the Federal Constitution*, 41 RUTGERS L.J. 851, 852 (2010).

¹⁰⁹ See *Chutzpah*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Chutzpah> (defining “chutzpah” as “the quality of audacity for good or for bad”) (last visited Feb. 19, 2022); LEO ROSTEN, *THE JOYS OF YINGLISH* 117-20 (McGraw-Hill Publ’g Co. 1989).

human beings for God as the source of authority.¹¹⁰ For many students or devotees of the Constitution of the United States, both in the eighteenth and twenty-first centuries, the basis of constitutional authority was “ordination” by “We the People.”¹¹¹ The first *Federalist* declares, “it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice”¹¹²

Oaths of office, which are quite prominent in the text of the Constitution,¹¹³ signify this willingness to submit oneself to the will of the people, assuming what the people had commanded may be ascertained. Now-Congressman Jamie Raskin captured the inversion of sovereign authority when, as a Maryland state legislator protesting religious demands for bans on same-sex marriage, he observed that when taking office, he had put his hand on the Bible to swear allegiance to the Constitution; he did not put his hand on the Constitution to swear allegiance to the Bible.¹¹⁴

Popular sovereignty is the foundation of most contemporary American theories of “constitutional interpretation,” which eschew

See also Max Stearns, *Liberty, Civilization, and COVID Chutzpah*, blindspotblog.us (Aug. 30, 2020), <https://www.blindspotblog.us/post/covid-liberty-and-chutzpah> (“Chutzpah is a Yiddish word that some claim can't really be defined. The classic example involves a child who, after murdering his parents, pleads for clemency on the grounds of being an orphan”).

¹¹⁰ See James A. Gardner, *Madison's Hope: Virtue, Self-Interest, and the Design of Electoral Systems*, 86 IOWA L. REV. 87, 131 (2000).

¹¹¹ See MORGAN, *supra* note 105, at 283.

¹¹² THE FEDERALIST NO. 1, at 33 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹¹³ For the presidential oath in the Constitution, see U.S. CONST. art. II. For the requirement that all public officials pledge fealty to the Constitution, see U.S. CONST. art. VI.

¹¹⁴ *Emotions Flare Over Same-Sex Marriage*, BALT. SUN: CAP. NOTEBOOK (Mar. 2, 2006), <https://www.baltimoresun.com/news/bs-xpm-2006-03-02-0603020182-story.html>. William J. Brennan, in his confirmation hearings before the Senate Judiciary Committee, stated that he could not imagine that his fidelity to the Constitution would conflict with his duties as a Catholic; however, he assured the senators that, should such a conflict occur, his oath to support, protect, and defend the Constitution would take precedence. Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047, 1062-63 (1990). At least one critic described this as “idolatry.” *Id.* at 1066 n.64.

natural law for positivism.¹¹⁵ We may argue about the “proper interpretation” of the People’s will, but finding arguments that the ascertainable will should be ignored in favor of some other value, including adherence to a morality that has been rejected by the relevant “people,” is rare. Even Ronald Dworkin, who emphasized overarching “principles” as central to proper legal interpretation, rejected the universalistic commitments of classical “natural law.”¹¹⁶ Dworkin’s principles made the Constitution “the best it could be” which was different from the best overall polity.¹¹⁷ If a fundamental principle of American constitutionalism was the priority of the Union and, therefore, the necessity to enforce a “rotten compromise” vis-à-vis slavery in order to do so,¹¹⁸ then Dworkians might behave as did the justices Cover studied. Story and McLean rested their constitutionally pro-slavery arguments on the foundations and principles established by the “vox populi” when defending positions they “knew” to be subject to devastating moral criticism.¹¹⁹ The Constitution commanded that slavery be protected. Kierkegaard would have understood their behavior all too well.

¹¹⁵ RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* (2016). Barnett’s book is the exception that proves the rule. Barnett explicitly criticizes “democratic” theories of interpretation for ignoring the teachings of natural law and natural right. *Id.* at 22-26. Barnett is a prominent devotee of “originalism” in the contemporary legal academy, which is a relentlessly positivist theory of interpretation. Perhaps as a result, he is also devoted to demonstrating that those scholars who agree with William Lloyd Garrison mistakenly believe that the Constitution is a “covenant with death and an agreement with hell” concerning slavery. *See* BARNETT & BERNICK, *supra* note 38, at 89-93. He can be credited with “rediscovering” Lysander Spooner and touting his theory that the Constitution, correctly understood, was anti-slavery. *Id.* at 91-93. Cover’s one reference to Spooner described him as “utopian.” COVER, *supra* note 1, at 154. He did not take Spooner seriously as a proper entry point to constitutional interpretation.

¹¹⁶ *See* Kenneth Einar Himma, *Situating Dworkin: The Logical Space Between Legal Positivism and Natural Law Theory*, 27 OKLA. CITY UNIV. L. REV. 41, 95-107 (2002).

¹¹⁷ James E. Fleming, *Fit, Justification, and Fidelity*, 93 B.U.L. REV. 1283, 1292 (2013) (paraphrasing RONALD DWORKIN, *LAW’S EMPIRE* 255 (Harv. Univ. Press 1986)).

¹¹⁸ MARGALIT, *supra* note 71, at 55-57.

¹¹⁹ *See, e.g.,* DUNNE, *supra* note 70, at 401-02.

The vox populi, vox dei, and Judaism are structured by dubious assertions of unity: “We are one.”¹²⁰ The constant refrain in the Jewish community that “we are one” is belied by substantial disagreements between more-orthodox and reform Jews over almost every current political issue, not to mention basic theological differences between the various branches of Judaism. Although “we are one” is often used when Jews are called to support Israel, when Israel was first established in 1948, many Orthodox Jews withheld their support out of a belief that only the Messiah could establish a “Jewish state.”¹²¹ This position is still adhered to by some of the “ultra-Orthodox” in Jerusalem.¹²² At the same time, many Reform Jews currently withhold their support in part because of the exclusionist theory of “who is a Jew” still instantiated in important aspects of Israeli law (such as marriage).

The English-American translation of “e pluribus unum” is “out of many, one,” but the American vernacular translation might be “we are one.” Hector de Crevecoeur captured part of this American spirit when he wrote:

What then is the American, this new man? He is either a European, or the descendant of a European, hence that strange mixture of blood which you will find in no other country. I could point out to you a family whose grandfather was an Englishman, whose wife was Dutch, whose son married a French woman, and whose present four sons have now four wives of different nations, *He* is an American who, leaving behind him all his ancient prejudices and manners, receives new ones from the new mode of life he has embraced, the new government he obeys, and the new rank he holds. He becomes an American by being received in the broad lap of our great *Alma Mater*. Here individuals of all nations are melted into a new race of men, whose

¹²⁰ See Image search for “we are one Judaism,” MICROSOFT BING, <https://www.bing.com/images/search?q=we+are+one+judaism&form=QBIR&first=1&tsc=ImageBasicHover> (last visited Jan. 7, 2022).

¹²¹ See Daniel Sugarman, *Who Are the Neturei Karta*, JEWISH CHRON. (Sept. 11, 2017), <https://www.thejc.com/comment/comment/who-are-the-neturei-karta-1.444090>.

¹²² See Norman Lamm, *The Ideology of the Neturei Karta: According to the Satmar Version*, 12 TRADITION: J. ORTHODOX JEWISH THOUGHT 38 (1971).

labours and posterity will one day cause great changes in the world.¹²³

The more-famous, if less-elegant, version of this catechism is the Publian claim in *Federalist No. 2*:

Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established their general liberty and independence.¹²⁴

One might easily ask students, “what is wrong with these pictures?” Consider those numerous Americans who had to read the Constitution in German or Dutch, and the nearly one-third of all Americans who were loyalists during the American Revolution, many of whom had the courtesy to flee what was no longer “their” country. Racialized chattel slavery was a flourishing institution even in the New York in which John Jay wrote *Federalist No. 2*. Slavery was not abolished in New York until 1827, and the strong connections between Southern cotton-growers and New York financiers—including the Jewish Lehman brothers who had moved from Alabama to New York—helped to explain the Copperhead sympathies of New York’s Civil War Mayor, Fernando Wood, and the anti-Black antipathy of many white working class New Yorkers who participated in the anti-draft riots of 1863 in New York.¹²⁵ *E pluribus unum*, Crevecoeur, and *Federalist No. 2* were hardly guides to the politics of New York City during the Civil War, or for that matter, today.

The reason why political actors and leaders of faith communities proclaim that “we are one” in the face of apparently intractable diversity is inherent in the nature of collective action. Government and social life cannot function if persons view themselves

¹²³ John Hector St. John de Crèvecoeur, *What is an American?* (1782) in LETTERS FROM AN AMERICAN FARMER, 40, 43-44 (Susan Manning ed., 2009).

¹²⁴ THE FEDERALIST NO. 2, at 38 (John Jay).

¹²⁵ See IVER BERNSTEIN, THE NEW YORK CITY DRAFT RIOTS: THEIR SIGNIFICANCE FOR AMERICAN SOCIETY AND POLITICS IN THE AGE OF THE CIVIL WAR (Oxford Univ. Press 1990).

as truly sovereign and obey only the laws they think just. Rousseau's general will describes political and social phenomena.¹²⁶ People are free to vigorously debate proposed government laws and policies, but no analogous disagreement exists on the duty to obey.¹²⁷ The general will governs after the laws are passed or official decisions are made.¹²⁸ We are one.

All relationships, to some degree, require the suspension of the ethical. If, as Graber's brother-in-law, Rabbi Neil Kominsky, points out, "all children grow up in mixed households," then one or both spouses must consistently make what they think are ethical sacrifices for the sake of the marriage.¹²⁹ Religious education is likely to include what one or both spouses think are heretical doctrines that will prevent their offspring from entering the Kingdom of Heaven at the appointed hour.¹³⁰ Children are likely to grow up in mixed political households as well, given no two people are likely to have identical opinions on all the political issues of the day. These require the same suspension of the ethical. "Hell is—other people,"¹³¹ Sartre declared. Living with other people inevitably requires doing things that one might fear lead one to Hell. Resolving moral-formal dilemmas in favor of "covenant[s] with death"¹³² keeps marriages, families, relationships, and countries intact. Much civil disobedience may be a cry that this relationship needs counseling, if not a divorce lawyer.

¹²⁶ See JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 69-78 (Maurice Cranston trans., Penguin Books 1968).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Conversation with Rabbi Neil Kominsky on Feb. 4, 2022 at 9:55 AM EST.

¹³⁰ This, of course, is the central realization of Huck Finn when he realizes that his relationship with Jim, the fugitive slave, will require Huck to "go to hell" because of his choosing loyalty to Jim over loyalty to the slave regime, as represented by a letter he had written, but not yet sent, to Miss Watson, who represented the "respectable" and slavery-tolerating, society. See MARK TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN* 281-84 (Charles L. Webster & Co. 1884) ("It was a close place. I took . . . up [the letter to Miss Watson], and held it in my hand. I was a-trembling, because I'd got to decide, forever, betwixt two things, and I knowed [sic] it. I studied a minute sort of holding my breath, and then says to myself: 'All right, then, I'll go to hell'—and tore it up. It was awful thoughts, and awful words, but they was said. And I let them stay said; and never thought no more about reforming.").

¹³¹ JEAN-PAUL SARTRE, *No Exit* (1945) in *NO EXIT AND THREE OTHER PLAYS* 1, 45 (Stuart Gilbert trans., Vintage Books 1989).

¹³² William Lloyd Garrison, *The American Union*, 15 *LIBERATOR* 5, 5 (1845).

III. LAWYERS AND THE MORAL-FORMAL-DILEMMA

Cover became a lawyer and entered the legal academy when the most pressing issue discussed in the halls of academe was “constitutional interpretation” and more particularly, the role of the judge in ascribing meaning to what Justice Robert Jackson rightly identified as the “majestic generalities” of the Constitution.¹³³ *Justice Accused* reflects the “countermajoritarian obsession”¹³⁴ with the role of justices in a democracy, as well as the anguished debates taking place throughout the country over civil disobedience and the concomitant meaning of “the rule of law.”¹³⁵ Cover would soon write pathbreaking works on the nomic capacities of individuals and groups, who are far removed from the judiciary, to become lawmakers and declarers of what law requires¹³⁶; however, that development could not have been predicted from *Justice Accused*. That work adopted the then (and possibly now) conventional assumption that Justices might have a special role for maintaining the quality of justice in the United States or, as Frank Michelman suggested, “listening for voices from the margin.”¹³⁷ Ironically, that perception of the unique role of Justices in facing a moral-formal dilemma was rooted in the distinctive constitutional politics of the Great Society Era rather than in a timeless judicial role that united Joseph Story and John McLean, on the one hand, and Earl Warren and Thurgood Marshall, on the other.

Felix Frankfurter educated the generation of lawyers who came of age during the New Deal Era in the virtues of what became known as “judicial restraint.”¹³⁸ Justices, the catechism went, should defer, except under very special circumstances, to decisions made by other

¹³³ *W. Va. State Bd. Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

¹³⁴ Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 219 (2002).

¹³⁵ See COVER, *supra* note 1, at 6-7.

¹³⁶ See generally Cover, *supra* note 92 (discussing the normative world, or *nomos*, where people determine rights and wrongs without the judiciary); Robert M. Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815 (1986) (discussing the law as “one of the liberal arts”).

¹³⁷ Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1537 (1988).

¹³⁸ See Jeffrey Rosen, *The Supreme Court: Judicial Temperament and the Democratic Ideal*, 47 WASHBURN L.J. 1, 1-3 (2007) (discussing the importance of judicial temperament as embodied by Chief Justice John Marshall). But see Mark A. Graber, *False Modesty: Felix Frankfurter and the Tradition of Judicial Restraint*, 47 WASHBURN L.J. 23, 23-27 (2007) (providing a response to Rosen’s essay where Graber discusses Justice Frankfurter’s false judicial modesty).

branches of government.¹³⁹ While discussing the role of the Supreme Court in *Trop v. Dulles*,¹⁴⁰ Justice Frankfurter maintained that the Court

must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the Executive Branch do.¹⁴¹

Committed to this deferential understanding of judicial power, Frankfurter became infamous among most progressive students of the time for his opinions sustaining illiberal uses of state power.¹⁴² In *State of Louisiana ex rel. Francis v. Resweber*,¹⁴³ Frankfurter cast the deciding vote for a 5-4 majority that allowed the state to “re-execute” a defendant whose first visit to the electric chair was “unsuccessful” because the current was strong enough only to torture, but not kill, him.¹⁴⁴ Frankfurter was appalled by Louisiana’s cruelty, but he insisted that was not relevant to his duties as a judge.¹⁴⁵ Frankfurter concluded that

this Court must abstain from interference with State action no matter how strong one's personal feeling of revulsion against a State's insistence on its pound of flesh . . . that were I to hold that Louisiana would transgress the Due Process Clause if the State were allowed, in the precise circumstances before us, to carry out the death sentence, I would be enforcing my private view rather than that consensus of society's opinion

¹³⁹ Rosen, *supra* note 138, at 6-7.

¹⁴⁰ 356 U.S. 86 (1958).

¹⁴¹ *Id.* at 120.

¹⁴² *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940); *W. Va. State Bd. Educ. v. Barnette*, 319 U.S. 624, 646-71 (1943) (Frankfurter, J., dissenting); *Korematsu v. United States*, 323 U.S. 214, 224-25 (1944) (Frankfurter, J., concurring); *Dennis v. United States*, 341 U.S. 494, 517-61 (1951) (Frankfurter, J., concurring).

¹⁴³ 329 U.S. 459, 466-72 (1947) (Frankfurter, J., concurring).

¹⁴⁴ *Id.* at 460, 464-66.

¹⁴⁵ *Id.* at 470-71.

which, for purposes of due process, is the standard enjoined by the Constitution.¹⁴⁶

Finally, Frankfurter's dissent on the Court in *Baker v. Carr*¹⁴⁷ told complainants about malapportionment to attempt to "sear[] the conscience" of the Tennessee representatives who benefitted from the existing system.¹⁴⁸

Philip Kurland's notorious "Foreword" to the November 1964 issue of the *Harvard Law Review* illustrates Frankfurter's hold on the generation of scholars who came of age during the New Deal.¹⁴⁹ When reviewing the previous judicial term, Kurland, in no uncertain terms, castigated those who were then in control of the Supreme Court for misusing their power as apex judges.¹⁵⁰ Quoting fellow former Frankfurter clerks Alexander Bickel and Harry Wellington, Kurland asserted

The Court's product has shown an increasing incidence of the sweeping dogmatic statement, of the formulation of results accompanied by little or no effort to support them in reason, in sum, of opinions that do not opine and of per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree.¹⁵¹

¹⁴⁶ *Id.* at 471. Frankfurter's reference to the "pound of flesh," of course, can be read as a reference to Shylock's demand, in *The Merchant of Venice*, for Antonio's "pound of flesh" as compensation for his failure to meet the terms of the bond he had entered into with Shylock. See WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 1, sc. 3, l. 155-63. The money-lender, Shylock, can easily be viewed as an anti-Semitic caricature of ostensibly Jewish legalism, against the "mercy" ostensibly defended by Portia (whose "mercy" in part includes forcing Shylock to convert to Christianity). So, was Frankfurter consciously emulating his fellow Jew, Shylock, in legitimizing Louisiana's demand for its "pound of flesh" instead of joining his four colleagues who would have been more merciful to the poor wretch, Willie Francis?

¹⁴⁷ 369 U.S. 186 (1962).

¹⁴⁸ *Id.* at 270 (Frankfurter, J., dissenting).

¹⁴⁹ See generally Philip B. Kurland, *Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143 (1964); Martin Shapiro, *Fathers and Sons: The Court, the Commentators, and the Search for Values*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 218, 218-20 (Vincent Blasi ed., Yale Univ. Press 1983).

¹⁵⁰ Kurland, *supra* note 149, at 143-45.

¹⁵¹ *Id.* at 145.

The moral-formal dilemma, Kurland asserted, in all cases south of *Brown v. Board of Education*,¹⁵² was to be solved in favor of the law.¹⁵³ The rule was deference to the decisions of legislatures or other non-judicial officials authorized to posit law. These comments obscured how Kurland was a raging proponent of judicial power from a Frankfurterian perspective. His acceptance of *Brown* placed him on the judicial activist side of the Frankfurterian ledger.¹⁵⁴ Many Frankfurterians, most notably Herbert Wechsler and Learned Hand, insisted *Brown* was inconsistent with the judicial duty to decide cases on the basis of neutral principles, the most neutral of which was the judicial duty to defer to the legislature.¹⁵⁵

Justice Oliver Wendell Holmes, Jr. was Frankfurter's great hero and a heroic figure for many other political liberals who came of age during the New Deal. Holmes may have initially enlisted to fight for the Union in 1861 because of his moral opposition to slavery; but, the carnage of war, including three wounds, made him a thoroughgoing skeptic about the meaning of political morality.¹⁵⁶ Although Holmes sometimes upheld the legal claims made by progressive activists, he had no real patience for "do-gooders." He happily wrote John W. Davis, who would later defend segregated schools in *Brown*, that "if my country wants to go to hell, I am here to help it."¹⁵⁷ Frankfurter famously defended, in *The New Republic*,¹⁵⁸ Holmes's judicial passivity in such cases as *Meyer v. Nebraska*¹⁵⁹ and *Pierce v. Society of Sisters*,¹⁶⁰ which would have allowed states, respectively, to ban teaching youngsters German and all private education more

¹⁵² 347 U.S. 483 (1954).

¹⁵³ Kurland, *supra* note 149, at 157-58.

¹⁵⁴ *Id.* at 156-58.

¹⁵⁵ See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 22-34 (1959) (discussing the Court's inconsistent neutral principles in "the school-segregation ruling of 1954" as well as other racially-charged cases). See also LEARNED HAND, *THE BILL OF RIGHTS* 54-55 (Atheneum 1958).

¹⁵⁶ See ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 41-51 (2000) (discussing the differences between a pre-war and post-war Justice Holmes).

¹⁵⁷ See WILLIAM H. HARBAUGH, *LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS* 120 (Univ. Press Va. 1973) (discussing Davis's defense of segregation and eventually his opposite stance later in life).

¹⁵⁸ Felix Frankfurter, Unsigned Editorial, *Can the Supreme Court Guarantee Toleration?*, NEW REPUBLIC, June 1923 at 85, 86.

¹⁵⁹ 262 U.S. 390 (1923).

¹⁶⁰ 268 U.S. 510 (1925).

generally.¹⁶¹ Later that decade, Holmes issued his notorious opinion in *Buck v. Bell*.¹⁶² In his cavalier three-page opinion, Holmes dismissed what we would today recognize as standard-model equal protection arguments as “the usual last resort” of constitutional lawyers who lacked any genuine arguments for their position.¹⁶³ Yosai Rogat demonstrated that on the racial issues that came before the early twentieth century Supreme Court, Holmes “simply did not care.”¹⁶⁴ Neither did Frankfurter. Although a committed proponent of racial equality outside the legal system,¹⁶⁵ Frankfurter devoted nary a word to Holmes’s willingness to write and join judicial opinions that accepted the second-class status of African Americans in American society.¹⁶⁶

Comparative youngsters who were just entering the academy in the 1960s and 1970s were tempted to cite the future Nobelist Bob Dylan: “[S]omething is happening here/ But you don't know what it is/ Do you, Mr. Jones?”¹⁶⁷ In this case, Professor Kurland was the person who, in the words of another Dylan song, “turn[ed] his head and pretend[ed] that he just doesn’t see.”

Things were “happening” at the Supreme Court. The heroes of most progressives of the time were Earl Warren, William Brennan, and, later, Thurgood Marshall. Warren was celebrated for asking from the bench whether litigants were championing positions that were “fair.”¹⁶⁸ The Warren Court overturned much precedent in the name of creating a better United States, although the liberal Justices who sat on the Warren Court exercised extreme deference to any and all assertions by Congress of a power to regulate anything touching on

¹⁶¹ See *Meyer*, 262 U.S. at 398, 403; *Pierce*, 268 U.S. at 530, 534-35.

¹⁶² 274 U.S. 200, 205-208 (1927).

¹⁶³ *Id.* at 208.

¹⁶⁴ Yosai Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 255 (1964).

¹⁶⁵ LEONARD BAKER, *BRANDEIS & FRANKFURTER: A DUAL BIOGRAPHY* 473-74 (Harper & Row Publishers 1984).

¹⁶⁶ Frankfurter talked about Holmes extensively in his reminiscing, but never about race. See HARLAN B. PHILLIPS, *FELIX FRANKFURTER REMINISCES* (Reynal & Co. 1960).

¹⁶⁷ BOB DYLAN, *BALLAD OF A THIN MAN* (Columbia Records 1965). Graber has no idea what Levinson is talking about. He suspects this is not a translation of the finale to Mahler 2.

¹⁶⁸ Justin Driver, *The Constitutional Conservatism of the Warren Court*, 100 CAL. L. REV. 1101, 1164 (2012).

interstate commerce.¹⁶⁹ “Skepticism, Democracy, and Judicial Restraint,” Levinson’s 1969 Ph.D. dissertation that discussed the paragons of judicial restraint—Oliver Wendell Holmes and Frankfurter, was a typical work written by a member of the rising generation of legal intellectuals who did not convey much admiration for either person as a model judge.¹⁷⁰ In *Lochner v. New York*,¹⁷¹ Holmes dissented, exclaiming that even “tyrannical” laws were perfectly legitimate in almost all instances.¹⁷² Levinson and his peers treated that comment as being subversive of constitutional democracy even as their seniors regarded such utterances as being at the heart of constitutional democracy.¹⁷³

The scholars who came of age during the Great Society changed how constitutional lawyers assessed judges.¹⁷⁴ Even if Frankfurter’s suggestion that the Supreme Court could not “guarantee toleration”¹⁷⁵ was correct, Cover and his generational cohorts, which included Levinson, were not convinced that Justices should make no effort to do so. *Justice Accused* was written at a time when “judicial restraint” was passe. The Great Society was an era in the United States of what a recently published book on comparative constitutional law calls “towering judges.”¹⁷⁶ What made a judge “tower” was a willingness to use judicial power on behalf of humanistic values.¹⁷⁷ The point of being a judge was to use judicial power to make the world better.¹⁷⁸ The moral-formal dilemma was almost always resolved in favor of justice.¹⁷⁹

¹⁶⁹ See, e.g., *Perez v. United States*, 402 U.S. 146, 156-57 (1971); *Katzenbach v. McClung*, 379 U.S. 294, 304-05 (1964).

¹⁷⁰ Sanford Levinson, *Skepticism, Democracy, and Judicial Restraint: An Essay on the Thought of Oliver Wendell Holmes and Felix Frankfurter* (1969) (Ph.D. dissertation, Harvard University) (on file with Harvard University Archives) [hereinafter *Skepticism*]. See also Sanford Levinson, *The Democratic Faith of Felix Frankfurter*, 25 STAN. L. REV. 430, 447-48 (1973) [hereinafter *Democratic Faith*] (discussing Frankfurter’s and Holmes’ different paths to judicial restraint).

¹⁷¹ 198 U.S. 45 (1905).

¹⁷² *Id.* at 75-76 (Holmes, J., dissenting).

¹⁷³ Levinson, *supra* note 170.

¹⁷⁴ Shapiro, *supra* note 149, at 220-25.

¹⁷⁵ Frankfurter, *supra* note 148, at 85-87.

¹⁷⁶ See generally TOWERING JUDGES: A COMPARATIVE STUDY OF CONSTITUTIONAL JUDGES (Rehan Abeyratne & Iddo Porat eds., 2021).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

The very young Cover and his generation nevertheless initially adhered to the judicial-centric understanding of the New Deal conceptual universe.¹⁸⁰ The job of the academic lawyer was devoted almost entirely to critiquing a particular subset of public officials called judges.¹⁸¹ Cover's immediate ancestors explained why those "towering justices" should defer to the moral judgments made elsewhere in the political system.¹⁸² Cover and his cohorts offered justifications of judicial power on behalf of broadly progressive values, whether defined in terms of anti-slavery, civil rights, or placing restraints on the modern state's powers to suppress dissent.¹⁸³ They readily criticized those judges who became, to quote what Holmes offered as his self-description, "the supple tool of power."¹⁸⁴ The constitutional theories of the Great Society were not directed at presidents or members of Congress because, as Herbert Wechsler had pointed out, elected officials were authorized to make decisions on political expedience rather than constitutional principle.¹⁸⁵

The judicial restraint versus judicial activism debate was rooted in the particular features of the "long state of courts and parties."¹⁸⁶ Throughout much of American history, polarized elites looked to politics to resolve contested constitutional questions. Both *Federalist No. 48* and *Federalist No. 51* scorn parchment barriers as a means for maintaining the separation of powers.¹⁸⁷ Writing as Publius, both Madison and Hamilton, thought that "encroachments" would be prevented if powers were divided horizontally and vertically, between

¹⁸⁰ Mark A. Graber, *The Collapse of the New Deal Conceptual Universe: The Schmooze Project*, 77 MD. L. REV. 108, 112-13 (2017).

¹⁸¹ *Id.* at 111-12.

¹⁸² See Wechsler, *supra* note 155, at 22-34 (criticizing various exercises of judicial power, including the Supreme Court's "school-segregation ruling of 1954" as well as other racially-charged cases); HAND, *supra* note 155, at 56-77.

¹⁸³ See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xii-xiii (Harv. Univ. Press 1977); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 183 (Harv. Univ. Press 1980); MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* ix-x (Yale Univ. Press 1982).

¹⁸⁴ *Democratic Faith*, *supra* note 170, at 448 n.9. He had suggested this as a possible carving on his gravestone. *Id.*

¹⁸⁵ Wechsler, *supra* note 155, at 14-15.

¹⁸⁶ See Mark A. Graber, *Kahn and the Glorious Long State of Courts and Parties*, 4 CONST. STUD. 1, 16 (2019).

¹⁸⁷ THE FEDERALIST NO. 48, at 313 (James Madison) ("a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments").

the different branches of the federal government and between the federal and state governments. Controversies over the responsibilities of different branches of government would be settled by a process of political negotiation with all government institutions beginning with sufficient prerogatives to protect their basic functions.¹⁸⁸ Martin Van Buren, Abraham Lincoln, and other prominent political actors during the middle two quarters of the nineteenth century thought dominant political parties would resolve contested constitutional questions.¹⁸⁹ At several points in his career, Lincoln pointed to elections as the means for overthrowing the regime of *Dred Scott*.¹⁹⁰

The moral-formal dilemma in the United States from ratification to the late nineteenth century occurred only in the relatively rare instance when a committed antislavery judge adjudicated a freedom suit. This helps explain why almost all of Cover's Justices hailed from free states and tended not to be northern Jacksonians.¹⁹¹ Most Justices who held office immediately before the Civil War were slaveholders who fully supported slavery, or northern doughfaces who, at most, found slavery somewhat distasteful.¹⁹² The only moral-formal dilemma that pro-slavery judges faced before the Civil War arose in cases concerning the international slave trade, where federal laws that aggressively implemented bans on human commerce might be inconsistent with those Justices' probable moral views.¹⁹³ In several

¹⁸⁸ The *locus-classicus* of this argument is THE FEDERALIST NO. 51, at 347-53.

¹⁸⁹ See Mark A. Graber, *Separation of Powers*, in THE CAMBRIDGE COMPANION TO THE UNITED STATES CONSTITUTION 224, 235-42 (Karen Orren & John W. Compton eds., Cambridge Univ. Press 2018).

¹⁹⁰ See Abraham Lincoln, Notes for Speeches at Columbus and Cincinnati, Ohio, in 1 COLLECTED WORKS OF ABRAHAM LINCOLN 435-36 (Roy P. Basler ed., Rutgers Univ. Press 1953); Abraham Lincoln, Speech at Cincinnati, Ohio, in 1 COLLECTED WORKS OF ABRAHAM LINCOLN 435-36 (Roy P. Basler ed., Rutgers Univ. Press 1953). See also GRABER, *supra* note 53, at 120-26.

¹⁹¹ See COVER, *supra* note 1, at 81 (noting the many justices who did not experience moral-formal dilemmas when adjudicating slavery cases because they were not wholeheartedly opposed to slavery).

¹⁹² Mark A. Graber, *Dred Scott as a Centrist Decision*, 83 N.C.L. REV. 1229, 1232 (2005).

¹⁹³ Many slaveholders thought the international slave trade, including the Middle Passage from Africa to the New World, was horrendous. They also believed that slavery within the United States was benevolent and that new enslaved persons who were created through the domestic market by breeding would be better attuned to the demands of American slavery than would newcomers from Africa. For a discussion of southern debates over the international slave trade, see RONALD T. TAKAKI, A PRO-SLAVERY CRUSADE: THE AGITATION TO REOPEN THE AFRICAN SLAVE TRADE

cases, southern Justices echoed Justice Story's rhetoric in *Prigg* when sustaining federal laws restricting the international slave trade.¹⁹⁴ Still, such decisions may be explained less by the need to respect antislavery compromises as by substantial opposition to the international slave trade, banned by the Constitution of the Confederate States¹⁹⁵ and in most slave states.¹⁹⁶ After all, the limitation on the importation of enslaved persons meant an increase in the market value of domestic persons who were offered by their "masters" for sale.¹⁹⁷

Most anti-slavery Justices in the antebellum regime, Story being the best example, recognized that slaveholders were crucial coalition partners. These opponents of human bondage had good political reasons for supporting laws that they may have believed necessary to keep their coalition and nation together.¹⁹⁸ Story's slavery jurisprudence veered rightwards as he became an important actor on the national scene. Again, no moral-formal dilemma, or whatever moral-formal dilemma existed, was resolved by politics. The only Justices in Jacksonian America who could experience the moral-formal dilemma were the few northern state Supreme Court Justices who were not only anti-slavery, but were also part of anti-slavery political coalitions.¹⁹⁹ As H. Robert Baker amply documented,²⁰⁰ the Wisconsin experience demonstrates that such state justices often

(Free Press 1971). Henry Clay acted on this commitment when, as part of the Compromise of 1850, he proposed the prohibition of the flourishing slave trade in Washington DC, while continuing to support slavery. See ROBERT REMINI, HENRY CLAY: STATESMAN FOR THE UNION 732-33 (W.W. Norton & Co. 1991). He maintained that the organization of "the remainder of the Mexican cession," other than California—which was admitted as a free state, should be without "any restriction or condition on the subject of slavery." See SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY 638 (2005).

¹⁹⁴ *United States v. Haun*, 26 F. Cas. 227, 232 (C.C.S.D. 1860) (No. 15,329); *In re Charge to Grand Jury*, 30 F. Cas. 1026, 1032 (C.C. D. Ga. 1859) (No. 18,269a).

¹⁹⁵ *The Constitution of the Confederate States of America*, in 5 THE COMPLETE AMERICAN CONSTITUTIONALISM: THE CONSTITUTION OF THE CONFEDERATE STATES 100, 104 (Mark A. Graber & Howard Gillman eds., Oxford Univ. Press 2018).

¹⁹⁶ TAKAKI, *supra* note 193, at 103-33.

¹⁹⁷ *Id.* at 20-21.

¹⁹⁸ See RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840 237-38 (Univ. Cal. Press 1969).

¹⁹⁹ See, e.g., Shelden, *supra* note 61 (discussing McLean's antislavery political connections).

²⁰⁰ H. ROBERT BAKER, THE RESCUE OF JOSHUA GLOVER: A FUGITIVE SLAVE, THE CONSTITUTION, AND THE COMING OF THE CIVIL WAR (Ohio Univ. Press 2006).

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resolved the moral-formal dilemma in terms of morality. The Supreme Court of Wisconsin notably sustained a habeas ruling by lower state courts freeing a collaborator with a fugitive slave from federal custody.²⁰¹ Roger Taney rejected any such subversive notion of “states’ rights” in *Ableman v. Booth*,²⁰² which continues to be “good law.”²⁰³ *Ableman* suggests that Jacksonian deference was largely a myth.²⁰⁴ Justices in slavery cases made decisions based on their pro-slavery commitments, or those of their political allies. Judicial deference may have been more a post hoc rationalization, rather than a sincere commitment.

Constitutional politics was reorganized during the 1880s in a way that made the moral-formal dilemma a reality for more Justices. Parties marked by different constitutional visions were gradually replaced by parties that fought over the spoils of government.²⁰⁵ By 1912, both the Republican and Democratic parties had a more, and a less, progressive wing. Levinson’s favorite presidential election, the four-way contest between Woodrow Wilson, Theodore Roosevelt, William Howard Taft, and Eugene V. Debs, was possible only because neither Democrats nor Republicans were united on a clear constitutional vision. Parties that were not united on constitutional visions were poor vehicles for settling constitutional disputes. Some other institution, or institutional practice, had to be developed to articulate the official constitutional law of the land. The institution that replaced political parties was the court system, and the new practice was modern judicial review. As numerous scholars have documented, contemporary judicial review dates from the late nineteenth century,²⁰⁶ not from *Marbury v. Madison*.²⁰⁷

The peculiar feature of judicial review in the “long state of courts and parties” was that the justices were far more united than the parties on certain constitutional issues, at least with respect to policy preferences.²⁰⁸ Legal elites had opinions that differed substantially

²⁰¹ *In re Booth*, 3 Wis 1 (1854).

²⁰² 62 U.S. 506 (1859).

²⁰³ See *Danforth v. Minnesota*, 552 U.S. 264, 288 (2008).

²⁰⁴ See KEITH E. WHITTINGTON, *REPUGNANT LAWS: JUDICIAL REVIEW OF FEDERAL LAWS FROM THE FOUNDING TO THE PRESENT* 38-59 (Univ. Press Kan. 2019).

²⁰⁵ Graber, *supra* note 138, at 242-48.

²⁰⁶ See, e.g., ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* (University Press Kan. 1989); WHITTINGTON, *supra* note 204, at 38-39.

²⁰⁷ 5 U.S. 137 (1803).

²⁰⁸ Graber, *supra* note 186, at 16.

from those of ordinary citizens on the civil rights and civil liberties issues that confronted the Court during the three decades after World War II.²⁰⁹ Legal elites were committed to at least weak forms of racial equality. They favored giving free speech rights to Communists and Jehovah's Witnesses, and they endorsed wholeheartedly the due process revolution.²¹⁰ Ordinary Americans were badly divided on these matters, with rural and southern states more firmly committed to Jim Crow, restricting free speech, and crime-control models of criminal justice.²¹¹ When feminism and the sexual revolution hit the courts beginning in the 1960s, the same phenomena recurred: legal elites were enthusiastic proponents of weak liberal feminism and tended to support the sexual revolution, while less legal, and less elite, citizens were either divided or opposed.²¹²

The constitutional politics of the "long state of courts and parties" help explain why both Frankfurter and Cover treated moral-formal dilemmas as distinctively within the province of Justices, rather than as a conundrum for all participants in the constitutional order.²¹³ During the Jacksonian age, members of Congress, presidents, and political parties were considered important vehicles of constitutional meaning.²¹⁴ By 1970, proponents of judicial restraint and activism united in support of Ronald Dworkin's later claim that the judiciary was the unique forum of principle.²¹⁵ Debate was entirely over whether the forum of principle was committed to judicial restraint or judicial activism.²¹⁶

During the Jacksonian era, elites bitterly divided on the morality of slavery, on tolerating slavery, and on such matters as the merits of the national bank and internal improvements.²¹⁷ Few Justices actually confronted a moral-formal dilemma when considering

²⁰⁹ See, e.g., DIMENSIONS OF TOLERANCE, *supra* note 8, at 243-44.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² See Mark A. Graber, *The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making*, 56 HOWARD L. J. 661, 687-88 (2013).

²¹³ See COVER, *supra* note 1, at 6 (noting his study was about judges). For Frankfurter's emphasis on the judicial duty to follow law rather than morality, see *supra* notes 139-50 and accompanying text.

²¹⁴ See LEONARD & CORNELL, *supra* note 40.

²¹⁵ Graber, *supra* note 180, at 111.

²¹⁶ See, e.g., DAVID F. FORTE, *THE SUPREME COURT IN AMERICAN POLITICS: JUDICIAL ACTIVISM VS. JUDICIAL RESTRAINT* (Heath 1972).

²¹⁷ See GILLMAN ET AL., *supra* note 39, at 173-79.

questions about the powers of the national government that did not directly concern slavery.²¹⁸ By 1970, almost all Justices were New Deal liberals who abhorred Jim Crow and McCarthyism.²¹⁹ The moral-formal dilemma Cover wrote about was what Justices, and presumably only liberal Justices, faced in the Great Society when confronted with choices between judicial restraint and judicial activism.²²⁰

The Supreme Court occupied the central place in the self-image of such places as Columbia or Yale, where Cover taught (not to mention Harvard). Supreme Court Justices occupied prominent places in the physical buildings that housed the leading law schools in the United States. Anyone wandering the halls of most elite law schools and looking at the pictures of noted alumni who occupied the walls, who served as inspirations to new generations of students, would conclude that the job of the law school was to prepare students to become Supreme Court Justices. If they could not sit on the bench, students inspired by those portraits might become “cause lawyers” who would bring Supreme Court Justices sometimes audacious, but always brilliant, arguments whose acceptance would make the United States a more just society. The conversation in the physical building was devoted to the Supreme Court. Both in class and in named lectures, typically named after a Supreme Court Justice, students learned that the only judges worth talking about were Supreme Court Justices who had the practical power to reshape the law. Judges of what the Constitution labels as “inferior” courts²²¹ were rarely discussed at any great length, not least because they were viewed, rightly or wrongly, as far more constrained. There were a few exceptions, such as Learned Hand²²² or Henry Friendly,²²³ but by Cover’s era they were, like Frankfurter, figures of the past.²²⁴

²¹⁸ See Mark A. Graber, *Resolving Political Questions Into Judicial Questions: Tocqueville’s Thesis Revisited*, 21 CONST. COMMENT. 485 (2004).

²¹⁹ See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (Harv. Univ. Press 2000).

²²⁰ See *supra* note 16 and accompanying text.

²²¹ U.S. CONST. art. 1, § 8, cl. 9.

²²² See GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (Harv. Univ. Press 1994).

²²³ See DAVID M. DORSEN, *HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA* (Harv. Univ. Press 2012).

²²⁴ See, e.g., GUNTHER, *supra* note 222, at 664 (noting that by 1960 Hand when calling for judicial restraint “stood . . . virtually alone”); Michael Boudin, *Judge*

This fixation with Supreme Court judges (and judging) helps explain the modern academic (fixation with debating the pros and cons of “originalism.”²²⁵ Originalism matters, if originalism matters at all,²²⁶ only when the Supreme Court is making decisions. Whatever one thinks of originalism, and of such judges as Antonin Scalia or Clarence Thomas, originalism has little value with regard to almost all the constitutional litigation that takes place outside the sacred temple of the Supreme Court. As Levinson argued nearly a quarter century ago, debates over originalism are wholly irrelevant to most practicing lawyers who will never argue a case before the Supreme Court and “inferior” judges who define their role, for better or worse, as faithful agents of Supreme Court precedents.²²⁷ Some version of doctrinalism is the currency in the vast majority of constitutional arguments that take place in the lower federal courts. That some lower federal court justices might offer what appear to be strained interpretations of past precedent does not contradict the point that they present themselves as faithful agents. The very few “inferior” judges who dare to “overrule” the Supreme Court, even in the name of originalism, are almost always chastised.²²⁸

That Cover fixated on the role of the “judicial process” and judges when discussing the great conflicts that wrack our society was overdetermined and overvalued. What judges do, especially in the modern world, is respond to legislation passed by Congress or state legislatures or to decisions made by state or federal administrative agencies. Legal realists insisted that judges themselves “make law”; but, as an empirical matter, non-judicial officials were far more

Henry Friendly and the Mirror of Constitutional Law, 82 N.Y.U. L. REV. 975, 993 (2007) (noting that Friendly was out of step with Warren Court activism).

²²⁵ See David Fontana, *Comparative Originalism*, 88 TEX. L. REV. 189, 190 (2010).

²²⁶ See ERIC J. SEGALL, *ORIGINALISM AS FAITH* (Cambridge Univ. Press 2018).

²²⁷ See Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 HARV. J.L. & PUB. POL’Y 495 (1996), reprinted in *The Operational Irrelevance of Originalism*, in *LIBERTY UNDER LAW: AMERICAN CONSTITUTIONALISM, YESTERDAY, TODAY, AND TOMORROW* 105, 106, 112 (Kenneth L. Grasso & Cecilia Rodriguez Castillo eds., 1997).

²²⁸ For the fate of Judge Brevard Hand’s idiosyncratic interpretations of the Establishment Clause, see *Jaffress v. Bd. Sch. Comm’rs*, 554 F. Supp. 1104 (D.C. Ala. 1983). Or see also the Court’s opinion in *Agostini v. Felton*, 521 U.S. 203 (1997), when an inferior court dared, altogether correctly, to suggest that a precedent of the Supreme Court was in fact ripe for overruling because of the Court’s own clear hesitation to continue subscribing to it.

important as law-makers.²²⁹ Judges intervened in fugitive slave cases only in the rare instance when a claimed fugitive slave was hauled before a state or federal court or, in the rarer instance, when persons who assisted fugitives were indicted for federal crimes.²³⁰ The constitutional issues raised by the Vietnam War were resolved by the President and Congress.²³¹ The constitutionality of the War Powers Act of 1975²³² has yet to be adjudicated by the Supreme Court. The Civil Rights Act of 1964²³³ and Voting Rights Act of 1965²³⁴ were the subjects of intense constitutional debate in Congress²³⁵ and both did far more than any Supreme Court decision to eradicate Jim Crow.²³⁶

The contemporary fixation with Justices is also a product of “the long state of courts and parties.”²³⁷ Donald Morgan noted many years ago that for most of the nineteenth century, Congress was at least as much, if not considerably more, the center of constitutional debate in the United States than the Supreme Court.²³⁸ Congress debated the constitutionality of the national bank for more than thirty years until the Supreme Court in *McCulloch* did little more than reiterate arguments made in the national legislature and national executive.²³⁹ Questions of internal improvements were debated entirely within the national legislature, as were the questions raised by territorial expansion.²⁴⁰ The central themes of Taney’s opinion in *Dred Scott v. Sandford*²⁴¹ were articulated in the debates over the Missouri

²²⁹ See, e.g., Mark A. Graber, *Judicial Supremacy Revisited: Independent Constitutional Authority in American Constitutional Law and Practice*, 58 WM. & MARY L. REV. 1549 (2017).

²³⁰ One might compare the number of fugitive slaves to the number of federal and state cases on fugitive slaves.

²³¹ See SUSAN R. BURGESS, *CONTEST FOR CONSTITUTIONAL AUTHORITY: THE ABORTION AND WAR POWERS DEBATES* (Univ. Press Kan, 1992).

²³² 87 STAT. 555 (1973).

²³³ 78 STAT. 241 (1964).

²³⁴ 79 STAT. 437 (1965).

²³⁵ See generally HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960-1972* (Oxford Univ. Press 1990).

²³⁶ See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed., Univ. Chi. Press 2008).

²³⁷ See Graber, *supra* note 186, at 16.

²³⁸ See DONALD GRANT MORGAN, *CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY* (Harv. Univ. Press 1966).

²³⁹ See GILLMAN ET AL., *supra* note 39, at 124-36.

²⁴⁰ See Graber, *supra* note 218, at 508-16.

²⁴¹ 60 U.S. 393 (1856).

Compromise.²⁴² Questions of presidential and congressional power over war and peace were analyzed extensively during the Mexican War, the Civil War, and Reconstruction.²⁴³ Had Herbert Wechsler made his claim that we do not expect principled constitutional arguments from elected officials²⁴⁴ in a history seminar, he would have politely been given a dime (or a burner cell phone), told to call his parents, and report to them that he would never be an historian.

The issues discussed by Cover, and manifested in Story's and McLean's anguish, about conforming to their role as a judge committed to enforcing the law—independent of their views about the wisdom or morality of the issues being litigated—were hardly unique to judges in antebellum America. Alexis de Toqueville's oft-quoted remark that in America, all political issues are transformed into legal issues decided by judges²⁴⁵ is demonstrably false,²⁴⁶ even if Americans may be exceptional in “constitutionalizing” what in other countries would be only political disputes.²⁴⁷ Judges throughout American history have never been viewed as the only proper officials to debate and resolve important constitutional controversies.²⁴⁸ Public officials, most of whom were not lawyers, were expected to make constitutional arguments and to be bound by their conclusions.²⁴⁹

One of the first great constitutional debates, which was over the legitimacy of chartering the Bank of the United States in 1791, was resolved by George Washington when he decided to sign the bill passed by Congress²⁵⁰ only after listening to the constitutional

²⁴² See GRABER, *supra* note 53.

²⁴³ See, e.g., AMY S. GREENBERG, *A WICKED WAR: POLK, CLAY, LINCOLN, AND THE 1846 U.S. INVASION OF MEXICO* (Vintage Books 2012); DANIEL A. FARBER, *LINCOLN'S CONSTITUTION* (Univ. Chi. Press 2003); GREGORY P. DOWNS, *AFTER APPOMATTOX: MILITARY OCCUPATION AND THE ENDS OF WAR* (Harv. Univ. Press 2015); MARK A. GRABER, *PUNISH TREASON, REWARD LOYALTY: THE FORGOTTEN FOURTEENTH AMENDMENT I* (forthcoming 2022).

²⁴⁴ Wechsler, *supra* note 155, at 14-15.

²⁴⁵ 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Phillips Bradley ed., Vintage Classics 1990).

²⁴⁶ See generally Graber, *supra* note 218.

²⁴⁷ This gap between the U.S. and the rest of the world may, however, be narrowing. See generally Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93 (2008).

²⁴⁸ See JOHN J. DINAN, *KEEPING THE PEOPLE'S LIBERTIES: LEGISLATORS, CITIZENS, AND JUDGES AS GUARDIANS OF RIGHTS* (1998).

²⁴⁹ See MORGAN, *supra* note 238.

²⁵⁰ See BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* 118 (Princeton Univ. Press 1957).

arguments presented him by the members of his cabinet, Edmund Randolph,²⁵¹ Thomas Jefferson,²⁵² and Alexander Hamilton.²⁵³ Two of them, Randolph and Jefferson, agreed with James Madison that the Bill was unconstitutional.²⁵⁴ Hamilton did not, and the non-lawyer, Washington, was persuaded by Hamilton's arguments.²⁵⁵ This is certainly not a one-off with regard to important decisions being made in the halls of Congress or the White House, free from the opinions that Justices of the Court might have.²⁵⁶ Perhaps one might simply want to say that "the past is a different country," given the degree to which modern Solons seem altogether happy to subordinate themselves to judicial supremacy²⁵⁷; but, that is worth debating—after first being recognized as a fundamental change in our overall constitutional order.

The Framers in 1787 were writing on a "clean slate" inasmuch as none could claim to be making their decisions on the basis of anything other than political prudence, the English constitutional experience, which was non-binding in the United States, or perhaps for some of them, the dictates of "natural justice."²⁵⁸ There was no positive law to which they felt themselves required to be faithful.²⁵⁹ Washington, Madison, and friends ignored the "command" of the Articles of Confederation that amendment take place only if agreed to unanimously by the legislatures of the thirteen member states.²⁶⁰ *Federalist No. 40* is a paean to the leadership by public-spirited

²⁵¹ For the letter from Randolph to President Washington, see *The Constitutionality of the Bank Bill: The Attorney General's First Constitutional Law Opinion*, 44 DUKE L. J. 110, 121 (1994).

²⁵² THOMAS JEFFERSON, *Opinion on the Constitutionality of the National Bank*, in THE PORTABLE THOMAS JEFFERSON 261, 261-67 (Merrill D. Peterson ed., Penguin Books 1975).

²⁵³ ALEXANDER HAMILTON, *Opinion of the Constitutionality of the Bank, February 23, 1791*, in THE REPORTS OF ALEXANDER HAMILTON (Jacob E. Cooke ed., Harper & Row 1964).

²⁵⁴ See 2 ANNALS OF CONG. 1944-51 (1791).

²⁵⁵ See HAMMOND, *supra* note 250, at 117-18.

²⁵⁶ See generally WHITTINGTON, *supra* note 204.

²⁵⁷ See LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 8 (Oxford Univ. Press 2004).

²⁵⁸ See THE FEDERALIST NO. 1, at 33 (Alexander Hamilton) (noting ratification raised the question "whether societies of men are really capable or not of establishing good government from reflection and choice").

²⁵⁹ See THE FEDERALIST NO. 15, AT 105-13 (Alexander Hamilton) (detailing the "imbecility" of the Articles of Confederation).

²⁶⁰ GILLMAN ET AL., *supra* note 39, at 68-70.

delegates who did not feel constrained by the “absurdity” of the requirement set out in the Articles of Confederation that amendment require unanimous consent of all state legislatures.²⁶¹ “Forms,” proclaimed Madison, “ought to give way to substance.”²⁶² One should certainly not valorize a “rigid adherence” to forms when adherence would be fatal to meeting the great “exigencies” that brought the delegates to Philadelphia in the first place.²⁶³

Once the Constitution was ratified, the situation presumably changed. Insofar as many judges, beginning with Marshall in *Marbury v. Madison*,²⁶⁴ adverted to their oath required by Article VI of the Constitution—to be faithful to the demands of the Constitution. This is the identical issue that is presented for *all* officials, both state and federal.²⁶⁵ Article VI requires *all* officials to take a similar oath, as does the president whose oath is spelled out in Article II.²⁶⁶ So what did taking the oath, and taking the oath seriously, mean? Particularly with regard to the issues presented by slavery that so captivated Cover?

Whatever one’s answer to that question, is the answer significantly different for judges as compared to legislators or presidents? Should one be more cynical about the constitutional professions of legislators or presidents than about similar arguments when made in judicial opinions? We think most legal academics tended to brush off that possibility. They agreed with Dworkin that only the judiciary could be “the forum of principle,”²⁶⁷ whereas legislatures were basically cesspools of unprincipled political judgment.

The career and arguments made by one of the most significant public officials in Jacksonian America, Daniel Webster,²⁶⁸ may shed light on the moral-formal dilemma constitutional authorities in electoral politics faced with respect to fugitive slaves. Just as Story is second only to Marshall, the most distinguished judge of the ante-

²⁶¹ THE FEDERALIST NO. 40 (James Madison).

²⁶² *Id.* at 253.

²⁶³ *Id.* at 248, 252-53. See SANFORD LEVINSON, AN ARGUMENT OPEN TO ALL: READING THE FEDERALIST IN THE 21ST CENTURY 149-151 (“Exigency and Fidelity to Law”).

²⁶⁴ 5 U.S. 137 (1803).

²⁶⁵ U.S. CONST. art. 4, cl. 3.

²⁶⁶ *Id.*; U.S. CONST. art. 2, § 1, cl. 8.

²⁶⁷ See generally Dworkin, *supra* note 20.

²⁶⁸ For Webster’s influence on antebellum American constitutionalism, see PETER CHARLES HOFFER, DANIEL WEBSTER AND THE UNFINISHED CONSTITUTION (2021).

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bellum period,²⁶⁹ so Webster, along with Henry Clay and John C. Calhoun, was one of the three greatest political figures of Jacksonian America.²⁷⁰ Webster was a senator and Secretary of State. He argued myriads of cases before the United States Supreme Court, most notably *McCulloch v. Maryland*²⁷¹ and the *Dartmouth College Case*,²⁷² where he famously defended his and Graber's alma mater against efforts by the state of New Hampshire to convert Dartmouth into the University of New Hampshire by altering the corporate charter. Webster's views about fugitive slaves hardly reflected a consensus about the issue, even in the North. Debate over slavery and the Constitution was as heated in the free states as it was throughout the country. Webster nevertheless stood out as a leader, a person who so spoke for the northern view of the Constitution that he was immortalized by Stephen St. Vincent Benet as willing to debate Satan to save the soul of an ordinary representative of the free states.²⁷³

Webster's great speech of March 7, 1850, defended the Compromise of 1850. That bargain included an even more onerous version of the original Fugitive Slave Act of 1793 that Story upheld in *Prigg*.²⁷⁴ Webster took the floor of the Senate to urge fellow free state representatives and citizens to support a Constitution and a bill implementing that Constitution that conflicted with their cherished moral beliefs, where he stated:

Mr. President, in the excited times in which we live, there is found to exist a state of crimination and recrimination between the North and South. . . . But I will state . . . one complaint of the South, which has in my opinion just foundation; and that is, that there has been found at the North, among individuals and among legislators, a disinclination to perform fully their constitutional duties in regard to the return of persons

²⁶⁹ See, e.g., AKHIL REED AMAR, *THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760-1840* (2021) (providing enthusiastic encomia to Marshall and Story as key figures in the making of America).

²⁷⁰ See MERRILL D. PETERSON, *THE GREAT TRIUMVIRATE: WEBSTER, CLAY, AND CALHOUN* (Oxford Univ. Press 1987) (discussing the vital roles Webster, Clay and Calhoun played in Jacksonian America).

²⁷¹ 17 U.S. 316 (1819).

²⁷² *Dartmouth Coll. v. Woodward*, 17 U.S. 41 (1819).

²⁷³ STEPHEN VINCENT BENET, *THE DEVIL AND DANIEL WEBSTER AND OTHER TALES OF AMERICAN HISTORY* (Hythloday Press 2014).

²⁷⁴ See *supra* note 13.

bound to service who have escaped into the free States. In that respect, the South, in my judgment, is right, and the North is wrong. Every member of every Northern legislature is bound by oath, like every other officer in the country, to support the Constitution of the United States; and the article of the Constitution which says to these States that they shall deliver up fugitives from service is as binding in honor and conscience as any other article. *No man fulfills his duty in any legislature who sets himself to find excuses, evasions, escapes from this constitutional obligation.* I have always thought that the Constitution addressed itself to the legislatures of the States or to the States themselves. It says that those persons escaping to other States, shall be delivered up, and I confess I have always been of the opinion that it was an injunction upon the States themselves. When it is said that a person escaping into another State, and coming therefrom within the jurisdiction of that State, shall be delivered up, it seems to me the import of the clause is, that the State itself, in obedience to the Constitution, shall cause him to be delivered up. That is my judgment. I have always entertained that opinion, and I entertain it now. But when the subject, some years ago, was before the Supreme Court of the United States [in *Prigg v. Pennsylvania*], the majority of the judges held that the power to cause fugitives from service to be delivered up was a power to be exercised under the authority of this Government. . . . My habit is to respect the result of judicial deliberations and the solemnity of judicial decisions. As it now stands, the business of seeing that these fugitives are delivered up resides in the power of Congress and the national judicature, and my friend at the head of the Judiciary Committee [James M. Mason] has a bill on the subject, now before the Senate, which, with some amendments to it, I propose to support, with all its provisions, to the fullest extent. And I desire to call the attention of all sober-minded men at the North, of all conscientious men, of all men who are not carried away by some fanatical idea or some false impression,

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to their constitutional obligations. I put it to all the sober and sound minds at the North as a question of morals and a question of conscience. What right have they, in their legislative capacity or any other capacity, to endeavor to get round this Constitution, or to embarrass the free exercise of the rights secured by the Constitution to the persons whose slaves escape from them? None at all—none at all. Neither in the forum of conscience, nor before the face of the Constitution, are they justified; in my opinion. . . . I say that the South has been injured in this respect, and has a right to complain; and the North has been too careless of what I think the Constitution peremptorily and emphatically enjoins upon her as a duty.²⁷⁵

Webster was concerned, as was Story in *Prigg*, with preserving the Union. By 1850, calls for “secession” were something to which any “conscientious legislator”²⁷⁶ had to attend. One might dismiss the calls for “No Union with Slaveholders,” issued by William Lloyd Garrison and Wendell Phillips,²⁷⁷ as what a later President might call “malarkey,”²⁷⁸ representing little more than the venting by a dissatisfied, relatively powerless minority than a real threat to national survival. Similar threats issued by slaveholders, represented extremely ably in the Senate by John C. Calhoun and others, were far more serious. William Freehling has detailed how calls for measuring “the price of Union” had become commonplace in the land of cotton.²⁷⁹ Well aware of these stakes Webster continued:

Mr. President, I should much prefer to have heard from every member on this floor declarations of opinion that this Union could never be dissolved, than the declaration of opinion by any body, that, in any case, under the pressure of any circumstances, such a dissolution was possible. I hear with distress and anguish the word secession, especially when it falls

²⁷⁵ *Congressional Globe*, 31st Cong., 1st Sess., App., 274-75 (emphasis added).

²⁷⁶ See generally Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

²⁷⁷ See MAYER, *supra* note 67, at 328.

²⁷⁸ See President Joe Biden (@POTUS), TWITTER, (July 2, 2021).

²⁷⁹ See generally FREEHLING, *supra* note 69.

from the lips of those who are patriotic, and known to the country, and known all over the world, for their political services. Secession! Peaceable secession! . . . There can be no such thing as peaceable secession. Peaceable secession is an utter impossibility. . . . I see it as plainly as I see the sun in heaven—I see that disruption must produce such a war as I will not describe²⁸⁰

Americans, this speech indicated, had a choice. They could live in Union “half-free” and “half-slave,” or they could bring down the constitutional house.²⁸¹

Webster, the elected official, was joined at the hip with Story, the federal judge.²⁸² Webster’s arguments on March 7 track quite closely to those that Story made in *Prigg*. Both suffered the same consequence for their reputations in the free states. Both were excoriated by many former New England supporters for betraying their past support, if not of “abolitionism,” then at least for making no further accommodations with the “slavocracy.”²⁸³ Webster and Story opposed the admission of Texas to the Union because, since Texas was a foreign country, admission required ratification of a treaty by two-thirds of the Senate, which could never have been attained.²⁸⁴ Admission was initially predicated on such a treaty, but President John Tyler decided, after the treaty failed in the Senate, that Texas could be treated as a “territory” and admitted by a simple majority vote of both houses of Congress.²⁸⁵ Webster and Story disagreed. They fought bitterly against statehood. Webster’s constituents cheered his fight against Texas statehood because they correctly viewed admitting

²⁸⁰ *Congressional Globe*, 31st Cong., 1st Sess., App., 276.

²⁸¹ See Abraham Lincoln, Senator, Address at the Republican State Convention: House Divided (June 16, 1858),

²⁸² See HOFFER, *supra* note 268, at 24.

²⁸³ See MAURICE G. BAXTER, ONE AND INSEPARABLE: DANIEL WEBSTER AND THE UNION 417-418 (Harv. Univ. Press 1984); DUNNE, *supra* note 70, at 304-06.

²⁸⁴ See BAXTER, *supra* note 283, at 374-77; R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 351 (Univ. N.C. Press 1985).

²⁸⁵ See generally Mark A. Graber, *Settling the West: The Louisiana Purchase, the Annexation of Texas, and Bush v. Gore*, in THE LOUISIANA PURCHASE AND AMERICAN EXPANSIONISM (Sanford Levinson & Bartholomew Sparrow eds., 2006) (discussing constitutional issues raised by the annexation of Texas).

Texas as expanding slavery into the west.²⁸⁶ By supporting the Compromise of 1850, Webster appeared to have abandoned the antislavery principles underlying his opposition to Texas. The demigod whose eulogy to the free state farmer could soften even the heart of the Devil now offered “constitutional arguments” for why support for the enhanced Fugitive Slave Law was, to coin a phrase, both “necessary and proper” with regard to his duties as a conscientious Senator.²⁸⁷

The Compromise of 1850 was brokered in part by Henry Clay, the iconic hero of another politician originally from Kentucky who, unlike Clay, became president.²⁸⁸ Lincoln’s views about the Fugitive Slave Act echoed those of his beau ideal and those of Daniel Webster. The Illinois Whig turned Republican frequently emphasized his hatred of slavery.²⁸⁹ No reason exists for doubting the sincerity of that sentiment. At the same time, Lincoln was fully committed to the American system of government established by the Constitution. From an early age, Lincoln insisted that moral-formal dilemmas be resolved in favor the law.

In a now-famous speech that Lincoln delivered in Springfield, Illinois, in 1838, at the age of twenty-nine (roughly the same age as Cover when drafting *Justice Accused*), the young lawyer denounced the spirit of lawlessness that he saw threatening the American experiment. Lincoln illustrated this spirit primarily through examples of mob violence against abolitionists, but he appeared equally censorious of the then-rising number of abolitionists who themselves seemed less than fully devoted to their duties as American citizens.²⁹⁰ The future president warned that if legal rights are ultimately held “by no better tenure than the caprice of a mob, the alienation of [the people’s] affections from the Government is the natural consequence;

²⁸⁶ See BAXTER, *supra* note 283, at 376.

²⁸⁷ See *Congressional Globe*, 31st Cong., 1st Sess., App., 274-76; HOFFER, *supra* note 268, at 139-54.

²⁸⁸ Abraham Lincoln, Eulogy on Henry Clay (1852), in 2 COLLECTED WORKS OF ABRAHAM LINCOLN 121-32 (Roy P. Basler ed., Rutgers Univ. Press 1953).

²⁸⁹ Abraham Lincoln, Speech at Chicago, Illinois (1858), in 2 COLLECTED WORKS OF ABRAHAM LINCOLN 492 (Roy P. Basler ed., Rutgers Univ. Press 1953) (“I have always hated slavery.”).

²⁹⁰ Abraham Lincoln, Address Before the Young Men’s Lyceum of Springfield, Illinois. (1838), in 2 COLLECTED WORKS OF ABRAHAM LINCOLN 113 (Roy P. Basler ed., Rutgers Univ. Press 1953).

and to that, sooner or later, it must come.”²⁹¹ Persons from all sections of the United States could remain attached to the regime only if all agreed to follow law, rather than conscience. Lincoln declared:

Let every American, every lover of liberty, every well wisher to his posterity, swear by the blood of the Revolution, never to violate in the least particular, the laws of the country; and never to tolerate their violation by others. As the patriots of seventy-six did to the support of the Declaration of Independence, so to the support of the Constitution and Laws, let every American pledge his life, his property, and his sacred honor;—let every man remember that to violate the law, is to trample on the blood of his father, and to tear the character of his own, and his children's liberty. Let reverence for the laws, be breathed by every American mother, to the lisping babe, that prattles on her lap—let it be taught in schools, in seminaries, and in colleges; let it be written in Primers, spelling books, and in Almanacs;—let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the *political religion* of the nation; and let the old and the young, the rich and the poor, the grave and the gay, of all sexes and tongues, and colors and conditions, sacrifice unceasingly upon its altars. . . .

. . . .

When I so pressingly urge a strict observance of all the laws, let me not be understood as saying there are no bad laws, nor that grievances may not arise, for the redress of which, no legal provisions have been made. I mean to say no such thing. But I do mean to say, that, although bad laws, if they exist, should be repealed as soon as possible, still while they continue in force, for the sake of example, they should be religiously observed. So also in unprovided cases. If such arise, let proper legal provisions be made for them with the least

²⁹¹ *Id.* at 112.

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possible delay; but, till then, let them, if not too intolerable, be borne with.²⁹²

Daniel Webster would make the same appeal in a different context thirteen years later.²⁹³

Lincoln's comments about constitutional fidelity had consequences for the issues presented by American slavery. Although Lincoln vigorously opposed the extension of slavery into any of the American territories,²⁹⁴ he not only accepted the legal propriety of slavery in the states where it already existed,²⁹⁵ the so-called "federal compromise," but also, and more relevantly, the legality of the Fugitive Slave Laws of 1793 and 1850.²⁹⁶ Neither law nor the behaviors it sanctioned apparently required anything "intolerable" from a citizenry charged with "strict observance of all the laws."²⁹⁷ Lincoln elaborated his views on legality in his 1854 address in Peoria, Illinois. That speech marked Lincoln's return to electoral politics in light of his anger over the repeal of the Missouri Compromise by the Kansas-Nebraska Act.²⁹⁸ Lincoln condemned the expansion of slavery into the west but accepted the Compromise of 1850, including the Fugitive Slave Law, which was designed to preserve slavery in the south and border states.²⁹⁹ Both his antislavery and proslavery commitments were rooted in fidelity to the Constitution and national union.³⁰⁰ Lincoln in his Peoria address referred to the Missouri Compromise and Compromise of 1850 when praising a capitalized "Spirit of Compromise," which he defined as "the spirit of mutual concession . . . which first gave us the constitution and which has

²⁹² *Id.* at 112-13.

²⁹³ See *supra* notes 272-85 and accompanying text.

²⁹⁴ See Abraham Lincoln, To Joshua Speed (1855), in 2 COLLECTED WORKS OF ABRAHAM LINCOLN 320-23 (Roy P. Basler ed., Rutgers Univ. Press 1953).

²⁹⁵ See Abraham Lincoln, Speech at Harford, Connecticut (1860), in 4 COLLECTED WORKS OF ABRAHAM LINCOLN 5 (Roy P. Basler ed., Rutgers Univ. Press 1953).

²⁹⁶ Abraham Lincoln, To Thurlow Weed (1865), in 4 COLLECTED WORKS OF ABRAHAM LINCOLN 154 (Roy P. Basler ed., Rutgers Univ. Press 1953) ("I probably think all opposition, real and apparent, to the fugitive slave [clause] of the constitution ought to be withdrawn.").

²⁹⁷ *Supra* note 291.

²⁹⁸ Kansas-Nebraska Act, 33rd Cong., 1st Sess., 10 Stat. 277 (1854).

²⁹⁹ See Abraham Lincoln, *Speech at Peoria*, in 2 COLLECTED WORKS OF ABRAHAM LINCOLN 259 (Roy P. Basler ed., Rutgers Univ. Press 1953).

³⁰⁰ See GRABER, *supra* note 53, at 200-05.

[twice thereafter] saved the Union.”³⁰¹ Lincoln called for Americans to stand “on the middle ground” that can hold the ship of state “level and steady.”³⁰² That meant standing “against” those who would repeal the Fugitive Slave Act or refuse to enforce that measure.³⁰³

Lincoln repeated the central themes of his Peoria speech in his First Inaugural Address. Much attention has been given to his refusal to accept *Dred Scott* as dispositive regarding the Republican commitment to preventing the extension of slavery into the territories,³⁰⁴ but slavery in the west was a different subject than slavery in the south. The First Inaugural Address remained committed to the “federal consensus” and to the Fugitive Slave Clause,³⁰⁵ the central commitments of what Don Fehrenbacher called “The Slaveholding Republic.”³⁰⁶ Whether Lincoln’s “fidelity to the Constitution” captured numerous executive actions acts during the War, including the emancipation proclamation, remains a subject of debate,³⁰⁷ but those actions were in the future. Upon taking office, Lincoln insisted Americans focus solely on explicit constitutional commitments. He called on his fellow citizens to allow the constitutional processes for staffing the national government that were not in dispute to resolve questions about the status of slavery that were in dispute.³⁰⁸ Putting aside questions about the democratic credentials of the Electoral College, the person who won the 1860 presidential election with less than forty percent of the popular vote declared, “from questions of this class spring all our constitutional controversies, and

³⁰¹ Abraham Lincoln, Speech at Peoria, Illinois (1854), in 2 COLLECTED WORKS OF ABRAHAM LINCOLN 272 (Roy P. Basler ed., Rutgers Univ. Press 1953).

³⁰² *Id.* at 273.

³⁰³ *Id.*

³⁰⁴ Abraham Lincoln, First Inaugural Address—Final Text (1861), in 4 COLLECTED WORKS OF ABRAHAM LINCOLN 268 (Roy P. Basler ed., Rutgers Univ. Press 1953).

³⁰⁵ *Id.* at 263-64.

³⁰⁶ See generally DON E. FENHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT’S RELATIONS TO SLAVERY (Ward M. McAfee ed., Oxford Univ. Press 2001); GEORGE WILLIAM VAN CLEVE, A SLAVEHOLDERS’ UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC (Univ. Chi. Press 2010).

³⁰⁷ See NOAH FELDMAN, THE BROKEN CONSTITUTION: LINCOLN, SLAVERY, AND THE REFOUNDING OF AMERICA (Farrar, Straus, & Giroux 2021); see also, FARBER, *supra* note 232.

³⁰⁸ GRABER, *supra* note 53, at 179-81.

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we divide upon them into majorities and minorities. If the minority will not acquiesce, the majority must, or the government must cease.”³⁰⁹

The policy underlying the Fugitive Slave Clause was a constitutional matter not in dispute, even as Americans contested the best means for implementing that policy. After quoting the relevant passage from Article IV, Lincoln went on:

It is scarcely questioned that this provision was intended by those who made it for the reclaiming of what we call fugitive slaves; and the intention of the lawgiver is the law. All members of Congress swear their support to the whole Constitution--to this provision as much as to any other. To the proposition, then, that slaves whose cases come within the terms of this clause "shall be delivered up" their oaths are unanimous. Now, if they would make the effort in good temper, could they not with nearly equal unanimity frame and pass a law by means of which to keep good that unanimous oath? . . .

. . . .

I take the official oath to-day with no mental reservations and with no purpose to construe the Constitution or laws by any hypercritical rules; and while I do not choose now to specify particular acts of Congress as proper to be enforced, I do suggest that it will be much safer for all, both in official and private stations, to conform to and abide by all those acts which stand unrepealed than to violate any of them trusting to find impunity in having them held to be unconstitutional.³¹⁰

Webster and Lincoln placed their loyalty to the Constitution (and preserving the Union), to which they had sworn a solemn oath, above any opposition they might have on moral grounds to slavery. For Webster, this commitment to the Constitution required voting for the revised Fugitive Slave Act to preserve the Union. For Lincoln, this commitment to the Constitution required wholehearted support for enforcing fugitive slave laws and punishing those who resisted enforcement by joining mobs bent on liberating fugitives from

³⁰⁹ Lincoln, *supra* note 304, at 267.

³¹⁰ *Id.* at 263-64.

rendition back to slave states. Law trumped morality or, even better, obedience to the law was the highest form of morality when obeying the law was a means for maintaining national union.

Frederick Douglass resolved moral-formal dilemmas differently. Consider his “Is it Right and Wise to Kill a Kidnapper?”³¹¹ that was published the same year as Lincoln’s Peoria speech. Douglass, the best-known former fugitive slave in the United States, addressed the killing by an anti-slavery mob in Boston of James Balchelder, a United States Marshal engaged in returning Anthony Burns, a fugitive slave, to his southern owner.³¹² Conventional wisdom described Balchelder’s killing as “murder.”³¹³ Douglass demurred. The “right to life” is not absolute, he claimed, as evidenced by the ability of those claiming “self-defense” to take life rather than be subjected to the potential loss of their liberty.³¹⁴ The same principle applied when the liberty of a fugitive slave was at issue. Douglass insisted:

A[] human life is not superior . . . to the eternal law of justice, which is essential to the preservation of the rights, and the security, and happiness of the race.

The argument thus far is to the point, that society has the right to preserve itself even at the expense of the life of the aggressor; and it may be said that while what we allege may be right enough, as regards society, it is false as vested in an individual, such as the poor, powerless, and almost friendless wretch now in the clutches of this proud and powerful republican government. But we take it to be a sound principle, that when government fails to protect the just rights of any individual man, either he or his friends may be held in the sight of God and man, innocent, in exercising any right for his preservation which society may exercise for its preservation. Such an individual is flung, by his untoward circumstances, upon his original right of self-defense. We hold, therefore, that when James Balchelder . . . abandoned his useful employment, as a

³¹¹ See generally FREDERICK DOUGLASS, IS IT RIGHT AND WISE TO KILL A KIDNAPPER, in THE ESSENTIAL DOUGLASS: SELECTED WRITINGS AND SPEECHES (Nicholas Buccola ed., Hackett Publ’g Co. 2016).

³¹² *Id.* at 76-77.

³¹³ *Id.* at 76.

³¹⁴ *Id.* at 77.

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common laborer and took upon himself the revolting business of a kidnapper [helping those who would return Anthony Burns to his condition as an enslaved person], he labeled himself the common enemy of mankind, and his slaughter was as innocent, in the sight of God, as would be the slaughter of a ravenous wolf in the act of throttling an infant.³¹⁵

Violence and civil disobedience were justifiable responses according to Douglass's understanding of the moral-formal dilemma.

Neither Lincoln nor any other established American political leader agreed with Douglass. No judge accepted the claim of "self-defense" in the Anthony Burns case, a defense offered by an abolitionist supporter of Burns, rather than Burns himself.³¹⁶ This might demonstrate that Douglass's argument is wrong. "Neutral" officials wielding "neutral principles" recognized that the price of American Union and the meaning of devotion to preserving the Constitution that is dedicated to preserving the Union was accepting the legitimacy of the Fugitive Slave Law and "rendering" back to slavery those caught in that law's vise. The difference between Lincoln and Frederick Douglass might also be the difference between a government official, or an aspirant to public office, and the leader of a social movement. Moral-formal dilemmas may look different to the outsiders who lead crusades for justice or write in the law reviews than those charged with preserving the social order.

These ruminations on Webster, Lincoln, and other "conscientious" legislators raise questions about whether members of Congress or presidents of the United States do, or should, operate under the same cross-pressures that Cover identified so memorably in his 1975 book. One important inquiry is whether we should evaluate Webster, Lincoln, other non-judicial officials opposed to slavery in the antebellum United States, or other non-judicial officials faced with different moral-formal dilemmas using different standards than those we apply to judges in the same circumstances. We might expect more constitutional fidelity, and less moral sensitivity, from judges than from elected political officials. Justices often pride themselves in

³¹⁵ *Id.* at 78.

³¹⁶ See EARL M. MALTZ, *FUGITIVE SLAVE ON TRIAL: THE ANTHONY BURNS CASE AND ABOLITIONIST OUTRAGE* 55-89 (Univ. Press Kan. 2010).

doing what is constitutional rather than what is wise or just.³¹⁷ Alternatively, life tenure might enable Justices to rise above the petty constitutional and political bargains that often characterize constitutional politics. If Justices have “special capacities to listen to voices from the margin,”³¹⁸ perhaps they are better positioned than other governing officials to be the “conscience of the nation’s pluralism”³¹⁹ or “republican schoolmasters,”³²⁰ when moral imperatives clash with words written down in the often-distant past.

The year 1975 also saw the publication of Paul Brest’s “Conscientious Legislator’s Guide to Constitutional Interpretation,”³²¹ which took seriously the possibility that at least some public officials would take their oaths of office, to “support, protect, and defend the Constitution of the United States,” with the same degree of seriousness as do judges. The questions Brest raised differ from the debate, which was provoked by Edmund Burke’s letter to the Bristol electors,³²² over whether a “representative” should be an instructed “delegate” or a “trustee” charged with taking the comprehensive national interest into account, even when that interest clashes with the values or selfish wishes of factional constituents.³²³

Madison, in *Federalist No. 10*, maintained the only genuine cure for the “faction” was an “extended republic” that would privilege the election of public-spirited, national-level officials.³²⁴ “Conscientious Legislators,” who followed the Constitution even when doing so risked the ire of their constituents, still had to determine whether to follow the Constitution when doing so risked the ire of their conscience or their God. Neither Madison nor Hamilton (nor Jay) in the “Federalist Papers” explored what “public-spirited” officials

³¹⁷ *Texas v. Johnson*, 491 U.S. 397 (1989) (Kennedy, J., concurring); *Trop v. Dulles*, 356 U.S. 86, 120 (1958) (Frankfurter, J., dissenting) (explaining why justices must not give “effect to [their] own notions of what is wise or politic”).

³¹⁸ Michelman, *supra* note 137, at 1537.

³¹⁹ William N. Eskridge, Jr., *Overriding Supreme Court Statutory Decisions*, 101 YALE L.J. 331, 413 (1991).

³²⁰ Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 S. CT. REV. 127, 180 (1967).

³²¹ See generally Brest, *supra* note 276.

³²² Edmund Burke, Speech to the Electors of Bristol, in THE FOUNDERS’ CONSTITUTION, 391-392(1) (Philip B. Kurland & Ralph Lerner eds., Univ. Chi. Press 1987).

³²³ HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION (Univ. Cal. Press 1967) (discussing the role of the representative).

³²⁴ THE FEDERALIST NO. 10, at 78-84 (James Madison) (Clinton Rossiter ed., 1961).

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should do when they concluded that some policy that would undoubtedly serve the public weal was also, alas, unconstitutional. Madison, as President, vetoed banking and internal improvements bills that he thought presented good policy on the ground but that the national government had no constitutional power to authorize such measures.³²⁵ A committed slaveholder, he never confronted a situation where doing right by moral or God's law differed from doing right by constitutional law.

Public officials may only partially evade moral-formal dilemmas by adopting the legal realism *cum* judicial-supremacist position that nothing is constitutional or unconstitutional unless and until the Supreme Court weighed in. Morality, in this view, governs until the *U.S. Reports* compels legality. This stalling tactic leaves open the proper response to judicial decisions that the conscientious legislator believes are dreadfully wrong and disserve the public interest. Andrew Jackson insisted that governing officials could not defer moral-formal dilemmas or any other constitutional decision to the judiciary. His message vetoing the renewal of the Second Bank of the United States insisted that the decisions of the Court in *McCulloch* and in *Osborn v. Bank of the United States*³²⁶ were not binding because the Marshall Court's reasoning was unpersuasive. Jackson thundered:

The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.³²⁷

Jackson's argument renders nugatory any argument based simply on judicial precedent. What precedent-based arguments do, he might have pointed out, is bracket out of consideration substantive justice, social consequences, or even fidelity to the Constitution in the name of adherence to the "rule laid down." Precedent, so understood, becomes

³²⁵ See James Madison, Veto Message, in 1 THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897 484-85, 554-557 (James D. Richardson ed., Gov't Printing Off. 1896).

³²⁶ 22 U.S. 738 (1824).

³²⁷ Andrew Jackson, Veto Message, in 2 THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897 582 (James D. Richardson ed., Gov't Printing Off. 1896).

the formalism a constitutional decision-maker may wield against morality. This was McLean's position following *Prigg*.³²⁸ Stephen Douglas made the same argument after *Dred Scott*. The Illinois Democrat during his debates with Lincoln declared:

I am content to take [*Dred Scott*] as it stands, delivered by the highest judicial tribunal on earth, a tribunal established by the Constitution of the United States for that purpose, and hence that decision becomes the law of the land, binding on you, on me, and on every other good citizen, whether we like it or not.³²⁹

The highest constitutional duty, this quotation suggests, is to obey the Supreme Court.

Lincoln, Webster, and their anti-slavery contemporaries had several means for dissolving their moral-formal dilemma. They might have insisted that a correct understanding of the Constitution demonstrates how it forbade slavery, or at least forbade providing the particular protection to slaveholding under consideration. Several prominent "anti-slavery constitutionalists" made such arguments.³³⁰ St. Augustine, and many after him, maintained that positive law that so obviously conflicts with "natural law" and "justice" is not really "law" at all and should be disregarded.³³¹ Before the Civil War, William Seward, the governor of New York who became Lincoln's Secretary of State, famously advocated submission to a "higher law" than that of the Constitution.³³² Justice Samuel Chase, in *Calder v. Bull*, declared that "[a]n ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."³³³ Anti-slavery constitutional decision-makers might have paid more attention to the injunction of the Preamble to "establish Justice" and "secure the blessings of Liberty" as the central purposes of the Constitution when

³²⁸ See *Miller v. McQuerry*, 17 F. Cas. 335, 340 (C.C.D. Ohio 1853).

³²⁹ Abraham Lincoln, Third Debate with Stephen A. Douglas at Jonesboro, Illinois (1858), in 3 COLLECTED WORKS OF ABRAHAM LINCOLN 102, 112 (Roy P. Basler ed., Rutgers Univ. Press 1953).

³³⁰ See COVER, *supra* note 1, at 154-58.

³³¹ See Robert P. George, *Justice, Legitimacy, and Allegiance: "The End of Democracy" Symposium Revisited*, 44 LOYOLA L. REV. 103, 106 (1998) (discussing Augustine and the principle of "les iniusta non est lex").

³³² *Congressional Globe*, 31st Cong., 1st Sess., App., 265.

³³³ *Calder v. Bull*, 3 U.S. 386, 388 (1798) (majority opinion).

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those grand injunctions collided with perceived needs to preserve the Union or the generally understood meaning of particular constitutional texts. Justice James Iredell thought he had refuted such recourses to first principles and natural law in *Calder*,³³⁴ but such forms of reasoning remained alive and well in the antislavery constitutionalism of the antebellum United States.³³⁵

Lincoln, Webster, and Cover did not treat the Constitution as a comedy with happy endings when interpreted correctly. Cover briefly describes antislavery constitutionalists, such as Lysander Spooner, as offering “utopian arguments.”³³⁶ Such antislavery constitutionalists convinced no “mainstream” judges, lawyers able to gain both presidential nomination and senatorial confirmation to the federal bench, before whom they brought their claims.³³⁷ Most Republicans were no more convinced, even as they thought the most extreme pro-slavery arguments mistaken. Before the Civil War, Lincoln insisted that under the Constitution properly interpreted the United States could still be a slaveholding country in 1960.³³⁸ The system of compensated emancipation scheme he endorsed in 1863 had 1900 as the date at which slavery would finally disappear.³³⁹ The Civil War brought forth emancipation through slaughter. Constitutional and moral arguments had little to do with the case.

IV. THE MORAL-FORMAL DILEMMA, 2017-2021

Donald Trump’s presidency and the aftermath played new variations on the moral-formal dilemma that antislavery Justices faced before the Civil War and Justices committed to racial equality faced during the Great Society. Donald Trump was widely acknowledged to be uniquely unqualified to be President of the United States.³⁴⁰ This

³³⁴ *Id.* at 399 (Iredell, J., dissenting).

³³⁵ See WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848* (1977).

³³⁶ COVER, *supra* note 1.

³³⁷ See THOMAS D. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780-1861* (Johns Hopkins Univ. Press 1974) (noting the widescale rejection of claims by federal judges that the Fugitive Slave Acts were unconstitutional).

³³⁸ Abraham Lincoln, First Debate with Stephen A. Douglas at Ottawa, Illinois (1858), in 3 *COLLECTED WORKS OF ABRAHAM LINCOLN* 18 (Roy P. Basler ed., Rutgers Univ. Press 1953).

³³⁹ Abraham Lincoln, Annual Message to Congress (1861), in 5 *COLLECTED WORKS OF ABRAHAM LINCOLN* 530 (Roy P. Basler ed. 1953).

³⁴⁰ See Levinson & Graber, *supra* note 32, at 140-45.

was not simply the sentiment of persons on the political left, who would condemn any Republican. Almost the entire conservative intelligentsia of 2015 repudiated Trump during his candidacy and throughout his presidency. Consider the examples of Jennifer Rubin, Max Boot, Michael Gerson, George Will, William Kristol, Ross Douthat and Bret Stephens.³⁴¹ The *Washington Post* had to hire a new columnist, Marc Thiessen, who had no previous reputation, just to find a pundit who would praise Trump on a regular basis; a step the *New York Times*, correctly in our judgment, refused to take.³⁴² Moral considerations demanded that Trump's power be minimized and he be removed from power as soon as possible.³⁴³ The only possible defense of Trump's power and continuation in office was that he was entitled to the office as a matter of blackletter constitutional law.³⁴⁴ Formality had to trump morality.

This moral-formal dilemma played out largely in Congress and the elected branches of the national government. The Supreme Court resolved a few issues, most notably the Muslim ban³⁴⁵ and questions

³⁴¹ See generally JENNIFER RUBIN, *RESISTANCE: HOW WOMEN SAVED DEMOCRACY FROM DONALD TRUMP* (Harper Collins 2021). See also Max Boot, *How Can 42 Percent of Americans Still Support the Worst President in Our History?*, WASH. POST (Oct. 13, 2020), <https://www.washingtonpost.com/opinions/2020/10/13/how-can-42-percent-americans-still-support-worst-president-our-history/>; Michael Gerson, *The Trump Nightmare Looms Again*, WASH. POST (Oct. 11, 2021), <https://www.washingtonpost.com/opinions/2021/10/11/trump-nightmare-looms-again/>; George Will, Opinion, *Trump Has a Dangerous Disability*, WASH. POST (May 3, 2017), https://www.washingtonpost.com/opinions/trump-has-a-dangerous-disability/2017/05/03/56ca6118-2f6b-11e7-9534-00e4656c22aa_story.html.

³⁴² See, e.g., Mark A. Thiessen, *The 10 Best Things Trump Did in 2020*, WASH. POST (Dec. 31, 2020), <https://www.washingtonpost.com/opinions/2020/12/31/best-things-trump-did-2020/>; William Kristol, *Trump has Broken the Republican Party—and Conservatism—for Good*, BULWARK (Apr. 2, 2020), <https://www.thebulwark.com/trump-has-broken-the-republican-party-and-conservatism-for-good/>; Ross Douthat, *The Once and Future Threat of Trump*, N.Y. TIMES (Oct. 5, 2021), <https://www.nytimes.com/2021/10/05/opinion/trump-2024.html>; Bret Stephens, *Donald Trump and the Damage Done*, N.Y. TIMES (Dec. 14, 2020), <https://www.nytimes.com/2020/12/14/opinion/donald-trump-presidency.html>.

³⁴³ Levinson & Graber, *supra* note 32, at 164-70.

³⁴⁴ See Josh Blackman, 'Neutral Principles' and the 'Presumption of Regularity' in the Era of Trump, LAWFARE (Sept. 7, 2017, 12:03 PM), <https://www.lawfareblog.com/neutral-principles-and-presumption-regularity-era-trump>.

³⁴⁵ See *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (sustaining President Trump's order barring immigrants from primarily Muslim countries).

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concerning the 2020 census.³⁴⁶ Congress more regularly confronted issues concerning whether to rein in or encourage presidential powers or, more importantly, whether to remove Donald Trump from office.³⁴⁷ The moral-formal dilemma had particular force during impeachment. On one view, most famously championed by Sean Wilentz during the Clinton impeachment, the decision to remove a President has everything to do with law and nothing to do with fitness for office.³⁴⁸ A President commits an impeachable crime only when what the President has done satisfies a technical parsing of “high Crimes and Misdemeanors.”³⁴⁹ On another view, “high Crimes and Misdemeanors” must be understood in ways that permit Americans to remove a person from office who is demonstrably unfit to hold high office.³⁵⁰ Just as Justice Story in *Prigg* insisted that the Constitution compelled decisionmakers to treat a human fugitive from slavery as if that person was a cow that wandered on to a neighbor’s property,³⁵¹ so Trump’s defenders insisted that members of Congress, when considering the President’s Article II powers and impeachment standards, treat Trump the same way they would treat George Washington.

Donald Trump’s presidency compelled some Republicans to acknowledge Brest’s call for conscientious legislators as they struggled over whether to follow partisan or constitutional imperatives. At the beginning of the congressional inquiry on July 27, 2021 that investigated the circumstances surrounding the attack on the Capitol on January 6 earlier in the year, Wyoming Representative Liz Cheney declared:

I have been a conservative Republican since 1984 when I first voted for Ronald Reagan. I have disagreed sharply on policy and politics with almost every Democratic member of this committee. But, in the end, we are one nation under God. The Framers of our

³⁴⁶ See *Dep’t Com. v. New York*, 139 S. Ct. 2551 (2019) (declaring illegal Trump administrative efforts to ask certain questions about citizenship status on the 2020 national census).

³⁴⁷ See GILLMAN ET AL., *supra* note 39, at 740-53.

³⁴⁸ See Sean Wilentz et al., *Historians in Defense of the Constitution*, N.Y. TIMES, Oct. 30, 1998, at A17.

³⁴⁹ U.S. CONST. art. II, § 4. See ALAN DERSHOWITZ, *THE CASE AGAINST IMPEACHING TRUMP* 143 (2019).

³⁵⁰ See generally ALLAN J. LICHTMAN, *THE CASE FOR IMPEACHMENT* (2018).

³⁵¹ *Prigg v. Pennsylvania*, 41 U.S. 539, 625-26 (1842).

Constitution recognized the danger of the vicious factionalism of partisan politics -- and they knew that our daily arguments could become so fierce that we might lose track of our most important obligation -- to defend the rule of law and the freedom of all Americans. That is why our Framers compelled each of us to swear a solemn oath to preserve and protect the Constitution. When a threat to our constitutional order arises, as it has here, we are obligated to rise above politics.³⁵²

Utah Senator Mitt Romney spoke similarly when voting to convict Donald J. Trump in February 2020 of the “high [c]rime and [m]isdemeanor” for which he had been impeached by the House of Representatives:

In the last several weeks, I have received numerous calls and texts. Many demand that, in their words, “I stand with the team.” I can assure you that that thought has been very much on my mind. I support a great deal of what the President has done. I have voted with him 80% of the time. But my promise before God to apply impartial justice required that I put my personal feelings and biases aside. Were I to ignore the evidence that has been presented, and disregard what I believe my oath and the Constitution demands of me for the sake of a partisan end, it would, I fear, expose my character to history’s rebuke and the censure of my own conscience.³⁵³

Consistent with the sharp separation of law and politics in contemporary literature,³⁵⁴ we might treat Representative Cheney and Senator Romney as engaged in mere posturing or, in what David Mayhew called, “position-taking.”³⁵⁵ They speak to gain the

³⁵² *Liz Cheney’s Opening Statement Before The January 6 Select Committee*, CNN POL. (July 27, 2021, 11:53 AM), <https://edition.cnn.com/2021/07/27/politics/read-cheney-statement/index.html>.

³⁵³ *Full Transcript: Mitt Romney’s Speech Announcing Vote to Convict Trump*, N.Y. TIMES (Feb. 5, 2020), <https://www.nytimes.com/2020/02/05/us/politics/mitt-romney-impeachment-speech-transcript.html>.

³⁵⁴ See Graber, *supra* note 180, at 110-17.

³⁵⁵ See DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 61-73 (Yale Univ. Press 1974).

appearance of a loyal public servant knowing that would do little to rid the scourge of Donald Trump from American constitutional politics. On another, we think better, view, Cheney and Romney are demonstrating the importance of the oath and are examples of would-be “conscientious legislators.” They are serious and commendable public servants engaged with the distinct form the moral-formal dilemma is taking in the twenty-first century.

This contemporary moral-formal dilemma has a different structure than the moral-formal dilemmas of the distant and recent past. Moral-formal dilemmas of the present concern matters more often taught in the first semester of constitutional law, which is typically devoted to the structure and powers of government, than matters more often taught in the second semester of constitutional law, which is typically devoted to civil rights and liberties. Trump’s presidency raised questions about executive powers, executive privilege, and impeachment.³⁵⁶ Related moral-formal dilemmas in the future will likely concern questions of constitutional adequacy, how government responds to pandemics, and the threat of climate disaster, which should balance moral and formal concerns when interpreting constitutional powers and structures.

The moral-formal dilemmas of the present also concern a political party that has, in the eyes of most commentators, gone off the constitutional democracy rails.³⁵⁷ The Republican Party’s adherence to Donald Trump threatens constitutional democracy in the United States. The Republican Party’s denial of modern science has contributed to the loss of nearly one million U.S. lives during the pandemic³⁵⁸ and threatens the United States, as well as the rest of the world, with an environmental catastrophe that, if we are lucky, will only kill untold millions of people and not become an extinction event.³⁵⁹ These concerns raise moral-formal dilemmas in courts,

³⁵⁶ For a summary of those issues and relevant excerpts, see GILLMAN ET AL., *supra* note 39, at 683-753.

³⁵⁷ See generally MANN & ORNSTEIN, *supra* note 33 (discussing how Republicans have undermined congressional capacity to legislate responsibly).

³⁵⁸ See Jonathan Chait, *Republican Vaccine Denial Is Not a Political Strategy*, N.Y. MAG. (Aug. 21, 2021), <https://nymag.com/intelligencer/2021/08/republican-vaccine-denial-is-not-a-political-strategy.htm>.

³⁵⁹ See Paul Krugman, *The Party That Ruined the Planet*, N.Y. TIMES (Dec. 12, 2019), <https://www.nytimes.com/2019/12/12/opinion/climate-change-republicans.html> (discussing the Republican party’s dangerous denial of climate change).

because we suspect a great many Republican judicial appointments are aware that Trump's Republican Party is a threat to constitutional democracy, if not human existence. These concerns raise moral-formal dilemmas outside of courts because we suspect a great many Republican officeholders understand their party is moving in directions that threaten constitutional democracy, if not human existence.³⁶⁰ Nevertheless, on a formal reading of the Constitution, a case can be made that all parties are created equal. Trump Republicans in office have the same powers as Lincoln Republicans, Roosevelt Democrats or, for that matter, Reagan Republicans, much as the two of us strongly disagree with the constitutional vision offered by the Reagan Administration. The survival of constitutional democracy in the United States and the human race may depend on how governing officials resolve this version of the moral-formal dilemma.

V. JUDGES, CONSTITUTIONAL ACTORS, AND MORAL-FORMAL DILEMMAS

Robert Cover attempted to “describe” the phenomenology of judging in a regime that recognized the legality of slavery. Cover was appalled by that regime, but he very carefully refrained from endorsing the “utopian”³⁶¹ arguments presented by Lysander Spooner³⁶² or, later, by Frederick Douglass.³⁶³ *Justice Accused* suggested that less formal, more imaginative, arguments were available that might have tempered Northern judicial acquiescence to the Slave Power³⁶⁴; but, at no point did Cover offer what he believed to be the “right” answer to the constitutional questions raised by slavery or the moral questions raised by judging in a regime that most people thought constitutionally committed to offering some protections for human bondage. Cover was far more interested in the personal psychology of the judges he discusses than in the technical jurisprudential questions clearly evoked in *Justice Accused*.³⁶⁵ Cover offers no extended discussion of such

³⁶⁰ See generally JEFF FLAKE, CONSCIENCE OF A CONSERVATIVE: A REJECTION OF DESTRUCTIVE POLITICS AND A RETURN TO PRINCIPLE (Random House 2017).

³⁶¹ COVER, *supra* note 1, at 154.

³⁶² See generally LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY, BELA MARSH (1860).

³⁶³ Frederick Douglass, Lecture Delivered in Glasgow, Scotland, *Unconstitutionality of Slavery* (Mar. 26, 1860).

³⁶⁴ COVER, *supra* note 1, at 33-116, 155-56.

³⁶⁵ *Id.* at 226-59.

figures as H.L.A. Hart, Lon Fuller, or Ronald Dworkin, who were, during the 1960s, carrying on a furious debate about the limits of a positivist analysis of law.³⁶⁶ Readers more concerned with solutions to the moral-formal dilemma than with the mental states of those who experience that phenomenon might turn to David Dyzenhaus, whose discussion of pre-1994 South Africa offers a very close jurisprudential analysis of what he calls *Hard Cases in Wicked Legal Systems*.³⁶⁷

If Robert Cover was still alive to write a second edition of his brilliant and path-breaking book, he might consider the monumental issues raised by the magnificent statue of Joseph Story carved by his son, William Wentworth Story, that is the first thing one sees on ascending the steps to the Harvard Law School Library. The State of Maryland has removed various monuments honoring native son, Roger Brooke Taney, because of the stigma attached to Taney's authorship of *Dred Scott*.³⁶⁸ *Prigg* is no better, and arguably worse.³⁶⁹ Once we remove the monument to Story, is the next step renaming Webster Hall, which is at the center of Dartmouth College? Does the Lincoln Memorial survive this scrutiny? Would Cover think these questions worth the attention of the legal academy? Would *Justice Accused II* explicitly or implicitly treat these questions as invoking what Lincoln, in the First Inaugural, called "[t]he mystic chords of memory"³⁷⁰ that ostensibly bind Americans together as a subject on which lawyers and law professors have no more to say than other citizens?

The second edition of *Justice Accused* might include a chapter addressing the constitutional duties attached to *all* public officials. Alas, Cover's hypothetical discussion of the antebellum moral-formal

³⁶⁶ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 54-64 (2d. ed. 1978). See generally H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). For an excellent summary of that debate, see generally Benjamin C. Zipursky, *Practical Positivism Versus Practical Perfectionism: The Hart-Fuller Debate at Fifty*, 83 N.Y.U. L. REV. 1170 (2008).

³⁶⁷ See generally DAVID DYZENHAUS, *HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY* (1991).

³⁶⁸ See *Maryland Removes Controversial Roger Taney Statue From State House Grounds*, CBS NEWS (Aug. 18, 2017, 5:28 AM), <https://www.cbsnews.com/news/maryland-removes-controversial-roger-taney-statue-from-state-house-grounds>.

³⁶⁹ See Sanford Levinson, *Is Dred Scott Really the Worst Opinion of All Time? Why Prigg is Worse than Dred Scott (But Is Likely to Stay Out of the "AntiCanon")*, 125 HARV. L. REV. F. 23, 23-32 (2011).

³⁷⁰ Lincoln, *supra* note 304, at 271.

dilemma as experienced by members of the legislative and executive branches of the national government might have centered on Webster, Lincoln, and other antislavery governing officials who, to preserve the Union, made one compromise after another with the “peculiar institution.” Readers would see in that discussion references to those governing officials and judges who had to decide whether to obey what they thought was the letter of the law when carrying out the pernicious commands of Donald Trump. We terribly miss that second edition, not least because both of us, and we suspect the legal academy as a whole, would love to know where Cover would come out on the tortuous questions that he identified for an earlier generation that very much remain with us today.