

# A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought

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In *Dennis v. United States*,<sup>1</sup> Justice Robert Jackson noted that lawmaking in his generation involved never-ending quests for a legal formula that would protect America against a communist revolution.<sup>2</sup> Jackson was writing primarily about the Smith Act,<sup>3</sup> but his remark had much broader application. In the years after World War II, the Supreme Court continually reformulated constitutional doctrine in ways designed to prevent a totalitarian regime, communist or otherwise, from arising in the United States. Sometimes, as in *Dennis*, antitotalitarianism<sup>4</sup> appeared on the face of judicial doctrine. In a more subtle way, the desire to articulate principles that distinguished America from the Soviet Union and Nazi Germany contributed to a long line of liberal Supreme Court decisions from the Second World War through the Warren era. Those decisions revolutionized the law of free expression,<sup>5</sup> equal protection,<sup>6</sup> police procedures,<sup>7</sup> and personal privacy.<sup>8</sup> But to credit antitotalitarianism with helping to remake constitutional case law is still to underestimate its influence. The problem of totalitarianism gave birth to major themes in modern academic constitutional theory. Indeed, constitutional thought still operates within the framework defined by opposition to Nazism and communism.

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1. 341 U.S. 494 (1951).

2. *See id.* at 561 (Jackson, J., concurring).

3. Smith Act, ch. 645, §§ 2-3, 54 Stat. 671 (1940) (current version at 18 U.S.C. § 2385 (1994)) (criminalizing conspiracy to overthrow government or advocacy of doctrines calling for such overthrow)

4. "Antitotalitarianism" in this Note simply means opposition to, revulsion at, and the desire to be meaningfully different from, the two totalitarianisms that mid-twentieth century Americans knew, namely, Nazi Germany and the Soviet Union. Those two regimes were unlike each other in many ways, but many American intellectuals by the 1930s had come to appreciate substantial similarities between them as well. Accordingly, they perceived "totalitarianism" as a single phenomenon. *See* PETER NOVICK, *THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION* 281 (1988); EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 135-38 (1973); *see also* ARTHUR M. SCHLESINGER, JR., *THE VITAL CENTER* 143-45 (1949). *See generally* HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (2d ed. 1968)

5. *See, e.g.*, *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)

6. *See, e.g.*, *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Ex parte Mitsuye Endo*, 323 U.S. 283 (1944).

7. *See, e.g.*, *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963)

8. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965)

Antitotalitarianism lies just below the surface of the leading modern theories of constitutional law, coloring the work of scholars like John Hart Ely and Bruce Ackerman. The quest for an antitotalitarian formula marks not just judicial doctrine but academic constitutional thought as well. Theorists know that the ability to prevent the rise of a Nazi- or Soviet-style regime has become the implicit final test of any constitutional theory, and they struggle, just as Jackson's Court struggled, to find a formula adequate to the task. Understanding the aims and the limits of modern constitutional thought, academic as well as judicial, thus requires understanding the influence of antitotalitarianism.

Existing scholarship has tended to underestimate the role of antitotalitarianism in postwar judicial doctrine and to ignore the influence of antitotalitarianism on contemporary constitutional theorists. To be sure, some scholars have noted the influence of antitotalitarianism on specific constitutional doctrines such as equal protection<sup>9</sup> and the right of privacy.<sup>10</sup> These accounts, however, are concerned with particular doctrines rather than with the development of constitutional thinking as a whole. Scholars who have tried to account for postwar constitutional development more broadly have discussed a range of explanatory factors other than antitotalitarianism: the New Deal,<sup>11</sup> the Cold War,<sup>12</sup> the Great Society,<sup>13</sup> the civil rights movement,<sup>14</sup> the women's movement,<sup>15</sup> public opposition to the war in Vietnam,<sup>16</sup> and

9. See, e.g., Robert A. Burt, *Brown's Reflection*, 103 YALE L.J. 1483, 1487-88 (1994) (suggesting that anti-Nazism influenced Justice Jackson's position on racial desegregation); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 14, 24-25 (1994) (claiming that general revulsion at Nazism and at associated theories of racial superiority informed decision to end school segregation).

10. See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784-804 (1989) (arguing that right of privacy announced in *Griswold* is intimately linked to problem of totalitarianism and should be understood as defense against state-enforced conformity).

11. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991). Ackerman's theory is discussed in more detail *infra* Section III.A. See also Sanford Levinson, in ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT 174-205* (chs. 8-9) (Sanford Levinson ed., 2d ed. 1994) (arguing that activist welfare state entails increased regulation of private life, thus raising importance of clarifying individual rights against state).

12. Several scholars have interpreted *Brown v. Board of Education*, 347 U.S. 483 (1954), as partly motivated by international *realpolitik*: Racial segregation did little to improve America's image with fence-sitting nations in Africa and Asia, and the Soviet Union exploited this American weakness. See, e.g., Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524-25 (1980); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62-63 (1988); Constance Baker Motley, *The Historical Setting of Brown and Its Impact on the Supreme Court's Decision*, 61 FORDHAM L. REV. 9, 9 (1992).

13. See Mark Tushnet, *Preface to THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* at ix-x (Mark Tushnet ed., 1993).

14. See generally TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63* (1988) (describing impact of civil rights movement on American political climate); JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* (1994) (describing impact of civil rights litigation on constitutional law).

15. See Levinson, *supra* note 11, at 164-65.

16. See LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 135-65* (1991) (describing impact of Pentagon Papers controversy); Arnold S. Rice, *Editor's*

the adoption by the Supreme Court of a theory of pure procedural democracy.<sup>17</sup> Those forces certainly did influence constitutional doctrine between World War II and the 1960s, but the influence of antitotalitarianism was at least as important.

The influence of antitotalitarianism on academic constitutional theory has been even more neglected. The leading work on American intellectual reaction to totalitarianism is Edward Purcell's *The Crisis of Democratic Theory*,<sup>18</sup> in which Purcell argued that many American legal scholars who had once been relativists embraced foundational moral theories in the 1930s and 1940s because the confrontation with Nazism made relativism less attractive.<sup>19</sup> Purcell's account ended with the 1960s, but the influence of totalitarianism did not. As this Note shows, the problem of totalitarianism significantly influenced two of the most important contributions to recent constitutional theory, John Hart Ely's *Democracy and Distrust*<sup>20</sup> and Bruce Ackerman's *We the People: Foundations*.<sup>21</sup> Each of these books exhibits internal tensions which, I suggest, are best viewed in the context of the antitotalitarian influence.

*Democracy and Distrust* argues for a purely procedural approach to judicial review. Judges, Ely argues, should not make substantive choices on issues of values or policy. Instead, they should interpret the Constitution so as to regulate the processes of representative democracy, making sure that the channels of political change are open and functioning properly.<sup>22</sup> Most of *Democracy and Distrust* is dedicated to this argument. Toward the end of the book, however, Ely argues that the Constitution must grant special protections to minority groups.<sup>23</sup> Several commentators have noted that this prescription does violence to the book's major claim that the Constitution should be interpreted in ways that avoid making judgments on substantive policy issues.<sup>24</sup> What those commentators have left unasked, however, is why Ely undercuts his general theory in this way. I suggest that what forces Ely to qualify his theory is the problem of totalitarianism. Without the special provision for minority rights, Ely's procedural constitutionalism could not block a Nazi-style regime from arising in America. Because antitotalitarianism is implicitly required of any constitutional theory, Ely adds an antitotalitarian

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Foreword to 8 THE SUPREME COURT IN AMERICAN LIFE: THE WARREN COURT, 1953-1969, at ix-x (Arnold S. Rice ed., 1987).

17. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) Ely's theory is discussed *infra* Section III.B.

18. PURCELL, *supra* note 4.

19. See *id.* at 159-79; see also *infra* Subsection I.A.1

20. ELY, *supra* note 17.

21. ACKERMAN, *supra* note 11.

22. See ELY, *supra* note 17, at 73-134.

23. See *id.* at 135-80.

24. See, e.g., Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1045 (1980)

chapter to his book, even though that chapter is in great tension with the heart of his proceduralist theory.

*We the People* also operates within an antitotalitarian framework. In that book, Ackerman offers a “dualist” theory of popular sovereignty, arguing that the People have broad authority to amend the Constitution both within and without the formal amending procedures of Article V.<sup>25</sup> The dualist theory is presented not as a prescriptive argument for how American constitutionalism should operate but as an interpretive description of how American constitutionalism has actually functioned. After elaborating that descriptive interpretation, Ackerman offers a prescriptive constitutional vision that explicitly rejects the dualist system that *We the People* describes. Having argued that the people have broad, inherent power to amend the Constitution, he proposes that certain parts of the Constitution be made unamendable by any means, formal or otherwise.<sup>26</sup> In parallel to the question of why Ely undercuts the descriptive theory of *Democracy and Distrust*, I ask why Ackerman disavows the descriptive theory that he offers in *We the People*. Again, one answer lies in the unwritten rule that a constitutional theory must address the problem of totalitarianism. Ackerman’s dualist constitutional system might not prevent the rise of a totalitarian regime, but his prescriptive foundationalism would. Accordingly, Ackerman rejects the dualist theory that is *We the People*’s major innovation. That Ely and Ackerman are willing to go to such lengths to ensure that their visions of constitutional law preclude the rise of totalitarian regimes suggests the extent to which antitotalitarianism continues to influence academic constitutional theory.

The body of this Note has three parts. Part I describes the impact of totalitarianism on the intellectual climate of America at midcentury, when academics in many disciplines, including law, struggled with the implications of Nazism and Soviet Communism for their ethical and epistemological theories. Part II analyzes antitotalitarianism in the Supreme Court from World War II through the 1960s, showing how the influence of anti-Nazism and anti-Sovietism contributed to landmark decisions in many fields of constitutional law. Part III explores the influence of antitotalitarianism on modern constitutional scholarship, arguing that leading theorists like Ackerman and Ely have been substantially influenced by the totalitarian problem. This Part suggests that the major tensions in *We the People* and *Democracy and Distrust*, two of the most important recent works of constitutional theory, are traceable to the influence of antitotalitarianism.

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25. See ACKERMAN, *supra* note 11, at 6–7.

26. See *id.* at 320–21. For more on Ackerman’s descriptive and prescriptive theories, see *infra* Section III.A.

## I. TWO THEMES IN THE INTELLECTUAL RESPONSE TO TOTALITARIANISM

The origins of antitotalitarianism lie in the decades before World War II, when the rise of Nazism and a growing fear of the Soviet Union precipitated a major crisis for English-speaking intellectuals.<sup>27</sup> Both regimes seemed highly pernicious, and many Americans struggled to articulate a principled opposition to Nazi and Soviet creeds. This Part discusses two separate and sometimes contradictory themes in the intellectual response to totalitarianism. One theme stressed the evil of relativism and the need for objective, universal truths. If no truth were absolute, this argument went, then no firm foundation existed from which to condemn and oppose Nazi or Soviet policies. Another theme stressed the evil of dogmatic ideologies. According to that argument, the essence of totalitarianism was unwavering adherence to alleged truths about science, politics, or morality. Antitotalitarianism entailed the willingness to doubt and revise one's own beliefs. The first mode of response urged foundationalism; the second counseled skepticism. In the field of law, the first theme was the more powerful. It helped chasten legal realism and positivism, revive natural law theory, and invent the doctrine of universal human rights. Its influence underlay landmarks of legal development like the Nuremberg trials, the Hart-Fuller debate,<sup>28</sup> and a long line of Supreme Court decisions on civil liberties. The second theme, however, was also an important presence, coloring the work of leading constitutional critics such as Alexander Bickel. Together, these two ways of opposing totalitarianism redefined the project of legal philosophy in the generation after World War II.

### A. *Dominant Theme: The Return of Normative Foundationalism*

#### 1. *The Quest for Objectivity*

As Purcell has shown, most American intellectuals had by the early 1930s rejected the idea that a normative theory could be logically conclusive.<sup>29</sup> The problem of totalitarianism, however, forced many to think again. Leading academics began to argue that moral and epistemological skepticism were the intellectual midwives of repulsive political orders. Bertrand Russell, for example, linked the "pragmatist" theory of truth with Soviet show trials.<sup>30</sup> The charge was fairly simple: Philosophical pragmatists like William James and John Dewey denied that there was sense in a "correspondence theory of truth," that is, a conception of truth as the unique representation of external

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27. See PURCELL, *supra* note 4, at 123-78.

28. See *infra* Subsection I.A.2.c.

29. See PURCELL, *supra* note 4, at 72.

30. See BERTRAND RUSSELL, THE WILL TO DOUBT 11 (1958)

reality.<sup>31</sup> But if no single external reality regulated truth, who was to say that the show trials were fraudulent? Defense against totalitarianism, Russell's argument implied, required that truth be objective.<sup>32</sup>

The call for objectivity reverberated through many intellectual disciplines. American historians trivialized the relativist scholarship of the prewar generation and strove to create a "consensus" that would be as "value-free" as possible.<sup>33</sup> Social scientists attacked Karl Mannheim's once-beloved "sociology of knowledge," charging that Nazi ideologues had used that idea to discredit liberal ideals as mere social constructions. The survival of liberalism, they claimed, required that it be able to claim its own foundations as objectively true.<sup>34</sup> Karl Popper made a similar argument in *The Poverty of Historicism*,<sup>35</sup> a book that he described as his "war effort" and "a defence of freedom against totalitarian and authoritarian ideas."<sup>36</sup> Truth, he insisted, was lasting and universal, and historicism and relativism could undermine the objective bases of freedom.<sup>37</sup> Much of the broader public also absorbed the idea that totalitarianism was bound up with the destruction of objective truth: The popular literary image of totalitarianism was George Orwell's *1984*, in which the protagonist worked for a totalitarian government as a professional falsifier of the past.<sup>38</sup>

The insistence on epistemological foundationalism and the possibility of objectivity reached the legal academy as well. As an illustration of the shift in attitudes, consider the fate of legal realism during and after World War II. Central elements of realism included a skeptical critique of the claim that law could be neutral and apolitical, and an equally skeptical view of the claim that formal legal reasoning could discover justice or "humanitarian values."<sup>39</sup>

31. See JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY 123 (enlarged ed., Beacon Press 1948) (1920); WILLIAM JAMES, PRAGMATISM 91 (Bruce Kuklick ed., Hackett 1981) (1907).

32. See RUSSELL, *supra* note 30, at 10–11.

33. See NOVICK, *supra* note 4, at 321. Leading examples of the consensus school include DANIEL J. BOORSTIN, THE GENIUS OF AMERICAN POLITICS (1953), and LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (1955).

34. See, e.g., ROBERT K. MERTON, *Science and the Social Order*, in THE SOCIOLOGY OF SCIENCE: THEORETICAL AND EMPIRICAL INVESTIGATIONS 254, 260 & n.20 (Norman W. Storer ed., 1973).

35. KARL R. POPPER, THE POVERTY OF HISTORICISM (1957).

36. NOVICK, *supra* note 4, at 298 (quoting KARL R. POPPER, *Autobiography of Karl Popper*, in THE PHILOSOPHY OF KARL POPPER 2, 9 (Paul A. Schilpp ed., 1974)). Popper also applied those characterizations to another book, see KARL R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES (Princeton Univ. Press rev. ed. 1950) (1945) [hereinafter POPPER, THE OPEN SOCIETY]. Unlike *The Poverty of Historicism*, which typified the antirelativist strain of antitotalitarianism, *The Open Society and Its Enemies* exemplified antitotalitarianism as skepticism and revisability. See *infra* text accompanying note 70. *The Poverty of Historicism* was dedicated to "the countless men and women of all creeds or nations or races who fell victims to the fascist and communist belief in Inexorable Laws of Historical Destiny." KARL R. POPPER, THE POVERTY OF HISTORICISM (dedication) (2d ed. 1960). Similarly, Popper explained that he decided to write *The Open Society and Its Enemies* in 1938, on the day that he heard the news of the Nazi takeover of Austria. See *id.* at viii.

37. See NOVICK, *supra* note 4, at 298–99 (describing Popper's objectivism and its connection to his understanding of freedom).

38. See GEORGE ORWELL, 1984 (1949).

39. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960, at 170 (1992).

Prewar giants of American jurisprudence such as Oliver Wendell Holmes, Jr., and Roscoe Pound were confirmed realists. With the rise of Nazism, however, many prominent realists changed their views. In the 1920s, Yale Law School Dean Robert Hutchins had been a prominent realist. By the late 1930s, he urged a return to foundationalism and universal morality. In denouncing ideas that he had formerly endorsed, Hutchins made explicit reference to the rise of Nazism. On the eve of the war, Hutchins bemoaned the skepticisms and empiricisms that completed “the journey from the man of good will to Hitler,”<sup>40</sup> and in 1940, he attacked legal realism by declaring that “[t]here is little to choose between the doctrine I learned in an American law school and that which Hitler proclaims.”<sup>41</sup> At roughly the same time, the great realist Karl Llewellyn abandoned several of his earlier positions, announcing that any legal thinker must “need correction at once and, if need be, with a club” if he forgot that “the goal of law is justice.”<sup>42</sup>

## 2. *The Fall of Positivism*

### a. “Human Rights”

As Llewellyn’s recantation implied, the decline in realist skepticism was matched by a renewed interest in universal and foundational theories of justice. Consider the *Yale Law Journal* as an illustrative example. In all of the 1930s, the *Yale Law Journal* did not publish a single article on natural law or universal rights.<sup>43</sup> After the war, such articles began to appear regularly.<sup>44</sup> These articles frequently contained prominent reference to the wartime encounter with Nazism.<sup>45</sup> Indeed, reaction against Nazism gave birth to a sweeping new doctrine of universal justice: the doctrine of “human rights.”<sup>46</sup> The idea of human rights is in some ways reminiscent of older theories of rights, notably the eighteenth-century ideas of “natural rights” and the “rights of man.”<sup>47</sup> In other ways, however, it grows distinctively from anti-Nazism.

40. PURCELL, *supra* note 4, at 152 (citations omitted). For another argument about realism as the road to fascism, see Ben W. Palmer, *Hobbes, Holmes, and Hitler*, 31 J. A.B.A. 569–73 (1945).

41. PURCELL, *supra* note 4, at 157–58 (citations omitted).

42. K.N. Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 *COLL. M. L. REV.* 581, 603 (1940).

43. Roscoe Pound noted in 1942 that natural law thinking survived only in Scotland, Italy, and a few Catholic faculties. In Protestant and nonsectarian institutions in the United States, natural law was dead. See Roscoe Pound, *The Revival of Natural Law*, 17 *NOTRE DAME LAW* 287, 287 (1942). It should also be noted that the “natural law” in which Catholic institutions maintained some slight interest was often Thomist rather than Lockean-liberal natural law; the latter was even more scarce.

44. E.g., Edmond N. Cahn, *Justice, Power and Law*, 55 *YALE L.J.* 336 (1946); Myres S. McDougal & Gertrude C.K. Leighton, *The Rights of Man in the World Community*, 59 *YALE L.J.* 60 (1949); Max Radin, *Natural Law and Natural Rights*, 59 *YALE L.J.* 214 (1950).

45. E.g., Cahn, *supra* note 44, at 351–52; McDougal & Leighton, *supra* note 44, at 64, 68, 80.

46. See, e.g., FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS* 1–2 (1990); Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 *UCLA WOMEN’S L.J.* 59, 71–72 (1993).

47. See THOMAS PAINE, *RIGHTS OF MAN* (Henry Collin ed., Penguin Books 1969) (1791).

Its chief preoccupations are not with property or taxation but with discrimination on the basis of race, religion, and political views,<sup>48</sup> preoccupations that map the greatest evils of Nazism as Americans understood them. Moreover, human rights doctrine has an international focus. It arose in response to atrocities committed in foreign countries, and the theory and practice of human rights retains an international orientation to this day. This universalism has helped solve conceptual problems that Nazism posed for Americans: A theory of universal, objective human rights provided a framework for condemning the activities of a foreign state, regardless of the content of its positive law.<sup>49</sup>

#### b. *Nuremberg*

In the first years after the war, the event that best symbolized such a condemnation was the trial of major German war criminals at Nuremberg. As a symbol, Nuremberg represented the archetypal administration of justice in a world beginning to use Nazism as its touchstone for unacceptable conduct. As a legal event, Nuremberg elicited the attention of scholars concerned with the possibility of nonpositive law.<sup>50</sup> Several influential American jurists participated personally in the trial, including Herbert Wechsler, Attorney General Francis Biddle, and Supreme Court Justice Robert Jackson. Through them and others, the themes of Nuremberg became prominent in American jurisprudence.<sup>51</sup>

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48. See, e.g., *Preface* to ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993, at vii–viii (Stephen Shute & Susan Hurley eds., 1993) (stating Amnesty International’s understanding of “human rights”).

49. The commitments to universalism and antipositivism implicit in “human rights” have been so strong in the postwar era that the vocabulary of human rights has often overwhelmed and subsumed earlier classifications of rights, as if “human rights” were not synonymous merely with “natural rights” but with “rights” itself. In some cases, the unmodified term “rights” is used to mean “human rights,” i.e., to refer to the legitimate claims that all human beings have, irrespective of location or political conditions. See, e.g., Louis Henkin, *Rights: Here and There*, 81 COLUM. L. REV. 1582, 1582 (1981). In other cases, rights that had previously been designated “constitutional rights,” “legal rights,” or any of many other kinds of rights have been subsumed under the heading of “human rights.” In the 1950s, Harvard Law Professor Zechariah Chafee published three books whose titles reflected the ascendancy of the “human rights” concept in legal thought at that time. See ZECHARIAH CHAFEE, JR., *HOW HUMAN RIGHTS GOT INTO THE CONSTITUTION* (1952); ZECHARIAH CHAFEE, JR., *THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787* (1956) [hereinafter CHAFEE, *THREE HUMAN RIGHTS*]; *DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS* (Zechariah Chafee, Jr. ed., 1951). In those books, Chafee included as “human rights” several rights long present in American law but not previously called “human rights,” such as the right against bills of attainder and the right of petition. See, e.g., CHAFEE, *THREE HUMAN RIGHTS*, *supra*, at 18, 90–161. The pattern persists: John Finnis, for example, has identified property, contract, and assembly as “human rights.” See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 221 (1980).

50. See, e.g., Sheldon Glueck, *The Nuernberg Trial and Aggressive War*, 59 HARV. L. REV. 396 (1946); Karl Jaspers, *The Significance of the Nurnberg Trials for Germany and the World*, 22 NOTRE DAME LAW. 150 (William B. Ball trans., 1947); Harold Leventhal et al., *The Nuernberg Verdict*, 60 HARV. L. REV. 857 (1947); Max Radin, *War Crimes and the Crime of War*, 21 VA. Q. REV. 497 (1945).

51. See, e.g., David Luban, *The Legacies of Nuremberg*, 54 SOC. RES. 779 (1987). The career of Edgar Bodenheimer, longtime professor of law and sometime counsel for the federal government, furnishes an excellent example of Nuremberg’s influence. Bodenheimer served in the prosecutor’s office at Nuremberg,



The International Military Tribunal tried to limit the trial to issues of positive law codified in treaties and international conventions of warfare. Several contemporary commentators tried unsuccessfully to provide intellectual support for that approach, arguing that the trial had conformed to the requirements of normal positivist jurisprudence. One argument held that the tribunal could not be accused of making new offenses and prosecuting people for them, because the tribunal was bound by the charter that had constituted it.<sup>52</sup> Of course, the question of that charter's authority to create offenses remained, because the charter was written by the Allies after the offenses had been committed. A different set of arguments maintained that international law was in an early stage of its development and that its courts were necessarily lawmakers, just as early Roman courts or early English common law courts had been.<sup>53</sup> Those arguments, however, were not denials but justifications of the trial's *ex post facto* nature. Another argument noted that the Allies had announced their intention to try and punish war criminals, thus giving the Germans adequate warning of the consequences of their actions.<sup>54</sup> The announcement of an intention to cause harm, however, does not differentiate a legitimate warning from an illegitimate threat.<sup>55</sup> In the end, none of these arguments escapes Judith Shklar's conclusion that the trial really turned on nonpositive theories of justice.<sup>56</sup> The propriety of Nuremberg rested on the distinctly nonpositivist principle that some things were simply wrong, whether codified or not, and that justice sometimes calls upon courts to act even when they lack formal legal authorization.

### c. *The Hart-Fuller Debate*

Anti-Nazism continued to chide legal positivism in the years after Nuremberg. It was, for example, a significant influence in the great Hart-Fuller debate over positivism and natural law, conducted in back-to-back essays in

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and changes in his jurisprudential philosophy after that event illustrate the shift from prewar positivism to postwar foundationalism. In 1940, Bodenheimer dismissed the possibility of an eternal natural law of reason, liberty, and equality, and he disapproved of encouraging judges to look beyond legal texts to other standards of justice. After the war, however, Bodenheimer came to believe that certain practices were unjust and illegal under any circumstances, even when the written positive law stated otherwise. Compare EDGAR BODENHEIMER, *JURISPRUDENCE* 174–80, 286 (1940), with EDGAR BODENHEIMER, *JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW* 296, 303 & nn.28–29 (1962)

52. See Leventhal et al., *supra* note 50, at 858–59.

53. See Glueck, *supra* note 50, at 416–18.

54. See *id.* at 440–42.

55. A thug who warns me that he will break my legs if I walk down his street still acts illegitimately when he acts in accordance with his warning. The difference between the thug's threat and a legitimate warning is not a question of notice but of substantive justice, and the argument that Allied warnings to the Germans justified Nuremberg begs rather than answers the question of whether the Allies had the right to issue such warnings in the first place.

56. See JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 146–90 (1986)

the *Harvard Law Review* in 1958.<sup>57</sup> Although H.L.A. Hart and Lon Fuller focused in their essays on their points of disagreement, they shared a powerful assumption about the criteria by which their arguments would be judged. Hart and Fuller both took as their point of departure the question of how legal systems should deal with the problem of Nazism.<sup>58</sup> At issue was whether natural law or positivism was the proper approach to law in a post-Nazi world, and which was more likely to cause Nazi-style calamities in the future.

Hart, making the positivist case, recognized that the weight of the Nazi issue was mostly against him. His essay devoted considerable space to engaging that challenge directly, but his argument actually conceded most of the question. As part of his defense of positivism, Hart claimed that positive law, though formally law, should not always be obeyed. Sometimes a law is simply too unjust to command obedience. He portrayed his dispute with Fuller on this point as simply being about whether such an unjust law is still worthy of the title "law."<sup>59</sup> Hart thus defended legal positivism after Nuremberg in part by emptying it of its normative significance: A positivism that does not counsel obedience to bad laws is barely worth debating.

A second part of Hart's defense of positivism was a historical claim. Anticipating one of Fuller's attacks, Hart explicitly denied that German legal positivism helped the Nazi regime to rise.<sup>60</sup> On the contrary, Hart alleged that Nazi jurisprudence had been insufficiently positivistic.<sup>61</sup> Arguing that judges should sentence convicted defendants only in accordance with predetermined rules rather than having discretion to shape sentences to individual cases, Hart alleged that Nazi judges used an "intelligent and purposive" method of sentencing.<sup>62</sup> Hart did not explain why intelligent or purposive sentencing was

57. See 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).

58. The same would be true of an exchange between Bruce Ackerman and Richard Posner a generation later. See *infra* text accompanying notes 195–201.

59. See Hart, *supra* note 57, at 615–21.

60. See *id.* at 617–19.

61. This point has itself been thoroughly debated. According to Ingo Müller, Nazi legal doctrines were "the exact opposite of legal positivism." INGO MÜLLER, *HITLER'S JUSTICE* 220 (1991). Others have argued that Nazi judges took liberties with pre-1933 laws but were strictly obedient positivists with Nazi-made laws. See Arthur Kauffman, *National Socialism and German Jurisprudence from 1933 to 1945*, 9 CARDOZO L. REV. 1629, 1645 (1988). In a slightly different vein, Judith Shklar has argued that German judges during the Nazi era regularly perverted Weimar laws but sometimes used positivist theory to rationalize their compliance with the Nazi regime. See SHKLAR, *supra* note 56, at 72. Finally, Marcus Dubber has observed that the relationship between Nazi jurisprudence and positivism depends largely on which of two understandings of "positivism" is in play. If "positivism" means "textualism," then positivism was indeed the strongest force in German jurisprudence at the time of Nazism. See Marcus Dirk Dubber, *Judicial Positivism and Hitler's Injustice*, 93 COLUM. L. REV. 1807, 1820 (1993) (reviewing INGO MÜLLER, *HITLER'S JUSTICE* (1991)). If, however, positivism means "the separation of law from morality as politics," then Nazism was entirely antipositivist, because law, morality, and politics were all one in Nazi Germany. *Id.* at 1822. Even on that last understanding, however, it would not necessarily be the case that German judges had been antipositivist. It is also possible that judges who were not ideologically pro-Nazi could have complied with an antipositivist regime for positivist reasons: A regime need not have a positivist ideology for a judge to be able to make decisions simply by following its positive law.

62. See Hart, *supra* note 57, at 613–14.

an evil. He seems to have assumed, perhaps correctly, that the simple fact of association with Nazism would condemn the practice. He was, in short, engaging in the pattern of argument that Leo Strauss once called the "*reductio ad Hitlerum*."<sup>63</sup>

Fuller's essay gave even more space to Nazism than did Hart's, and, given that Fuller was arguing the antipositivist position, this added emphasis should come as no surprise.<sup>64</sup> Because Nazi Germany could have existed under a strictly positivist system, the Nazi example is usually invoked in support of the antipositivist position (at least before audiences who take the undesirability of Nazism as given). Fuller took up the connection between positivism and Nazi Germany on the third page of his essay and kept the link in the foreground to the very end.<sup>65</sup> At one point, as if about to broaden his base of evidence, he averred that "[i]t is not necessary . . . to dwell on such moral upheavals as the Nazi regime"<sup>66</sup> in order to show the flaws in positivism, but he returned to discussion of the Nazi regime only two pages later.<sup>67</sup> Noting that positivism had been a dominant theory among German legal scholars before 1933, Fuller implied that positivism had assisted the Nazi rise to power.<sup>68</sup>

The Hart-Fuller debate over positivism and natural law, then, was largely a debate about which system was better suited to meet the challenges of Nazism. Both Hart and Fuller believed that a demonstration that positivism in fact led to Nazism would cripple positivism as a legal theory, which is why Hart explicitly denied the connection and Fuller pressed his attack at exactly that point. Conversely, Hart knew that he could support positivism if he could portray the Nazi judges as people who reached outside established legal norms and followed a private sense of justice. Hart's qualifications of his own

63. LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 42 (1950)

64. It is indicative of the postwar climate in legal theory that Fuller, who argued the natural law position, was a leading legal realist. Realism and positivism were not necessarily aligned, so there was nothing remarkable about a realist critiquing positivism. What was remarkable, however, was that he should have chosen to make such a critique in the name of "natural law," a concept for which prewar realists might have had little patience.

65. See Fuller, *supra* note 57, at 633.

66. *Id.* at 646.

67. See *id.* at 648.

68. See *id.* at 657–60. In an ironic twist near the end of his essay, Fuller implied that reaction against the evils of Nazism was the primary motivation not for his own natural law position but for Hart's positivism. See *id.* at 669–72. Nazism could easily make people afraid that the ideologies of a few powerful people will pervert the law, bringing injustice and destruction. Denying judges the discretion to convict, acquit, and sentence based on their own conceptions of justice is one possible protection against arbitrary power acting under color of law. Fuller's contention here raises the possibility that one of the most important and problematic features of postwar American constitutional philosophy—the concept of "neutrality"—is traceable to the fear of totalitarianism. Indeed, the foremost spokesman for neutrality in constitutional law, Herbert Wechsler, explicitly acknowledged that his concern for neutrality had roots in the confrontation with Nazism and specifically in his experience at Nuremberg. See Norman Silber & Geoffrey Miller, *Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 930 (1993). This variety of anti-Nazism is related to what I called the "counterpoint theme" at the beginning of this Part; rather than promoting foundationalism as the antidote to Nazism, it encourages skepticism of authoritatively imposed ideals. Section I B, *infra*, explores this counterpoint theme in more detail.

position suggest that the spirit of natural law prevailed in his debate with Fuller: Both sides agreed that people must consult sources outside the positive law when deciding what to do in a given circumstance, even when there is an applicable positive law. That conclusion is unsurprising in a debate conducted in an era of natural law revival, only twelve years after Nuremberg.

## B. *Counterpoint: Antitotalitarianism as Skepticism*

### 1. *Science and Ideology*

As discussed throughout the previous Section, many American intellectuals responded to totalitarianism by embracing foundational normative theories. But antitotalitarianism took more than one form. According to other important thinkers, the proper response to totalitarianism was not to espouse a foundationalist ideology, but to be skeptical of ideologies in general. After all, both Nazism and Communism were dogmatically ideological. Both were hostile to the liberal, scientific values of inquiry and skepticism, refusing to entertain the possibility that their dogmas might be in need of revision.<sup>69</sup> These thinkers held that, to be meaningfully different from the totalitarians, Americans should avoid falling into dogmas of their own.

Sometimes the same thinkers whose antirelativism supported the embrace of foundationalism also produced scholarship that supported the anti-ideological counterpoint. In the second of his two "war effort" books, Karl Popper denounced the dangers inherent in ideological visions of politics.<sup>70</sup> For Popper and like-minded theorists, ideology began where science ended, and the essence of science was falsifiability.<sup>71</sup> Totalitarian thought was ideological and beyond critique; democratic thought was scientific, that is, revisable and falsifiable.<sup>72</sup> In a similar vein, the consensus school historians of the 1950s described the United States as a nonideological polity. Daniel Boorstin, for example, wrote that America had no political ideology for home use or for export, that the United States should not attempt to combat the Soviet Union in an ideological war, and that sensible Americans had never been much interested in the great European tradition of systematic political philosophy that

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69. See DAVID A. HOLLINGER, *SCIENCE, JEWS, AND SECULAR CULTURE: STUDIES IN MID-TWENTIETH-CENTURY AMERICAN INTELLECTUAL HISTORY* 160–61 (1996).

70. See POPPER, *THE OPEN SOCIETY*, *supra* note 36.

71. See NOVICK, *supra* note 4, at 299.

72. See HOLLINGER, *supra* note 69, at 158. William James and John Dewey, relativist villains according to the foundationalist antitotalitarians, see *supra* notes 30–31 and accompanying text, were heroes of the skeptical camp, see PAUL S. BUCK ET AL., *GENERAL EDUCATION IN A FREE SOCIETY: REPORT OF THE HARVARD COMMITTEE* 47 (1945), because they urged incremental revision in systems of belief and taught that abstract reason led to political absolutism. See DEWEY, *supra* note 31, at 96–97; JAMES, *supra* note 31, at 33.

had produced, among other theorists, protototalitarians like Rousseau and Marx.<sup>73</sup> For thinkers like these, the lesson of totalitarianism was the danger of imposed ideology.

## 2. *Alexander Bickel and the Problem of Ideological Jurisprudence*

The skeptical, anti-ideological theme in postwar thought reached the highest levels of constitutional theory in the work of Alexander Bickel. In his early work, Bickel advocated a view of the Supreme Court as a political prophet, leading public opinion in morally auspicious directions.<sup>74</sup> In his later work, however, Bickel rejected the notion that the Court should act as an ideological vanguard, and he criticized the Warren Court for trying to be one.<sup>75</sup> According to Bickel, the dispositive force behind many of the Warren Court's major decisions was the Court's faith in a particular vision of egalitarianism. That, he said, was improper, because that kind of faith "overrides standards of analytical reason and scientific inquiry as warrantors of the validity of judgment."<sup>76</sup> Scientific inquiry was appropriate for decisionmaking in a democracy; ideological faith was not. Indeed, Bickel praised his greatest judicial hero, Felix Frankfurter, as having been progressive, democratic, and *skeptical*.<sup>77</sup> According to Bickel, the Warren Court was insufficiently skeptical of its own values. It would have been better served by "adherence to the method of analytical reason, and a less confident reliance on the intuitive judicial capacity to identify the course of progress. Pragmatic skepticism is certainly an attitude of its Progressive realist progenitors that the gallant Warren Court emulated all too little."<sup>78</sup>

Bickel's anti-ideological stance, like Boorstin's, involved a general denigration of systematic political philosophy. Quoting Madison, Bickel disparaged "theoretic politicians" who aimed to remake society in conformance with abstract ideas, and he charged that the Warren Court had succumbed to

73. See BOORSTIN, *supra* note 33, at 1-4; see also DANIEL BELL, *THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES* (1960).

74. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 239 (2d ed. 1962).

75. See ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 120-21 (1975) [hereinafter BICKEL, *MORALITY OF CONSENT*]; ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 13-14 (1970) [hereinafter BICKEL, *IDEA OF PROGRESS*]. But see Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 *YALE L.J.* 1567 (1985) (arguing that Bickel's jurisprudence was essentially consistent throughout his career). The same skeptical theme is also present in the work of John Hart Ely a generation later. See *infra* Section III.B.

76. BICKEL, *IDEA OF PROGRESS*, *supra* note 75, at 14.

77. See *id.* at 23. For a description of Bickel's relationship with and reverence for Frankfurter, see Louis Henkin, Book Review, 70 *COLUM. L. REV.* 1494, 1494 n.2, 1495-96 (1970) (reviewing ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970)).

78. BICKEL, *IDEA OF PROGRESS*, *supra* note 75, at 173-74; see also BICKEL, *MORALITY OF CONSENT*, *supra* note 75, at 120-21.

that tendency.<sup>79</sup> Even liberal ideology was dangerous, he believed, because it had “pretensions to universality” and was therefore inclined to become intolerant and oppressive.<sup>80</sup> “Our problem,” he wrote, “is the totalitarian tendency of the democratic faith.”<sup>81</sup> Bickel criticized not democracy but democratic *faith*, where faith is the unreasoned cousin of dogma and ideology. Unreasoned liberalism, Bickel wrote, could bring about totalitarian catastrophe.<sup>82</sup> Two hundred years earlier, ideological liberalism had brought about the French Revolution, which, no matter what good it may have yielded, was unmistakably “the first of the totalitarian movements to drench the Western world in blood, particularly in our own century.”<sup>83</sup> Avoidance of totalitarianism required avoidance of “a politics of theory and ideology, of abstract, absolute ideas,” because such a politics “must proceed from one bloodbath to another.”<sup>84</sup> In his last published pages, Bickel urged that we “resist the seductive temptations of moral imperatives,” because the price of being too certain of our principles would be the “dictatorship of the self-righteous.”<sup>85</sup>

The skeptical form of antitotalitarianism has not carried the argument among legal theoreticians. Despite the great esteem in which Bickel was held, no Bickelian school of professors or judges developed to advance or defend his ideas.<sup>86</sup> Instead, constitutional theory has moved in the very directions that Bickel feared, including the direction of abstract and systematic theory.<sup>87</sup> Although the skeptical reaction to totalitarianism has continued to play a role, the form of antitotalitarianism that has dominated constitutional law and theory is that of normative foundationalism, antipositivism, and human rights.<sup>88</sup> As Part II discusses, most of the antitotalitarianism that influenced postwar Supreme Court jurisprudence was not skeptical but foundationalist.

79. See BICKEL, *IDEA OF PROGRESS*, *supra* note 75, at 166 (quoting THE FEDERALIST NO. 10 (James Madison)).

80. See BICKEL, *MORALITY OF CONSENT*, *supra* note 75, at 11.

81. *Id.* at 12.

82. See *id.*

83. *Id.*

84. *Id.* at 19.

85. *Id.* at 142.

86. See Kronman, *supra* note 75, at 1567–68; Edward A. Purcell, Jr., *Alexander M. Bickel and the Post-Realist Constitution*, 11 HARV. C.R.-C.L. L. REV. 521, 563 (1976).

87. See Kronman, *supra* note 75, at 1567–68.

88. The power of foundationalist antitotalitarianism was so great that not even Bickel himself could consistently maintain the skeptical view. Even in *The Morality of Consent*, where his opposition to ideological jurisprudence was at its height, revulsion at Nazi and Soviet atrocities limited Bickel's skepticism. Bickel noted that the true liberal skeptic—his model was Holmes—would permit the public to have its way in the end, no matter what substantive values the public chose. See BICKEL, *MORALITY OF CONSENT*, *supra* note 75, at 72. Bickel was unwilling to accept that conclusion because recent experience had shown that the public may sometimes choose “proletarian dictatorship, or segregation, or genocide.” *Id.* at 76. Bickel wrote that: “It amused Holmes to pretend that if his fellow citizens wanted to go to hell in a basket he would help them.” *Id.* at 77. Having lived through the 1940s, Bickel found the prospect less amusing. “[T]his total relativism,” he pronounced, “cannot be the theory of our Constitution.” *Id.* at 77.

## II. ANTITOTALITARIANISM IN THE SUPREME COURT

By 1943, antitotalitarianism was a major force in Supreme Court decisions. Both the foundationalist and the skeptical themes appeared in the opinions of the Justices, sometimes complementing each other and sometimes working at cross-purposes. Anti-Nazism and anti-Sovietism also appeared both separately and together, sometimes in accord and sometimes in conflict. Moreover, judicial antitotalitarianism was sometimes methodological, sometimes substantive, and sometimes both. Substantively, the courts began to pay more respect to the rights of the kinds of persons characteristically victimized by totalitarian regimes, such as dissenters and members of racial minority groups. Methodologically, American courts became more willing to look outside the positive law, internalizing the antipositivism explicit in the human rights idea and implicit in the Nuremberg trials. From the 1940s until the 1960s, in one manifestation or another, antitotalitarianism played a major role in the development of doctrine after doctrine.

This Part analyzes the paradigm shift that antitotalitarianism effected in the Supreme Court, a shift parallel to the broader intellectual shift described in Part I. It begins by examining three sets of cases in which anti-Nazism contributed to the Court's reversing previously held positions regarding religious dissent, racial discrimination, and executive power. It then examines two sets of cases in which anti-Sovietism played a major role, first with regard to the limits of police power and then with regard to the limits of free speech. These sets of cases highlight what I have called "substantive" antitotalitarianism, that is, antitotalitarianism as a major influence on the substance of the Court's preferred result. This Part closes by highlighting two landmark cases, *Brown v. Board of Education*<sup>89</sup> and *Griswold v. Connecticut*,<sup>90</sup> in which antitotalitarianism helped inspire not just a substantive result but also a change in the methods of jurisprudence.

### A. Anti-Nazism

#### 1. *Religious Dissent: The Flag Salute Cases*

In 1940, a Pennsylvania public school expelled two students, William and Lillian Gobitis, for refusing to salute the American flag and to recite the Pledge of Allegiance. The Gobitis children were Jehovah's Witnesses, and they considered saluting a flag to be a religiously prohibited form of idolatry.<sup>91</sup>

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89. 347 U.S. 483 (1954).

90. 381 U.S. 479 (1965).

91. See *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 590 (1940).

The Supreme Court found that the right of free exercise of religion under the First Amendment did not protect the *Gobitis* children.<sup>92</sup> Three years later, the Court changed its mind. In *West Virginia State Board of Education v. Barnette*,<sup>93</sup> a 1943 case that presented exactly the same circumstances as *Gobitis*, the Court held that First Amendment rights prohibited the state from compelling people to salute the flag and overruled *Gobitis* accordingly.<sup>94</sup>

The reversal was largely driven by the Court's desire to distinguish America from wartime Germany. Laws compelling a salute to the national flag called for conformity of belief and action, which by 1943 was closely associated with the Nazi enemy. The association was especially strong because the conformity demanded came at the expense of the religious beliefs of a minority group. Indeed, a law demanding conformity of religious dissenters offended both the foundationalist and the skeptical forms of antitotalitarianism, the former because of the wrong done to a religious minority, and the latter because the state was presuming to tell people what to believe. Voicing these concerns in *Barnette*, Justice Jackson wrote:

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. . . . Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters.<sup>95</sup>

Anti-Nazism contributed to the reversal in *Barnette* in a second way as well. The salute that the West Virginia school required consisted not of placing one's hand on one's heart, as in the salute familiar today, but rather of holding one's right arm forward, stiff, and slightly raised. Writing as amici in the

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92. See *id.* at 600.

93. 319 U.S. 624 (1943).

94. See *id.* at 642.

95. *Id.* at 640–41. Jackson's jurisprudence frequently displayed several forms of the antitotalitarian influence. In the lines quoted above, for example, the mention of Siberian exiles suggests a contrast with Soviet as well as Nazi totalitarianism, even during the war. Moreover, Jackson's anti-Nazism was stronger than the affirmative commitment to free expression that it supported in *Barnette*. In *Kunz v. New York*, 340 U.S. 290 (1951), he argued that New York should be allowed to deny a license to preach in public places to a Baptist minister who preached that Jews "should have been burnt in the incinerators." *Id.* at 296 (Jackson, J., dissenting). He charged that the Court, in ruling for Kunz on free speech grounds, engaged in "a quixotic tilt at windmills which belittles great principles of liberty." *Id.* at 295 (Jackson, J., dissenting). This willingness to limit the free speech of people who articulated creeds associated with totalitarian regimes prefigured Jackson's *Dennis* opinion, written later in the same year. See *Dennis v. United States*, 341 U.S. 494 (1951) (Jackson, J., concurring); *infra* text accompanying notes 144–49; see also *Terminiello v. Chicago*, 337 U.S. 1 (1949) (Jackson, J., dissenting).



*Barnette* case, several community organizations announced that they disapproved of the flag salute because it looked “too much like Hitler’s.”<sup>96</sup>

## 2. *Race: The Japanese Internment*

The dominant, human rights oriented reaction against Nazi racism was a prominent undertone in the Court’s attitude toward the wartime internment of Japanese Americans. After the American entry into the war against Japan, the military “excluded” most Japanese Americans from the West Coast, interning those who lived there in military camps farther inland.<sup>97</sup> Three cases alleging violations of the rights of American citizens in connection with these restrictions reached the Supreme Court. The development of the Court’s attitude toward the internment, as well as contemporary commentary on the Court’s decisions, shows the influence of anti-Nazism on American conceptions of rights.

The first of the three cases, *Hirabayashi v. United States*,<sup>98</sup> was decided in 1943. Claiming that a curfew for Japanese Americans and an order to register for forced relocation violated his rights as a citizen under the Fifth Amendment, George Hirabayashi refused to comply and was prosecuted and convicted for violating the curfew.<sup>99</sup> The Supreme Court upheld the conviction without dissent.<sup>100</sup> Writing for the Court, Chief Justice Harlan Stone wrote that the question to be decided was not whether the restrictions were racially discriminatory, but merely whether there was a substantial basis to conclude that the curfew was a legitimate military precaution.<sup>101</sup> Stone explicitly stated that although “racial discriminations are in most circumstances irrelevant and therefore prohibited,” the government might “place citizens of one ancestry in a different category from others” when doing so was “relevant to measures for our national defense.”<sup>102</sup> Racial discrimination was not categorically unacceptable: The phrase “irrelevant and *therefore* prohibited”<sup>103</sup> implies that such discrimination could, if relevant in a particular case, be legitimate. Furthermore, Stone held that the restrictions were not subject to strict scrutiny just because they were racially discriminatory. A

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96. *Barnette*, 319 U.S. at 627–28. The organizations included the PTA, the Boy and Girl Scouts, and the Red Cross. *See id.*

97. What was sanitarly called an “exclusion” involved the forced transport and incarceration of more than 100,000 people. *See* JOHN W. DOWER, *WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR* 5 (1986).

98. 320 U.S. 81 (1943).

99. *See id.* at 83.

100. *See id.* at 105.

101. *See id.* at 95.

102. *Id.* at 100.

103. *Id.* (emphasis added).

finding of a rational basis for the classification, as the Court in fact found, would be sufficient to uphold the curfew.<sup>104</sup>

The Court ruled unanimously, but at least one Justice had reservations.<sup>105</sup> In a separate opinion, Justice Frank Murphy wrote that the exclusion policy had a troublingly racist content. He noted that the policy "bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe."<sup>106</sup> This explicit linkage between Japanese American internment in the United States and Nazi treatment of Jews would persist and grow stronger among opponents of the military policy.

A year and a half later, in *Korematsu v. United States*,<sup>107</sup> the Court upheld the conviction of an American citizen who had refused to report for relocation to a military internment center.<sup>108</sup> Three Justices dissented this time, and their written opinions linked the case with Nazi policies.<sup>109</sup> Justice Roberts, for example, wrote that Korematsu had been convicted "for not submitting to imprisonment in a concentration camp, based on his ancestry."<sup>110</sup> Even the majority upholding the restrictions evinced more discomfort than in *Hirabayashi*. Rejecting the *Hirabayashi* doctrine that racial classifications in the name of national defense need only pass a "rational basis" test to be upheld, Justice Black announced for the Court that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny."<sup>111</sup> He went to great lengths to try to distinguish the internment program from Nazi policies. Meeting Roberts's contention directly, Black insisted that *Korematsu* was not about the "imprisonment of a citizen in a concentration camp solely because of his ancestry . . . . Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice."<sup>112</sup> In a truly incredible claim, he insisted that the internment had nothing to do with "hostility to [Korematsu] or his race."<sup>113</sup> These protests suggest that Black wanted to deny the racist nature of the exclusion order, in contrast to the

104. *See id.* at 102. That Stone could apply a rational basis test this way five years after he wrote the Court's decision in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), suggests that footnote four of *Carolene Products* cannot by itself explain the Court's subsequent use of the strict scrutiny standard to prohibit racially discriminatory laws. Only after reaction against Nazism brought a strong antiracist agenda to the Court was racial discrimination afforded strict scrutiny. *See infra* note 208.

105. *See* J. WOODFORD HOWARD, JR., MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY 301-09 (1968); PETER IRONS, JUSTICE AT WAR 242-48 (1983) (describing Murphy's position in *Hirabayashi*).

106. *Hirabayashi*, 320 U.S. at 111 (Murphy, J., concurring).

107. 323 U.S. 214 (1944).

108. *See id.* at 224.

109. *See id.* at 225 (Roberts, J., dissenting); *id.* at 233 (Murphy, J., dissenting); *id.* at 242 (Jackson, J., dissenting).

110. *Id.* at 226 (Roberts, J., dissenting).

111. *Id.* at 216.

112. *Id.* at 223.

113. *Id.*

Court's earlier willingness in *Hirabayashi* to accept racial discrimination when rationally based. If the exclusion order were racially prejudicial, Black implied, it could not be sustained. Something else was even worse in Black's mind than racial prejudice: concentration camps. He went out of his way to engage in a terminological dispute with the dissent, writing of the relocation centers that "we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies."<sup>114</sup> In light of these exchanges between the majority opinion and the dissents, the case seems to have turned on two questions of definition: whether the exclusion order was racially prejudicial and whether the "relocation centers" were concentration camps. Racial prejudice and concentration camps were the trademarks of Nazi Germany, and the Japanese internment could not be upheld if it were of a kind with Nazism.

The final case in this series was *Ex parte Mitsuye Endo*,<sup>115</sup> decided in December 1944. Claiming that she was a citizen detained without charge, Endo had petitioned for a writ of habeas corpus to secure her release from a relocation center. The Supreme Court unanimously granted the writ. Writing for the Court, Justice Douglas declared that the Court would not uphold the detention of a loyal citizen simply because she was a member of a particular racial group.<sup>116</sup> Some concurrences took even harder lines, denouncing the entire evacuation policy as unjustified racism.<sup>117</sup>

These three cases show how the Court's attitude toward the internment of Japanese Americans changed during the course of the war. The Court unanimously upheld the internment in the first case, divided six to three in the second case, and unanimously rejected the internment in the third. From *Hirabayashi* to *Korematsu* and again from *Korematsu* to *Endo*, the Court grew progressively more sympathetic to the claims of members of a minority race discriminated against by their government.

The taint of association with Nazi racism seems to have influenced American attitudes toward the exclusion policy at the end of the war.<sup>118</sup> In a fiercely critical denouncement of the exclusion policy, Yale professor Eugene Rostow explicitly linked the American military policy toward Japanese Americans with Nazi policy toward Jews.<sup>119</sup> Rostow charged what Justice Black had specifically denied, that the relocation centers "were in fact concentration camps."<sup>120</sup> The military's claims about ingrained ethnic

114. *Id.*

115. 323 U.S. 283 (1944).

116. *See id.* at 304.

117. *See, e.g., id.* at 307 (Murphy, J., concurring)

118. The shift probably cannot be explained by a waning of anti-Japanese sentiment as the war neared a successful end, because anti-Japanese prejudice in America was at least as intense in the final stages of the war as it had been in previous periods. *See DOWER, supra* note 97, at 51-55

119. *See Eugene V. Rostow, The Japanese American Cases—A Disaster*, 54 *YALE L.J.* 489, 506 (1945).

120. *Id.* at 502.

tendencies toward disloyalty were virtually indistinguishable, Rostow wrote, from “the pseudo-genetics of the Nazis.”<sup>121</sup> Describing the congressional testimony of the military commander directly responsible for the internment, Rostow quoted several passages that seemed parallel to Nazi statements about Jews.<sup>122</sup> On the last page of his article, Rostow drew a deeper parallel, suggesting that Americans were publicly culpable for the Japanese internment in the same way that “the German people bear a common political responsibility for outrages secretly committed by the Gestapo and the SS.”<sup>123</sup>

Most revealingly, Rostow closed by expressing his hope that the Court would reconsider and repudiate *Hirabayashi* and *Korematsu*, explicitly invoking *Barnette*'s repudiation of *Gobitis* two years earlier.<sup>124</sup> This linkage of the Japanese internment cases to the flag salute cases makes sense only as a linkage of cases influenced by the confrontation with Nazi Germany. The Supreme Court had overruled itself many times by 1945; it was not necessary for Rostow to cite any particular example in order to urge a repudiation of *Hirabayashi* and *Korematsu*. Had he wanted to cite a specific instance of repudiation, it might have seemed more sensible to cite an example legally parallel to those cases, one that involved Fifth Amendment rights or the right of habeas corpus or rights against racial discrimination. Instead, he chose a First Amendment case having nothing to do with race. What linked the Japanese internment cases to the flag salute cases was not a specific legal doctrine but the conceptual framework of antitotalitarianism.

### 3. *Executive Power: The Steel Seizure Cases*

Judicial reaction against totalitarianism was not confined to questions of individual rights. It also informed the Court's treatment of structural issues. For example, the link between totalitarianism and the concentration of executive power was a powerful theme in the *Steel Seizure Cases*.<sup>125</sup> On April 8, 1952, President Harry Truman seized steel mills across the country by executive order.<sup>126</sup> His aim was to avert a nationwide strike that threatened to stop all production of steel. Such a strike, Truman argued, would imperil national security, because the production and maintenance of army equipment during the Korean War required large quantities of steel. Truman acknowledged that no constitutional or statutory provision explicitly authorized him to seize private industries. He maintained, however, that he could

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121. *Id.* at 506.

122. *See id.* at 531–32.

123. *Id.* at 533.

124. *See id.*

125. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

126. *See Exec. Order No. 10,340*, 17 Fed. Reg. 3139 (1952), reprinted in 1952 U.S.C.C.A.N. 1043.

legitimately seize the steel mills because the President had inherent power to protect the country in emergencies.<sup>127</sup>

The Supreme Court disagreed and held the seizure unconstitutional.<sup>128</sup> In a series of individual opinions, Justices Douglas, Frankfurter, and Jackson expounded the dangers of concentrating authority in the Executive. In each opinion, the specter of totalitarianism was prominent. The President had argued that he could meet the steel crises faster and more efficiently than Congress could; Douglas sardonically agreed, writing that “[a]ll executive power—from the reign of ancient kings to the rule of modern dictators—has the outward appearance of efficiency.”<sup>129</sup> Frankfurter wrote that “[t]he experience through which the world has passed in our own day has made vivid” the dangers of undivided authority, which even if initially benevolent was liable to lead toward dictatorship.<sup>130</sup>

Jackson’s concurrence, perhaps the most influential of the *Steel Seizure* opinions, was even more explicit. That executive power must be carefully limited should be manifest, he wrote, “if we seek instruction . . . from the executive powers in those governments we disparagingly describe as totalitarian.”<sup>131</sup> The lesson of that “instruction,” of course, is that executive power must be closely checked, because unchecked executive power is a hallmark of totalitarianism. Jackson also specifically aimed to refute the government’s claim that emergency situations give rise to special powers. The experience of Nazism, he cautioned, showed the danger in the government’s argument:

Germany, after the First World War, framed the Weimar Constitution, designed to secure her liberties in the Western tradition. However, the President of the Republic, without concurrence of the Reichstag, was empowered temporarily to suspend any or all individual rights if public safety and order were seriously disturbed or endangered. . . . Hitler persuaded President Von Hindenberg to suspend all such rights, and they were never restored.<sup>132</sup>

Seven years after Truman sent Jackson to Nuremberg, Jackson argued that the lessons of totalitarianism required him to limit Truman’s power.

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127. See *Youngstown*, 343 U.S. at 582.

128. See *id.* at 588–89.

129. *Id.* at 629 (Douglas, J., concurring).

130. *Id.* at 593–94 (Frankfurter, J., concurring). Frankfurter’s reference to “the experience [of] our own day,” sheds light on the Court’s demurrer to the President’s claim that similar seizures had been permitted in earlier times. In earlier, pretotalitarian times, the concern with unchecked executive power had not always been as great as it was in 1952.

131. *Id.* at 641 (Jackson, J., concurring).

132. *Id.* at 651 (Jackson, J., concurring).

## B. *Anti-Sovietism*

The *Steel Seizure Cases* produced an interplay between the anti-Nazi and anti-Soviet forms of antitotalitarianism. Jackson articulated a specifically anti-Nazi framework, but one might also detect a Soviet allusion in Frankfurter's and Douglas's references to modern dictatorship. The most prominent dictator in 1952 was, after all, the leader of the Soviet Union. In a different vein, the tension between anti-Nazism and anti-Sovietism partly distinguished the majority from the dissent: While Jackson cited the Nazi experience and voted to limit executive power, Chief Justice Vinson cited the Soviet military threat and sided with the President.<sup>133</sup> The antitotalitarianism that informed judicial doctrine thus could frequently favor either result.

Which result a given kind of antitotalitarianism favored, however, was not entirely arbitrary. The differences between the influences of Soviet and Nazi totalitarianism on American legal attitudes largely correlated with differences in how Americans understood those two political orders.<sup>134</sup> For example, anti-Nazism inspired a commitment to the rights of members of racial minority groups, and anti-Sovietism inspired protections against police power. Anti-Sovietism also had a more direct connection to free speech issues than anti-Nazism, and at different times it supported different sides of the free speech question. In the 1950s, Cold War security fears frequently translated anti-Sovietism into suppression of dissent.<sup>135</sup> By the 1960s, however, anti-Soviet sentiment regularly supported expanded rights of free expression, with the Court portraying the United States as meaningfully different from, and better than, the Soviet Union because of the rights that Americans possessed.<sup>136</sup>

### 1. *Police Procedures: Gideon and Escobedo*

In *Gideon v. Wainwright*,<sup>137</sup> the Supreme Court held that criminal defendants have a fundamental right to legal counsel.<sup>138</sup> *Gideon* overruled *Betts v. Brady*,<sup>139</sup> which was decided in 1942, the year before antitotalitarian

133. *See id.* at 669 (Vinson, C.J., dissenting).

134. In other words, the intellectual merging of Nazism and Soviet Communism into "totalitarianism," *see supra* note 4, did not completely obscure the differences between those two regimes.

135. *See infra* Subsection II.B.2.

136. The turning point seems to have come in 1957. Until that date, the Court sustained many Cold War measures designed to suppress political dissent. After that date, it tended to protect the free expression of dissenters. *See Service v. Dulles*, 354 U.S. 363 (1957) (reversing federal employee's dismissal for failure to take loyalty oath); *Yates v. United States*, 354 U.S. 298 (1957) (reversing Smith Act convictions of Communist Party leaders); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (barring legislative investigation into subversive activities); *Watkins v. United States*, 354 U.S. 178 (1957) (same); *see also* HORWITZ, *supra* note 39, at 260; HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 211–26 (Jamie Kalven ed., 1988).

137. 372 U.S. 335 (1963).

138. *See id.* at 344.

139. 316 U.S. 455 (1942).

sentiments began to inspire decisions like *Barnette* and *Endo*. Writing for a unanimous Court in *Gideon*, Justice Black wrote that “the right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”<sup>140</sup> One year later, in another right-to-counsel case, the Court eliminated any uncertainty as to which countries Black had meant by repeating the “us and them” motif and spelling out the reference. In *Escobedo v. Illinois*,<sup>141</sup> which established the right of a defendant to confer with counsel when being questioned by police, Justice Arthur Goldberg cast the question in terms of the proper dynamics of a confrontation between the police and the citizen accused: “Our Constitution, unlike some others, strikes the balance in favor of the right of the accused.”<sup>142</sup> He then included a footnote citing Nikita Khrushchev’s 1956 report to the Soviet Communist Party Congress, discussing confessions obtained during Stalinist purges.<sup>143</sup> By protecting the rights of criminal defendants, Goldberg implied, the American system proved itself superior to its Soviet counterpart.

## 2. *Subversive Advocacy: Dennis*

In *Dennis v. United States*,<sup>144</sup> the Supreme Court upheld the convictions of Communist Party leaders who had been convicted of advocating the overthrow of the government of the United States.<sup>145</sup> As a case in which the right to free political speech clashed directly with the desire to block the rise of communist power, *Dennis* provided a perfect forum for different versions of antitotalitarianism to struggle with one another. Chief Justice Vinson skirted the major issues in his short opinion for the Court, but the concurring and dissenting opinions engaged in an extensive argument about the relationship between communism and free speech in America. Justice Jackson, whose antitotalitarianism had supported increased freedom for dissenters in *Barnette*, now reached the opposite conclusion and concurred in the judgment. His major argument was pragmatic. Implicitly acknowledging the tension with *Barnette*, Jackson wrote that the problem in *Dennis* was not a “refusal of a handful of school children to salute our flag.”<sup>146</sup> It was a well-organized, well-financed, highly disciplined political organization and a serious threat to the American order.<sup>147</sup> The Communists’ superior organization and coordination made them unlike the anarchist hotheads of thirty years before, for whom the “clear and

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140. *Gideon*, 372 U.S. at 344.

141. 378 U.S. 478 (1964).

142. *Id.* at 488.

143. *See id.* at 489 n.11.

144. 341 U.S. 494 (1951).

145. *See id.* at 517.

146. *Id.* at 568 (Jackson, J., concurring).

147. *See id.* at 567–70, 577 (Jackson, J., concurring).

present danger" test was an adequate limitation on free speech.<sup>148</sup> If things progressed to the point where the Communists presented a clear and present danger of harm or violence, all would already be lost.<sup>149</sup> According to Jackson, preventing the evils of totalitarianism thus required limiting free speech.

Justice Douglas took precisely the opposite view. In a dissent whose spirit might have flowed directly from Jackson's *Barnette* opinion, Douglas argued that America must tolerate dissent so as not to reproduce the evils of communism, which demanded conformity.<sup>150</sup> He closed his opinion with a virtually paradigmatic statement of that argument: "Vishinsky wrote in 1930 in *The Law of the Soviet State*, 'In our state, naturally, there is and can be no place for freedom of speech, press, and so on for the foes of socialism.' Our concern should be that we accept no such standard for the United States."<sup>151</sup> A more clear statement of the antitotalitarian argument for free speech would be difficult to compose.<sup>152</sup>

At the same time, Douglas's argument in *Dennis* did not echo all of *Barnette*'s antitotalitarianism. In *Barnette*, Jackson had embraced both the foundationalist and the skeptical themes of antitotalitarianism. On the one hand, he defended dissent as a personal "right of self-determination," irrespective of the correctness of the dissenter's position,<sup>153</sup> on the other, he denounced the elevation of official beliefs to the status of dogma and orthodoxy.<sup>154</sup> With the example of Christianity under Roman censorship, he implicitly reminded his audience that beliefs that many Americans find fundamentally good had been deemed abhorrent in earlier times.<sup>155</sup> Douglas, in contrast, showed no trace of skepticism. He was entirely convinced that communism was error.<sup>156</sup> The counterexample of totalitarianism was for him a conclusive argument for the right of free speech, but only as a

148. Cf. *Schenck v. United States*, 249 U.S. 47, 51-52 (1919) (announcing "clear and present danger" test criticized by Jackson in *Dennis*).

149. See *Dennis*, 341 U.S. at 567-70 (Jackson, J., concurring).

150. See *id.* at 591 (Douglas, J., concurring).

151. *Id.* (Douglas, J., concurring) (quoting ANDREY Y. VISHINSKY, *THE LAW OF THE SOVIET STATE* (1938)). Douglas consistently took this view of the relationship between totalitarianism and free speech. Consider his statement of the anti-Soviet, pro-free speech position in *Paris Adult Theatre*, an obscenity case arising more than twenty years after *Dennis*: "'Obscenity' at most is the expression of offensive ideas. There are regimes in the world where ideas 'offensive' to the majority (or at least to those who control the majority) are suppressed. There life proceeds at a monotonous pace. Most of us would find that world offensive." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 71 (1973) (Douglas, J., dissenting).

152. A generation later, Douglas's position prevailed in the controversy over a proposed Nazi march in Skokie, Illinois. The Skokie question was in some sense *Dennis* redux, pitting the antitotalitarian right of free speech against the need to oppose actual advocates of a totalitarian regime. In upholding the right of the Nazi Party to march, a three-judge panel made precisely the argument that Douglas had made in his *Dennis* dissent, arguing that the right of free speech "distinguishes life in this country from life under the Third Reich." *Collin v. Smith*, 578 F.2d 1197, 1201 (7th Cir. 1978).

153. See *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943).

154. See *id.* at 637, 642.

155. See *id.* at 641.

156. See *Dennis*, 341 U.S. at 588-89 (Douglas, J., dissenting).



foundationalist matter or, alternatively, as a way to distinguish America from the Soviet Union. Douglas's antitotalitarianism did not include a willingness, let alone an eagerness, to examine and revise his fundamental principles—or at least not the principle of antitotalitarianism.

### C. *Antipositivism as Antitotalitarian Judicial Method*

The foundationalist antitotalitarianism of Douglas and others eventually helped to alter not only the substance but also the method of Supreme Court jurisprudence. With positivism increasingly discredited by its association with totalitarianism,<sup>157</sup> Justices became more willing to enforce conceptions of justice that had not been formally codified.<sup>158</sup> The Court was particularly inclined to prefer an uncoded notion of justice to the positive law in cases where doing so would serve a central substantive tenet of antitotalitarianism, such as racial nondiscrimination or the right of individuals to be free from police repression.<sup>159</sup> Two leading examples, corresponding to those two substantive concerns, were *Brown v. Board of Education*<sup>160</sup> and *Griswold v. Connecticut*.<sup>161</sup>

#### 1. *Brown v. Board of Education*

*Brown* was an epochal case, and this Note cannot possibly explain or explore it fully.<sup>162</sup> This Subsection's purpose is limited to suggesting that the foundationalist, human rights form of antitotalitarianism influenced the jurisprudential method that one key Justice, Felix Frankfurter, employed in

157. For the contrasting view—that the problem of totalitarianism makes positivism more defensible—see *supra* note 68.

158. Judicial willingness to impose nonlegislated principles of justice grew from antitotalitarianism as foundationalism rather than as skepticism or revisability. According to skeptical thinkers like the later Bickel, enforcing uncoded conceptions of justice was tantamount to imposing the ideology of a powerful elite, and such an ideology was liable to be misguided. See *supra* notes 75–85 and accompanying text.

159. Some civil rights leaders understood this pattern. Consider a favorite slogan of Dr. Martin Luther King, Jr., which he used to attack racially discriminatory laws: "Everything that Hitler did in Germany was 'legal,'" he said repeatedly. See, e.g., *Interview with Playboy Martin Luther King, Jr.*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.*, 340, 356 (James Melvin Washington ed., 1986) [hereinafter *ESSENTIAL WRITINGS*]; Martin Luther King, Jr., *Letter from Birmingham City Jail*, in *ESSENTIAL WRITINGS*, *supra*, at 289, 294–95; Martin Luther King, Jr., *Love, Law, and Civil Disobedience*, Address Before the Fellowship of the Concerned (Nov. 16, 1961), in *ESSENTIAL WRITINGS*, *supra*, at 43, 50. King's formula makes the postwar antipositivist case clearly and directly. Positivism and Nazism were compatible, so justice is not necessarily coterminous with the positive law. Moreover, King's rhetoric involved the form and the substance of antitotalitarianism simultaneously. In using a Nazi example to discredit positivism and further racial equality, his attack united two aspects of the reaction to Nazism.

160. 347 U.S. 483 (1954).

161. 381 U.S. 479 (1965).

162. Many have tried. See, e.g., RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976); Mark Tushnet & Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 *COLUM. L. REV.* 1867 (1991).

*Brown*. Frankfurter is a particularly good Justice to examine for this purpose, because he was generally hostile to the idea that judges should enforce their own visions of justice. Frankfurter, it will be recalled, was Bickel's mentor and was praised by Bickel for his skepticism.<sup>163</sup> As a matter of jurisprudential method, Frankfurter was extremely reluctant to rely upon nonlegislated principles of justice. He had been on the Supreme Court for fifteen years before *Brown* and had consistently deemed text, precedent, and history the only legitimate means of deciding cases.<sup>164</sup>

When *Brown* came before the Court, Frankfurter directed Bickel, then his law clerk, to research the legislative history of the Fourteenth Amendment to determine its intended meaning.<sup>165</sup> Bickel later published the results of his research and the rationale on which Frankfurter had decided for desegregation.<sup>166</sup> According to the Bickel-Frankfurter analysis, nothing in the text or the legislative history of the Fourteenth Amendment mandated the desegregation of public schools.<sup>167</sup> The Fourteenth Amendment did, however, contain language broad enough to allow some future generation to use it to prohibit segregation.<sup>168</sup> No matter what the Reconstruction Congress might have thought, the Fourteenth Amendment "left the way open to, in fact invited, a decision based on the moral and material state of the nation in 1954, not 1866."<sup>169</sup> The argument, in other words, was that the Court could find against segregation in *Brown* even though the Constitution and its legislative history were inconclusive on the point.

That argument contradicts Frankfurter's usual approach to jurisprudence. Where the Constitution was inconclusive, Frankfurter generally located discretion not in the courts but in the legislatures. Nevertheless, Frankfurter decided in *Brown* to strike down racial segregation. He seems to have been aware that he was deciding based on an abstract sense of justice and, in so doing, violating his own ideals of judicial review.<sup>170</sup> His decision is thus comprehensible as a convergence of methodological and substantive aspects of the antitotalitarian influence. Even without the sanction of the positive law, Frankfurter concluded, justice called on the Supreme Court to prohibit racial segregation.

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163. See *supra* note 77 and accompanying text.

164. See Tushnet & Lezin, *supra* note 162, at 1872-73 (noting Frankfurter's reluctance on jurisprudential grounds to reach result he favored merely on policy grounds).

165. See KLUGER, *supra* note 162, at 653.

166. See Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

167. See *id.* at 56, 58, 64.

168. See *id.* at 63.

169. *Id.* at 65.

170. See HORWITZ, *supra* note 39, at 260 n.83 (describing Frankfurter's correspondence with Learned Hand and Benjamin Cardozo about his inability to adhere in *Brown* to general policy of deference to legislatures).

## 2. *Griswold v. Connecticut*

The judicial methods inspired by foundationalist antitotalitarianism played a still greater role in *Griswold v. Connecticut*.<sup>171</sup> At issue in *Griswold* was whether a state could prohibit married people from using contraception. The Supreme Court answered in the negative on the basis of a constitutional right to privacy,<sup>172</sup> a right that is not explicitly mentioned in the Constitution. Writing for the Court, Justice Douglas hinted that the necessary alternative to a state that recognized a right to privacy was a Soviet-style police state. Early in his opinion, Douglas discussed censorship and discrimination on the basis of political views,<sup>173</sup> matters of questionable logical relevance to a contraception case. In his conclusion, he raised the specter of a police force that would monitor all aspects of citizens' lives, their bedrooms included, if the law in *Griswold* were allowed to stand.<sup>174</sup> Censorship, discrimination on the basis of political views, and constant police surveillance were all aspects of Soviet totalitarianism, and that association helps to explain Douglas's linkage of those three concepts in this opinion.<sup>175</sup>

The Court relied on the ascendant antipositivism when establishing a privacy right in *Griswold*. Noting that the Constitution guaranteed no right to privacy as such, Douglas famously announced that constitutional rights had "penumbras" and "emanations" within which the privacy right was contained.<sup>176</sup> Locating individual rights in the penumbras and emanations of positive law implies that nonpositive aspects of justice are as enforceable as positive ones. As discussed above with reference to his *Dennis* dissent, Douglas's antitotalitarianism was not skeptical but foundationalist.<sup>177</sup>

In the same foundationalist vein, *Griswold* involved a revival of the Ninth Amendment,<sup>178</sup> whose statement that the rights of the people are not limited to those explicitly stated in the Constitution had long been considered toothless. On the theory that such a guarantee could be used to justify anything, it was considered to justify nothing.<sup>179</sup> Indeed, as Justice Goldberg noted, the Court had referred to that Amendment on only three previous occasions.<sup>180</sup> In *Griswold*, however, Goldberg rested his finding of a privacy

171. 381 U.S. 479 (1965).

172. *See id.* at 483.

173. *See id.* at 482–83.

174. *See id.* at 485.

175. It is also important to remember that Douglas wrote this opinion only one year after the Court employed allusive anti-Soviet rhetoric in *Escobedo*. *See supra* notes 141–43 and accompanying text.

176. *See Griswold*, 381 U.S. at 484.

177. *See supra* note 156 and accompanying text.

178. *See Griswold*, 381 U.S. at 487–99 (Goldberg, J., concurring).

179. *See ELY, supra* note 17, at 34–40; BENNET B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* (1955).

180. *See Griswold*, 381 U.S. at 490 n.6 (Goldberg, J., concurring). The three cases were *United Public Workers v. Mitchell*, 330 U.S. 75, 94–95 (1947), *Tennessee Electric Power Co v. Tennessee Valley Authority*, 306 U.S. 118, 143–44 (1939), and *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288.

right on Ninth Amendment grounds, declaring explicitly that people have certain judicially enforceable rights whether the law mentions those rights or not.<sup>181</sup> In all, five Justices—Warren, Douglas, Clark, Brennan, and Goldberg—invoked Ninth Amendment authority for their stance on the privacy right.<sup>182</sup> Thus, a majority of the Supreme Court believed that people had certain rights not mentioned in the written law and, in contrast to the Court's attitude for almost all of its history to that point, that those rights could be enforced by the courts.

In one way or another, then, many of the decisions that revolutionized constitutional law between the 1940s and the 1960s were significantly influenced by antitotalitarianism. Sometimes, as in *Barnette* and *Endo*, the Supreme Court reversed itself to avoid handing down decisions that seemed consistent with Nazism or Soviet communism. Sometimes different forms of antitotalitarianism clashed in the same case, as in the exchange between Justices Jackson and Douglas in *Dennis*. Sometimes, as in *Griswold*, antitotalitarianism contributed to the attitude that certain enforceable rights supersede the written law. To be sure, antitotalitarianism was never the only influence on judicial doctrine. But its importance should not be underestimated. Antitotalitarianism in the Supreme Court helped to shift the central concerns of judicial debate, just as antitotalitarianism among intellectuals more generally had shifted the climate of debate in the academy.

### III. ANTITOTALITARIANISM AND CONSTITUTIONAL THEORY

The contemporary legal academy still operates within a theoretical framework shaped by antitotalitarianism. To date, however, that influence has been little explored. The leading study of antitotalitarianism among American intellectuals, Purcell's *The Crisis of Democratic Theory*,<sup>183</sup> ends with the 1960s, and there has been no systematic attempt to examine the effects of totalitarianism on the thinkers of later decades. To begin to fill that gap, this Part briefly considers Bruce Ackerman's *We the People*<sup>184</sup> and John Hart Ely's *Democracy and Distrust*,<sup>185</sup> two of the most important works of constitutional theory since the 1960s.<sup>186</sup> That antitotalitarianism influences

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330–31 (1936). It is noteworthy that none of these cases predates the rise of totalitarianism in Russia and Germany and that in neither of the prewar cases was the Ninth Amendment given any weight. Only in the *Mitchell* case, decided one year after Nuremberg, was the Ninth Amendment admitted to have any legal force. See *Mitchell*, 330 U.S. at 94–95.

181. See *Griswold*, 381 U.S. at 499 (Goldberg, J., concurring).

182. See *id.* at 484 (Douglas, J., for the Court, joined by Clark, J.); *id.* at 499 (Goldberg, J., concurring, joined by Warren, C.J., and Brennan, J.).

183. PURCELL, *supra* note 4.

184. ACKERMAN, *supra* note 11.

185. ELY, *supra* note 17.

186. See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1217 (1987) (describing importance of *Democracy and Distrust*); Sanford

those books should come as no surprise. Ackerman and Ely are, after all, heirs to the intellectual traditions of Llewellyn, Fuller, Hart, and Bickel. Like their predecessors, Ackerman and Ely operate within a conceptual framework dedicated to addressing the problems of totalitarianism.

Given that context, discussions of Nazism and totalitarianism in works like *We the People* and *Democracy and Distrust* emerge as more than isolated references. They are manifestations of a standard theme in postwar legal theory. Indeed, few things are more common in legal and moral debate than hypothetical Nazi scenarios. Part of the explanation for that discursive pattern is that invoking Nazism is a powerful rhetorical device. Many uses of the Nazi trope are instrumental, reflecting someone's tactical belief that associating a rival position with Nazism would be a strong attack against it. But the fact that anti-Nazism is used rhetorically does not mean that anti-Nazism is not a serious element of legal and moral theory. On the contrary, a successful rhetorical device must capture some aspect of its audience's world-view. The *reductio ad Hitlerum* has instrumental value only because Nazism is a prominent negative reference point for postwar conceptions of justice. Nazi examples, rhetorical and otherwise, occur frequently in postwar argument not only because they are instrumentally valuable, but also because anti-Nazism has played a large constitutive role in shaping the conversation. In other words, much discussion of constitutional theory and individual rights after World War II has been implicitly predicated on the questions of how best to distinguish America from Nazi Germany and how to avoid the rise of a Nazi-style regime.

#### A. We the People

In *We the People*, Ackerman argues that the key to understanding constitutional doctrine in the middle of the twentieth century lies in recognizing the New Deal as a revolution that changed the rules of constitutional interpretation.<sup>187</sup> To support that claim, he describes a process of constitutional amendment which, he argues, has historically been legitimate even though it does not abide by the formal amending procedures laid down in Article V. The informal amending process Ackerman describes works as follows: One of the "political" branches of the federal government has a new vision of American politics that conflicts with the prevailing reading of the Constitution. The actions it takes under this new vision are duly invalidated as unconstitutional by the Supreme Court. Then, in a series of elections where the conflicting constitutional visions are clearly at issue, the innovating branch is returned to power by the voters. The Court then understands that the people

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Levinson, *Accounting for Constitutional Change*, 8 CONST. COMMENTARY 409, 429 (1991) (describing importance of *We the People*).

187. See ACKERMAN, *supra* note 11, at 131-62.

have endorsed the new constitutional vision. As the people are the ultimate source of authority, the Court is now obligated to construe the Constitution in a way compatible with their will, that is, in a way compatible with the innovations.<sup>188</sup> Armed with this understanding of constitutional amendment, Ackerman argues that the New Deal worked a constitutional shift in much the same way that Reconstruction and the Founding did.<sup>189</sup> Since the late 1930s, he concludes, a vision born of the New Deal—properly synthesized with elements of the previous “revolutions”—has been the dominant and legitimating force in constitutional law.<sup>190</sup>

At the end of the book, however, Ackerman announces his dissatisfaction with the amending process that he describes. He recommends that Americans “entrench fundamental rights against constitutional revision” by declaring certain constitutionally guaranteed rights to be unamendable, either by the formal procedures of Article V or by the alternate process discussed above.<sup>191</sup> To show that such entrenchment is plausible, he notes that “[i]n the aftermath of Hitler’s defeat, the German people made it unconstitutional for subsequent majorities to weaken their commitment to a host of fundamental freedoms. The text’s guarantees of basic human dignity were proclaimed unamendable.”<sup>192</sup>

This proposal of unamendability is in tension with the book’s basic point about popular authority over the Constitution. The stronger the argument that the people are the source of constitutional legitimacy, the more difficult it is to argue that constitutional provisions should be entrenched and unreviseable. In terms of the two themes discussed in Part I, the argument for informal amendment pulls in the direction of skepticism, revisability, and suspicion of

188. *See id.* at 34–57.

189. *See id.* at 58.

190. *See id.* at 105–30. The focus of the present analysis is not a dispute with *We The People* over the intellectual history of the Supreme Court but rather a consideration of antitotalitarianism’s influence on *We The People*. Nevertheless, it bears mentioning that the argument of this Note offers a different view of the dominant influence on postwar judicial doctrine from the one that Ackerman presents. The New Deal surely was a seminal influence, but it has difficulty accounting for several elements of modern Supreme Court jurisprudence. For example, the judicial activism in the name of fundamental rights that marked the Warren Court contrasts sharply with the New Deal Court’s willingness to let the legislature eviscerate rights once thought fundamental. *See, e.g.,* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (sustaining minimum wage law for women against challenge based on liberty of contract); *Nebbia v. New York*, 291 U.S. 502, 539 (1934) (sustaining state regulation of milk prices against challenge based on absolute property right). Moreover, the central issues of the New Deal era involved property and contract, while those of the 1950s and 1960s involved racial equality, privacy, police procedure, and free expression. Ackerman is aware of these differences, and he does not argue that economics or judicial passivism *per se* underlay decisions like *Brown*, *Escobedo*, and *Griswold*. He argues for a more complex causality: *Brown*, he says, became possible when the intervening constitutional revolution of the New Deal diminished the force of *Plessy v. Ferguson*, 163 U.S. 537 (1896), as legal precedent; *Griswold* became necessary as a way to limit regulatory power after the repudiation of *Lochner v. New York*, 198 U.S. 45 (1905). *See* ACKERMAN, *supra* note 11, at 133–40. Perhaps Ackerman is correct about the relationship between those cases and the New Deal. Nevertheless, as I argued in Part II, the influence of antitotalitarianism also helped drive those decisions, perhaps in more straightforward ways.

191. ACKERMAN, *supra* note 11, at 320–21.

192. *Id.* at 320.

dogma; the argument for entrenchment resembles normative foundationalism. Ackerman is aware of the tension between these two arguments, and he addresses that tension by placing them in two different spheres. He characterizes his theory of “dualist” popular sovereignty as an interpretive account of how American constitutionalism has worked, not a prescriptive argument for how things should be. His prescriptive argument recommends entrenchment.<sup>193</sup> It would be difficult, however, to separate the two arguments completely, because legitimacy is itself a normative concern.<sup>194</sup> Moreover, even if the arguments could be separated, the basic tension would remain: If the people are sovereign over the Constitution, it is not clear how the Constitution can be placed beyond the people’s power.

In a critique of Ackerman’s model of informal amendment, Richard Posner presents a hypothetical situation that suggests the connection between antitotalitarianism and the tension within *We the People*. “Suppose,” Posner writes, that “a Hitler-style demagogue is elected president and persuades Congress to enact plainly unconstitutional statutes sweeping away basic civil liberties.”<sup>195</sup> The courts “duly invalidate these statutes but the demagogue is reelected anyway” in elections in which the invalidation of those statutes is clearly at issue.<sup>196</sup> According to Posner, Ackerman would be committed by his dualist theory to holding that the courts should then uphold the demagogue’s agenda, “even though it entailed their disregarding the written Constitution, which had never been amended.”<sup>197</sup> It is to prevent such a situation from arising that Ackerman recommends placing some constitutional provisions beyond the reach of amendment. “[I]n short,” Posner concludes, Ackerman aims “to ‘entrench’ the Bill of Rights against a future Hitler.”<sup>198</sup> Posner’s assessment seems correct. Indeed, it does no more than accord with Ackerman’s own stated motive for entrenchment: *We the People* first introduces the idea by saying that “it would be a good idea to entrench the Bill of Rights against subsequent revision by some future American majority caught up in some awful neo-Nazi paroxysm.”<sup>199</sup> Seen in that context, Ackerman’s use of the postwar German Constitution to demonstrate the possibility of entrenchment emerges as more than an arbitrarily chosen example. It is a hint at a specific influence shaping the call for entrenched rights: the problem of Nazism.

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193. *See id.* at 15–16.

194. Even an argument of second-order legitimacy, according to which whatever the people believe to be legitimate is legitimate, contains a normative component, because it takes a position on the source of legitimate value, i.e., by locating it in the beliefs of the people.

195. Richard A. Posner, *Democracy and Dualism*, 56 *TRANSITION* 68, 72 (1992)

196. *Id.*

197. *Id.*

198. *Id.*

199. ACKERMAN, *supra* note 11, at 16.

The essence of Posner's critique of Ackerman's informal amending procedure is that it would not prevent a Nazi regime from gaining power in America. Ackerman, by making the prescriptive argument for entrenchment, agrees that the critique has force. Neither theorist explains why the argument from Nazism is a good test of a legal theory,<sup>200</sup> but both accept that to show that Nazis could come to power within a given legal order is to present a compelling case against it. In using the problem of Nazism as an implicit touchstone for legal theory, Ackerman and Posner follow in the tradition of Fuller and Hart. Antitotalitarianism thus remains a powerful influence on constitutional thought, and leading theories like Ackerman's operate within a framework that it has helped to define.<sup>201</sup>

## B. Democracy and Distrust

Like Ackerman's *We the People*, Ely's *Democracy and Distrust* displays internal tensions that suggest the continued relevance of antitotalitarianism. Ely's major project is to advocate a process-based theory of judicial review. For five of the book's six chapters, Ely argues that judges should use the Constitution only to facilitate democratic representation and never to enforce substantive value choices. He dismisses "'substantive due process,'" the primary vehicle for value-laden judicial activism, as "a contradiction in terms—sort of like 'green pastel redness.'"<sup>202</sup> Ely argues that the legislature, not the judiciary, is the proper institution for ordering society according to fundamental values. Judges, he says, should confine themselves to acting as referees in the process of democratic representation, making sure that the avenues of political change are open.<sup>203</sup>

Ely's argument for this procedural approach to constitutional interpretation contains an antitotalitarian theme. Echoing Bickel's skepticism of judicial prophecy, Ely writes that the alternative to constitutional proceduralism is the imposition by an elite of values claimed to be those of the people. Ely calls that "the Führer principle."<sup>204</sup> He also notes that "'[t]he Soviet Definition' of democracy . . . involves the 'ancient error' of assuming that 'the wishes of the people can be ascertained more accurately by some mysterious methods of intuition open to an elite rather than by allowing people to discuss and vote

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200. Posner has elsewhere explicitly refused to make such an argument. Having denounced the Nazis as "monsters," RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 229 (1990), Posner notes: "I have not thought it necessary to pause to explain why I called the Nazis 'monsters'; indeed the explanation would have added nothing interesting to the bare statement." *Id.* at 237.

201. Posner, it should be noted, operates within the same framework. In his parting shot at Ackerman, Posner calls the informal amendment model "[d]angerous because it invites judges to treat the popular will as a form of higher law entitling them to disregard ordinary concepts of legality. That is what Hitler's judges did." Posner, *supra* note 195, at 79. This argument is recognizably the *reductio ad Hitlerum*.

202. ELY, *supra* note 17, at 18.

203. *See id.* at 73–134.

204. *Id.* at 68.



and decide freely."<sup>205</sup> Unless one is a judicial proceduralist, Ely implies, one is akin to a Nazi or a Soviet.

Nevertheless, *Democracy and Distrust* exhibits a deep tension between its major proceduralist thesis and another argument that appears toward the end of the book. In his last chapter, Ely argues that special steps must be taken to facilitate the representation of certain minority groups.<sup>206</sup> He espouses affirmative action.<sup>207</sup> Relying heavily on footnote four of *Carolene Products*,<sup>208</sup> he argues that legislation intended to harm certain disadvantaged and politically weak groups should be deemed unconstitutional.<sup>209</sup> According to Ely, the rationale for this special attention to minority groups is the same process-oriented rationale, the same commitment to democratic representation, that motivates the rest of his theory.<sup>210</sup> But that seems unlikely. In many ways, the proceduralist thesis and the minority protection plan pull against each other. For example, Ely's arguments for affirmative action may not be consistent with his particular theory of democratic representation.<sup>211</sup> More generally, the entire concern with minorities seems distinctly substantive.<sup>212</sup> It rests on policy decisions informed by values that, according to Ely's first five chapters, should be left to legislatures.<sup>213</sup> Having articulated a theory that asks judges to avoid reading substantive policy choices into the Constitution, Ely tries at the end to embed one set of such choices into his own theory.

In the book's conclusion, Ely all but announces that what prompted him to mitigate his pure proceduralism with an addendum about minorities was the problem of totalitarianism. Quite explicitly, Ely sets out in his conclusion to

205. *Id.* (quoting H.B. MAYO, AN INTRODUCTION TO DEMOCRATIC THEORY 217 (1960))

206. *See id.* at 135-79.

207. *See id.* at 170-72.

208. 304 U.S. 144, 152 n.4 (1938). *Carolene Products* was a prewar decision, but its fourth footnote did not eclipse the rest of the opinion and gain force as a tool for the defense of minorities until several years later. As discussed *supra* note 104 and accompanying text, *Carolene Products* author Harlan Fiske Stone was entirely willing to infringe on the rights of a discrete and insular minority (i.e. Japanese Americans) without a strict scrutiny showing five years after *Carolene Products* was decided. *See also* J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1989) (arguing that *Carolene's* footnote four was originally only part of larger theory and lacked independent stature later conferred upon it)

209. *See* ELY, *supra* note 17, at 136-45. For commentary on Ely's treatment of *Carolene Products*, see Archibald Cox, Book Review, 94 HARV. L. REV. 700, 700 (1981) (reviewing JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980)); Tribe, *supra* note 24; Tushnet, *supra* note 24

210. *See* ELY, *supra* note 17, at 86-87.

211. Posner, for example, argues that affirmative action generally helps members of minority groups at the expense of "marginal" whites, that is, those who are themselves most unable to gain effective representation in the political branches. Accordingly, affirmative action may actually redistribute rather than redress the shortcomings of representative democracy. *See* Richard A. Posner, *Democracy and Distrust Revisited*, 77 VA. L. REV. 641, 647 (1991). This argument is not necessarily an argument against affirmative action; it does, however, suggest that it is difficult to make an argument for affirmative action on Ely's proceduralist grounds alone.

212. *See* Tribe, *supra* note 24, at 1075-76.

213. *See* Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 735-41 (1991).

defend his theory of judicial review against the charge that it could be compatible with a repetition of the Holocaust:

It's not good enough to answer that the Holocaust couldn't happen here. We can pray it couldn't, I believe it couldn't, but nonetheless *we should plan our institutions on the assumption that it could . . .* But the reason the example cannot responsibly be dismissed [is] precisely the reason it is covered by the constitutional theory of this book. A regime this horrible is imaginable in a democracy only because it so quintessentially involved the victimization of a discrete and insular minority.<sup>214</sup>

In other words, Ely believes that his process-based theory of judicial review would be compatible with Nazism, and therefore unacceptable, were it not supplemented by a special commitment to protect minority groups. To solve that problem, Ely explains, he includes a minority protection principle in his theory. It is, however, an inconvenient marriage. Like Ackerman's proposal to entrench certain fundamental rights to prevent a Nazi regime, Ely's desire to give minority groups special protections is in tension with claims that most of his book is dedicated to defending. Ackerman solves that problem by normatively rejecting his descriptive theory; Ely defends his theory against the totalitarian threat by sacrificing its internal consistency. In both cases, a commitment to opposing totalitarianism takes a leading theory of constitutional law in directions where it might not otherwise have gone.

#### IV. CONCLUSION

This Note has argued that American opposition to European totalitarianism, Nazi and Soviet, has helped shape the most important constitutional theories and doctrines of the postwar era. Indeed, much of postwar constitutional thought could be described as a quest for a legal formula that would solve the totalitarian problem. The consequences of antitotalitarianism have been manifold: In many cases, different forms of antitotalitarianism recommend different results. The cumulative force of its influences, however, has substantially reshaped the project of constitutional law. On the level of abstract constitutional thought, the need for a universal basis on which to condemn foreign regimes inspired a resurgence of foundational theories of justice. A skeptical counterpoint that balks at doctrinaire ideologies of any kind also finds roots and support in the totalitarian problem. On the level of substantive doctrine, reaction against Nazism and fear of Communism have helped make racial equality, personal privacy, free expression, and protection against police abuse into central commitments of constitutional law. The need to address the

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214. ELY, *supra* note 17, at 181–82 (emphasis added).

threat of totalitarianism has also influenced the most important contributions to recent constitutional scholarship, as thinkers like Ackerman and Ely have followed Fuller and Hart in making the problem of Nazism the final test of a legal theory. In theory as well as practice, the specter of totalitarianism has been the brooding omnipresence of modern constitutional law.

Antitotalitarianism has not, of course, been the only force shaping postwar constitutional law. The New Deal, the postwar economic boom, the aspirations of minority groups, and the traditional canons of constitutional interpretation all affected the path of the law in the age of *Brown* and *Griswold*. Nevertheless, the power of anti-Sovietism and anti-Nazism should not be underestimated. Largely under those influences, the Supreme Court worked a legal revolution that still dominates much of constitutional law. Forty-five years after *Dennis*, constitutional theorists continue Jackson's "never-ending, because never-successful, quest" for an antitotalitarian legal formula.<sup>215</sup> No one has finished the work, and perhaps no one should be expected to do so. But the most important postwar constitutional thinkers have not felt free to abstain from it.

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215. *Dennis v. United States*, 341 U.S. 494, 561 (1951) (Jackson, J., concurring)

