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CONSTITUTIONAL ADJUDICATION: RELATIVE OR ABSOLUTE NEUTRALITY

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I

THE 1959 HOLMES LECTURE, *Toward Neutral Principles of Constitutional Law*,[1] has become a "state paper" of consequence. Two converging factors have made for this result. One of these is that Herbert Wechsler, the author of the paper, is a lawyer and scholar of great distinction. The second is that the paper condemned the Supreme Court's decision in the *School Segregation Cases*[2] (and that Court's decisions in the *Restrictive Covenant*[3] and *White Primary*[4] cases as well).

Of course, condemnation of the *School Segregation Cases* was nothing new. Most of it, however, has been stridently partisan, dismally uninformed, or both.[5] With a single and highly illustrious exception, the decision in the *School Segregation Cases* had not, prior to Professor Wechsler's paper, and has not since, been squarely challenged by a critic simultaneously endowed with great scholarly attainment and manifest objectivity.

The single illustrious exception was Professor Wechsler's immediate predecessor as Holmes Lecturer—Learned Hand. But Judge Hand's reservations about the *School Segregation Cases* were rooted in his more pervasive doubts of the legitimacy of judicial review itself. Hand saw judicial review as a weapon of necessity to be resorted to, only in times of gravest urgency, to enforce the constitutionally ordained distribution of functions among the several branches of the national government and between the nation and the states. He saw the *School Segregation Cases* as one of many instances in which the Court has—without even the excuse of a supposed need to keep the constituent elements of the American governmental complex working at their assigned tasks—ventured into a realm of value preferences which is not marked out on any proper map of the American judicial domain. In acting as a "third legislative chamber"[6]

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1 Wechsler, 73 HARV. L. REV. 1 (1959).

2 Brown v. Board of Education, 347 U.S. 483 (1954), 349 U.S. 294 (1955); *cf.* Bolling v. Sharpe, 347 U.S. 497 (1954).

3 Shelley v. Kraemer, 334 U.S. 1 (1948).

4 Smith v. Allwright, 321 U.S. 649 (1944); Terry v. Adams, 345 U.S. 461 (1953).

5 See generally Pollak, *The Supreme Court under Fire*, 6 J. PUB. L. 428, 433-43 (1957).

6 HAND, THE BILL OF RIGHTS 42 (1958).

reviewing the "legislative judgment"[7] of the states espousing racial segregation, the Court, Hand seems to have felt, was exercising a power of judicial review resting solely on a judicial *coup de main*.[8]

Were it not for his great name, Hand's doubts about the *School Segregation Cases* would have passed discreetly into a deserved limbo. Even buttressed by his name, his doubts are not a standard around which most foes of the decision can logically rally, since the doubts stem from a premise—the lawlessness of judicial review, save to prevent the imminent warping or collapse of the very structure of American government—that generally has been discredited since Marshall's day. Granting Hand's premise, his conclusion, of course, is not hard to come by, but the conclusion has no verity independent of the premise. And in the mid-twentieth century, viewed against the main stream of American constitutional development, Hand's premise is simply an anachronism. Because Hand was a great judge for a long period of our national history, because he wrote with a strength and cadence which matched his Olympian mien, because, in short, he became in his own lifetime a myth-judge who spoke with oracular power, Hand could cloak his premise in golden raiment. But even he could not invest it with real authority.

In contrast, Professor Wechsler's doubts about the *School Segregation Cases* (and about the *Covenant* and *Primary* cases as well) seemed of far greater moment than Hand's misgivings, precisely because Professor Wechsler—unlike Hand but like most other American lawyers, historians and political scientists—is firmly persuaded that the power of judicial review is "anchored in the Constitution." [9] Moving from that widely shared point of departure, Professor Wechsler had apparently concluded that the great trilogy of decisions vindicating Negro rights was suspect because it did not demonstrably "rest on neutral principles" and, therefore, was not "entitled to approval in the only terms . . . relevant to a decision of the courts." [10] Professor Wechsler's verdict seemed to be something to reckon with.

II

Many have responded to the challenge. Some have written papers assessing, on various levels, Professor Wechsler's core principle of neutrality.[11] Others, bypassing or declining to take issue with Professor

[7] *Id.* at 54.
[8] *Id.* at 55.
[9] Wechsler, *supra* note 1, at 6.
[10] *Id.* at 27.
[11] Henkin, *Some Reflections on Current Constitutional Controversy*, 109 U. PA. L. REV. 637, 652-62 (1961); Miller and Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960); Mueller and Schwartz, *The Principle of Neutral Principles*, 7 U.C.L.A.L. REV. 571 (1960); and *cf.* Bickel, "Foreword: The Passive Virtues," *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40 (1961); Griswold, "Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold," *The Supreme Court, 1959 Term*, 74 HARV. L. REV. 81, 94 (1960); Rostow, *American Legal Realism and the Sense of the Profession*, 34 ROCKY MT. L. REV. 123, 136-46 (1962).

Wechsler's insistence on neutrality, have addressed themselves directly to the particular decisions which were Professor Wechsler's chief targets. For example, my colleague Charles L. Black, Jr., has argued, with his characteristic lucidity and power, *The Lawfulness of the Segregation Decisions.*[12] And I, scattering my fire, have sought to support the entire trilogy of decisions.[13] I took the position that they were all the legitimate offspring of what, I supposed, Professor Wechsler meant by "neutral principles of constitutional law." I explained what it was that I read into Professor Wechsler's creed of neutrality: "a method of adjudication which is disinterested, reasoned, and comprehensive of the full range of like constitutional issues, coupled with a method of judicial exposition which plainly and fully articulates the real bases of decision." [14] If this were what Professor Wechsler meant by judicial neutrality, I was prepared to subscribe to his faith. Nevertheless, I felt sure that his missionary zeal had somewhere gone awry, leading him on a calamitous crusade.

At the conclusion of my article, I intimated, but did not elaborate upon, a sense of unease as to whether or not I had correctly read Professor Wechsler's basic message: I could not, to save my legal soul, understand why Professor Wechsler's seemingly unexceptionable articles of faith had led him to assault a group of decisions which seemed to me so plainly authenticated, indeed compelled, by conventional principles of constitutional adjudication. How was it that a common approach to constitutional adjudication could lead one of us to revere decisions which were, in the other's view, icons ripe for smashing? Were we, after all, using the same words to describe radically discrepant conceptions of the proper role of the United States Supreme Court?

Last year Professor Wechsler republished his paper as part of a book. In an introduction to the book he takes account of the controversy he has stirred and makes it clear that he is wholly unpersuaded by what Professor Black and I have argued in support of the decisions he challenged. Professor Wechsler is certainly entitled to be unpersuaded. There is, after all, the bare possibility that I was wrong as to the particular cases which divide us—although I doubt it. (And I should add that I not only lack any authority to admit the possibility that Professor Black was wrong, but I also lack any compelling evidence that he has been wrong on other occasions.) In any event, my purpose here is not to pursue a controversy with Professor Wechsler on the merits of particular cases. My purpose is rather to see whether we reached different results because we started from different preconceptions about the role of the Court. In writing my article I had, as I have indicated, assumed that we started from common ground,

[12] 69 YALE L.J. 421 (1960).
[13] Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler,* 108 U. PA. L. REV. 1 (1959).
[14] *Id.* at 32.

although not without some qualms that I had been too obtuse to absorb all the connotations of Professor Wechsler's principle of judicial neutrality. As if to allay these qualms, Professor Wechsler writes in his introduction that he places me (and, I gather, Professor Black) among the "many who agree with [him] in theory. . . ." [15] I find myself, at this point, unsure whether I am reassured by this reassurance.

III

Let us consider Professor Wechsler's recapitulation, in his recent introduction, of what he means by "neutrality of principle":

> In calling for neutrality of principle, I certainly do not deny that constitutional provisions are directed to protecting certain special values or that the principled development of a particular provision is concerned with the value or the values thus involved. The demand of neutrality is that a value and its measure be determined by a general analysis that gives no weight to accidents of application, finding a scope that is acceptable whatever interest, group, or person may assert the claim. So too, when there is conflict among values having constitutional protection, calling for their ordering or their accommodation, I argue that the principle of resolution must be neutral in a comparable sense (both in the definition of the individual competing values and in the approach that it entails to value competition).[16]

I agree with what I take to be the general theme, but I wonder how the theme is likely to be of genuine—not merely semantic—assistance in evaluating the work of the Supreme Court. Let us consider an actual case—but not one of the cases already picked apart in the general controversy.

In 1958 the Supreme Court considered the validity of a contempt citation and $100,000 fine imposed by an Alabama court on the National Association for the Advancement of Colored People. The judgment of contempt and the fine had come about because the NAACP had declined to comply with a court order requiring it to disclose its Alabama membership—the disclosure order being an intermediate step in a proceeding brought by the attorney general of Alabama to test the NAACP's right to do business in the state. The Supreme Court, in *NAACP v. Alabama,* unanimously concluded that the Alabama court had "fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have." [17]

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[15] WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW xiv (1961).
[16] *Id.* at xiii-xiv.
[17] 357 U.S. 449, 466 (1958). Candor requires disclosure that I was on the brief for the NAACP.

I thought then, and I still think, that the Supreme Court was right. But, on first reading, one aspect of Justice Harlan's largely excellent opinion gave me pause, in terms which I think relate to Professor Wechsler's thesis. In reaching its conclusion that the Alabama court's order to produce membership lists was unconstitutional, the Supreme Court distinguished its own prior decision in *Bryant v. Zimmerman.*[18] That case, decided in 1928, upheld New York's right to compel disclosure of the names of members of the Ku Klux Klan. But the cases were said to be unlike in many ways. Perhaps the most important of the differences itemized by Justice Harlan was that the earlier decision was "based on the particular character of the Klan's activities, involving acts of . . . intimidation and violence, which the [Supreme] Court assumed was before the state legislature . . . and of which the Court itself took judicial notice." [19] But this is a distinction which could be thought to have compounded, rather than simplified, the Court's problems in the *NAACP* case. For surely Alabama's legislature and courts took as jaundiced a view of the NAACP as New York's legislature and courts took of the Klan. And so, if we were forced to understand that the Supreme Court decided one case one way and one the other on the ground that the NAACP is nicer than the Klan, I think that both Professor Wechsler and I would find ourselves too simple-minded to construct a doctrine of "neutrality" which would be congenial to the Court's rationale.

But, as I satisfied myself on rereading Justice Harlan's opinion in *NAACP v. Alabama* and Justice Van Devanter's opinion in *Bryant v. Zimmerman,* this was clearly not the line of demarcation between the cases. In the first place, much first amendment learning which today seems highly familiar was largely inchoate when the Klan case was argued, and petitioner's counsel apparently did not exploit what doctrines were available with energy or precision enough to insure that they presented themselves to the Court's active awareness. Beyond this, it would seem that in *NAACP v. Alabama* the Court was making the point that the "particular character of the Klan's activities, involving acts of . . . intimidation and violence," had *constitutional* dimension, in the sense that the Klan's special character warranted circumscription of the Klansmen's rights of anonymous association.

Now, to the extent that the Court in *NAACP v. Alabama* was floating such a proposition of constitutional law, I respectfully disagree. I happen to subscribe to an old-fashioned view of the first amendment, under which the Klansmen would not lose the amendment's protection unless and until their exercise of their right to covert speech and association was merged with concrete "activities" of an immediately dangerous caste. Indeed, I

[18] 278 U.S. 63 (1928).
[19] 357 U.S. at 465.

think it at least arguable that "the fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the state." [20] Possibly the majority of the present Court—and pretty clearly Professor Wechsler[21]—rejects even the narrower of these views of the first amendment. But the relevant point is that the division among us stems from differences in defining the scope of the claimed constitutional protection, and that division need not call into question the integrity of the process by which one or another definition is formulated. From both the Court's and Professor Wechsler's perspectives, "the particular character of the Klan's activities" probably would hold a significance in defining the scope of the first amendment that it would not hold for me, except in circumstances which do not seem to me to have been demonstrated with sufficient clarity in the record before the Court in 1928. But, though I may quarrel with their views of the first amendment, I may not properly charge the Court in *NAACP v. Alabama*—or Professor Wechsler, if he supports the distinction adumbrated in that opinion—with *unneutrality* for finding, in the programmatic differences between the two comparably situated associations, constitutional distinctions which I do not perceive.

IV

I have used a single case, *NAACP v. Alabama,* to illustrate a very prosaic, and perhaps for that reason too-often-ignored, phenomenon: the ease with which one can allow oneself to be persuaded that an argument which does not seem compelling must be an argument that borders on the disingenuous. I think that lawyers, especially, must be cautious about reaching such conclusions. I say this because, so it seems to me, challenging the neutrality of judgments which seem wrongheaded poses real dangers for a society like ours. And these dangers, if they are real, are surely maximized when the criticism thrusts directly at the most vital level of judicial activity—that carried on by the Supreme Court. One danger is that repeated insistence on the need for judicial neutrality may generate a climate of doubt about the integrity of the judicial process as a whole, where there is no genuine warrant for such doubt. Another danger is that it may lead the hearer to believe that a virtuous attitude is the all-sufficient catalyst in the solution of difficult legal problems, and especially constitutional problems. Such problems are difficult enough. We can ill afford to have the eye and mind deflected from essential, well-nigh intractable, ingredients. Perhaps, indeed, making too noisy a virtue of neutrality may in some instances complicate the job of decision.

I come back to Professor Wechsler's characterization of the decisions

[20] Whitney v. California, 274 U.S. 357, 378 (1927) (concurring opinion of Justice Brandeis who was joined by Justice Holmes).
[21] Wechsler, *supra* note 1, at 25-26.

he has challenged. He says that the *Primary,* the *Covenant* and the *School Segregation Cases* have, in his judgment, "the best chance of making an enduring contribution to the quality of our society of any that I know in recent years." [22] Yet, he says that he wonders "how far they rest on neutral principles and are entitled to approval in the only terms that I acknowledge to be relevant to a decision of the courts." [23]

I take this to mean that the Supreme Court, faced with these cases, should have cast out of its reckoning the likelihood that a decision one way rather than another would effect "an enduring contribution to the quality of our society." I take it that "neutral principles" should have foreclosed, as not "relevant" to the decisions to be made, the impact on our society, for good or for bad, of the various courses of judicial action open to the Court.

Here Professor Wechsler and I part company.

The *Primary, Covenant* and *School Segregation* decisions each presented two levels of constitutional analysis. The first level of analysis involved giving content to the respective constitutional claims: the scope of the fifteenth-amendment right to vote without racial distinction versus the scope of a political party's claim to autonomy, the scope of the equal-protection right to have a state refrain from racial differentiation versus the scope of the property owner's right to enlist judicial assistance in limiting the alienability and the use of land, the scope of the equal-protection right versus the scope of the state's authority over public education. The second level of analysis involved the subordination, in each instance, of one competing constitutional claim to another. I cannot imagine how one would undertake to carry out the requisite analysis, on either level, without reference to the various societal interests embodied in the competing constitutional claims.

Indeed, I had thought all this axiomatic. At the first level—that of giving content to particular constitutional claims—I had supposed there was no dissent from Holmes's view that "the provisions of the Constitution are not mathematical formulas having their essence in their form.... Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." [24] I had rather thought that precisely this insight underlay Professor Wechsler's own endorsement of a generous reading of the fourteenth amendment, for he acknowledges that it has been the better part of judicial wisdom to read the due process clause as more than "a guarantee of fair procedure, coupled perhaps with prohibition of

[22] *Id.* at 27.
[23] *Ibid.*
[24] Gompers v. United States, 233 U.S. 604, 610 (1914).

executive displacement of established law" and to doubt that the equal protection clause is "no more than an assurance that no one may be placed beyond the safeguards of the law, outlawing, as it were, the possibility of outlawry, but nothing else." [25] "I cannot," says Professor Wechsler, "find it in my heart to regret that interpretation did not ground itself in ancient history but rather has perceived in these provisions a compendious affirmation of the basic values of a free society, values that must be given weight in legislation and administration at the risk of courting trouble in the courts." [26] I think Professor Wechsler is quite right in this—although I am somewhat surprised that on these issues he looks to his heart for guidance. But if Professor Wechsler is right, I fail to see how his model judge can determine whether or not sufficient weight has been given by a co-ordinate branch of government to "the basic values of a free society" unless the judge makes some estimate of the "contribution to the quality of our society" which may ensue from one or another judicial definition of the scope to be given a constitutional claim said to be rooted in one of those "basic values."

The point seems even clearer at the second level—the level at which a judge must elect among two or more constitutional claims, each of which may be urged to represent at least one of the "basic values of a free society." Professor Wechsler, it may be well to recall, says that "when there is conflict among values having constitutional protection, calling for their ordering or their accommodation, I argue that the principle of resolution must be neutral in a comparable sense (both in the definition of the individual competing values and in the approach that it entails to value competition)." [27] To this I say, "Amen"—then I am forced to add: *"But what does it mean operationally?"*

Let us consider two comparable cases. In one a California court fined a newspaper $300 for publishing an editorial dealing with a pending assault case which had stirred considerable community interest. The editorial appeared after the defendants had been found guilty but prior to sentence, and it advised the sentencing judge, in no uncertain terms, not to grant probation. In the other case a Maryland court fined three Baltimore radio stations and a local newscaster for one of the stations for having broadcasted an inflammatory account of the defendant's alleged confession.

The California contempt conviction was affirmed by the California

[25] Wechsler, *supra* note 1, at 18-19.
[26] *Id.* at 19.
[27] WECHSLER, *op. cit. supra* note 15. By "neutral in a comparable sense," Professor Wechsler presumably intends a reference back to the standard of neutrality which he feels should govern the preliminary process of defining individual constitutional values—"a value and its measure [must] be determined by a general analysis that gives no weight to accidents of application, finding a scope that is acceptable whatever interest, group or person may assert the claim." *Id.* at xiii-xiv.

Supreme Court[28] and, on certiorari, was reversed by the United States Supreme Court.[29] In his opinion for the Court, Justice Black observed that "free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."[30] The Maryland contempt convictions were set aside by the Maryland Court of Appeals, on federal constitutional grounds,[31] and the United States Supreme Court denied certiorari.[32] In an opinion filed in connection with the denial of certiorari, Justice Frankfurter remarked:

> Freedom of the press, properly conceived, is basic to our constitutional system. Safeguards for the fair administration of criminal justice are enshrined in our Bill of Rights. Respect for both of these indispensable elements of our constitutional system presents some of the most difficult and delicate problems for adjudication when they are before the Court . . . .[33]

What "neutral principle" offers itself to reconcile the constitutional conflict illustrated in these two cases? Despite much scholastic discussion of a "preferred position" for certain of the provisions of the Bill of Rights[34] and of the "absolute" character of some of these same provisions,[35] I doubt that anyone would seriously contend that any automatic constitutional arithmetic would resolve *either*—let alone *both*—of these cases. Surely the proper disposition of each case should depend on a comparative audit of the constitutional gains and losses which would flow from subordinating one or the other of the contending constitutional values in each of the two similar, but distinguishable, factual settings. But to acknowledge this is to acknowledge that the judge's job is to decide which of the contending constitutional values will, if allowed full scope in the particular factual context and in likely future replicas of that context, be more likely to make "an enduring contribution to the quality of our society." Yet this does not mean that the judge has free play to decide as he chooses. For he does his job right if, *and only if*, his appraisal of "the quality of our society" is itself rooted in a disciplined allegiance to those "basic values of a free society" which are embodied in the Constitution. To add that the judge must also give weight to the Constitution's complex allocations of responsibility, both within the national government and between the nation and the states, underscores

[28] Times-Mirror Co. v. Superior Court, 15 Cal. 2d 99, 98 P.2d 1029 (1949).
[29] Times-Mirror Co. v. Superior Court, 314 U.S. 252 (1941). Justice Frankfurter, joined by Chief Justice Stone and Justice Byrnes, dissented.
[30] *Id.* at 260.
[31] Baltimore Radio Show, Inc. v. State, 193 Md. 300, 67 A.2d 497 (1949).
[32] Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950).
[33] *Id.* at 919.
[34] Compare the various opinions in Kovacs v. Cooper, 336 U.S. 77 (1949).
[35] See Bickel, *Mr. Justice Black,* New Republic, March 14, 1960, p. 13; C. L. Black, Jr., *Mr. Justice Black, the Supreme Court, and the Bill of Rights,* Harpers', Feb. 1961, p. 63; H. Black, *The Bill of Rights,* 35 N.Y.U.L. REV. 865 (1960); C. L. BLACK, JR., THE PEOPLE AND THE COURT (1960), reviewed in Pollak, *Language and Its Legal Interpreters,* New Republic, May 2, 1960, p. 17.

the subtlety but does not alter the essential character of the choices involved in constitutional adjudication.

V

"I told a labor leader once that what they asked was favor, and if a decision was against them they called it wicked. The same might be said of their opponents." [36] In his bluntest fashion Holmes, speaking in 1913, was complaining about public insensitivity to the neutrality, as between litigant and litigant, which a judge must strive to maintain. Yet Holmes was even more concerned with the failure of judges to curb their partisan convictions.

> As law embodies beliefs that have triumphed in the battle of ideas and then have translated themselves into action, while there still is doubt, while opposite convictions still keep a battle front against each other, the time for law has not come; the notion destined to prevail is not yet entitled to the field. It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law .... When twenty years ago a vague terror went over the earth and the word socialism began to be heard, I thought and still think that fear was translated into doctrines that had no proper place in the Constitution or the common law.[37]

What Holmes had in mind is plain enough: The judicial landscape around him was littered with the gnawed bones of workmen's-compensation laws, maximum-hours laws, anti–yellow-dog-contract laws and comparable protective legislation. At the same time, as Professor Wechsler has observed,[38] combinations of labor found themselves corralled by national powers which somehow could not reach their corporate adversaries. It may be that more recently the brief hegemony of union picketing reflected a countervailing, albeit unconscious, judicial impulse—an impulse which insensibly inflated the pickets' constitutional claims.

Holmes was warning judges against elevating their individually-held social values into constitutional imperatives. But he certainly was not saying that social values are irrelevant to constitutional adjudication. It was Holmes, after all, who pioneered in showing:

> The true science of the law does not consist mainly in a theological working out of dogma or a logical development as in mathematics . . . an even more important part consists in the establishment of its postulates from within upon accurately measured social desires instead of tradition.[39]

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[36] HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 294 (1920).
[37] *Id.* at 294-95.
[38] Wechsler, *supra* note 1, at 23.
[39] HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 225-26 (1920).

What Holmes was inveighing against, in such great dissents as those in *Lochner*[40] and *Hammer v. Dagenhart*,[41] was saddling the fifth and fourteenth amendments and the commerce clause with "social desires" they were not meant to bear. In short, the decisions which Holmes found lacking in integrity of method were those in which judges had construed constitutional provisions without "considering their origin and the line of their growth."[42] Judges who emancipated themselves from the values which actually formed the history and the disciplined development of constitutional provisions found it no trick to read into those provisions unrelated values which had not yet "triumphed in the battle of ideas."

By contrast, the values given precedence in the decisions to which Professor Wechsler takes exception are values which—as Holmes learned under fire—triumphed at Appomattox as the precondition of their triumph, through constitutional amendment, "in the battle of ideas." This is not to say that the framers of the fourteenth and fifteenth amendments designedly outlawed segregated schools, restrictive covenants or even white primaries. But it is to say that they designedly enshrined in the permanent charter of our national aspirations values of equality which have in the long flux of time inexorably called for ampler and ampler vindication. That vindication might have come, as the framers of the amendments apparently expected, from Congress.[43] But since Congress did not and could not act—for reasons essentially unrelated to the constitutional legitimacy of the values involved—only the Supreme Court could achieve vindication of these values if their vindication was appropriate. Indeed, I am glad to note Professor Wechsler's agreement, with respect to the *School Segregation Cases*, that for the Court to "remit the issue to the Congress . . . would merely have evaded the claims made."[44]

What made the decisions Professor Wechsler challenges difficult ones to decide was that in each the constitutional values of equality were opposed by other, and weighty, constitutional values. But such a confrontation of values is what constitutional adjudication is all about. A confrontation does not mean an impasse, and judicial abstention. And it certainly does not mean that judges should prove their incorruptibility by sedulously eschewing the values to which, as individual citizens, they give allegiance. It does mean that judges must identify the competing values, must estimate the value consequences of preferring one set of competing values to another and must *choose*. But this is hardly new. Holmes—the

[40] Lochner v. New York, 198 U.S. 45, 74 (1905) (dissenting opinion).
[41] 247 U.S. 251, 277 (1918) (dissenting opinion).
[42] Gompers v. United States, 233 U.S. 604, 610 (1914), quoted in text at note 24 *supra*.
[43] See Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).
[44] Wechsler, *supra* note 1, at 32.

same Holmes who warned us against the judge who "reads his conscious or unconscious sympathy with one side or the other prematurely into the law"—told us sixty years ago that:

> inasmuch as the real justification of a rule of law, if there be one, is that it helps to bring about a social end which we desire, it is . . . necessary that those who make and develop the law should have those ends articulately in their minds. I do not expect or think it desirable that the judges should undertake to renovate the law. That is not their province. . . . But I think it most important to remember whenever a doubtful case arises, with certain analogies on one side and other analogies on the other, that what really is before us is a conflict between two social desires, each of which seeks to extend its dominion over the case, and which cannot both have their way. The social question is which desire is stronger at the point of conflict. The judicial one may be narrower, because one or the other desire may have been expressed in previous decisions to such an extent that logic requires us to assume it to preponderate in the one before us. But if that be clearly so, the case is not a doubtful one. Where there is doubt the simple tool of logic does not suffice, and even if it is disguised and unconscious, the judges are called on to exercise the sovereign prerogative of choice.[45]

On one point Professor Wechsler and I are in accord: The cases which trouble him are hard cases, cases whose proper disposition could not be obvious to any conscientious judge. Yet in just such cases, Holmes properly insists that "what really is before us is a conflict between two social desires. . . ." And in just such cases the "judicial" question tends to merge with the "social" question of "which desire is stronger at the point of conflict." That is why, as I see it, the cases which trouble Professor Wechsler are emphatically ones the Court could not responsibly decide without considering the very factor Professor Wechsler's "neutral principles" chiefly proscribe—the "contribution to the quality of our society" likely to ensue, in each case, from one or another judicial response. I venture the guess, moreover, that the Court's estimates of these likely consequences must have helped materially to crystallize what I think were correct decisions. I would say of the trilogy of decisions what Paul Freund has said of the decisions in the *School Segregation Cases:*

> It is proving very hard indeed in some quarters to live physically with the Court's decisions: in another sense would it not have proved even harder to live intellectually and morally with a contrary decision? [46]

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[45] HOLMES, *Law in Science and Science in Law,* in COLLECTED LEGAL PAPERS 238-39 (1920).

[46] Address by Freund, *The Supreme Court Crisis,* Brandeis University, Nov. 12, 1958, quoted in Lewis, *The Supreme Court and Its Critics,* 45 MINN. L. REV. 305, 331 (1961).

Constitutional adjudication is subtle and weighty business. But, assuming *Marbury v. Madison*[47] was correctly decided, it is proper business. When, in Holmes's phrase, "judges are called on to exercise the sovereign prerogative of choice" at the highest level of choice, fulfillment of the responsibility to judge is a matter of highest obligation. And it is an obligation the active and purposeful fulfillment of which should not be met with censure or even with a spirit of faintly apologetic acquiescence if the resultant judgment—the judicial "choice"—is right. Marshall was our greatest judge, not because he lived in an age we now surround with myth, but because "by a few opinions . . . he gave institutional direction to the inert ideas of a paper scheme of government. Such an achievement demanded an undimmed vision of the union of states as a nation and the determination of an uncompromising devotion to such insight." [48] Today's judges face some issues Marshall knew and many he did not. Their obligation to try to meet those issues with his firmness, and with his disciplined wisdom, has been in no way diminished by the lapse of time.

VI

Not long ago, my friend, teacher and colleague, Friedrich Kessler of Yale, very kindly consented to read the foregoing paragraphs. And, in his gentlest way, Professor Kessler filed a brief demurrer: Had I not missed the real thrust of Professor Wechsler's thinking? Wasn't Professor Wechsler raising questions which test the fundamental preconditions of a viable common-law system of case-by-case adjudication? [49] Had I not, at all events, been somewhat less than fair to Professor Wechsler?

I tested Professor Kessler's mild censure by asking Professor Wechsler to read what I had written. And he promptly wrote me a letter which, courteously but firmly, made it plain that, in his judgment, I had missed his intellectual boat:

> I surely cannot have afforded any basis for the view that I posed an antithesis between "making an enduring contribution to the quality of our society" and resting on "neutral principles." By no possible reading did I say that the Supreme Court "should have cast out of its reckoning the likelihood that a decision

[47] 5 U.S. (1 Cranch) 368 (1803).

[48] Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 218 (1955).

[49] Professor Kessler suggested that there were relevant insights in F. A. Hayek's recent book: "there seems to exist at least a prima facie conflict between the ideal of the rule of law and a system of case law. The extent to which under an established system of case law the judge actually creates law may not be greater than under a system of codified law. . . . And it is a question whether the much praised flexibility of the common law, which has been favorable to the evolution of the rule of law so long as that was the accepted political ideal, may not also mean less resistance to the tendencies undermining it, once that vigilance which is needed to keep liberty alive disappears." HAYEK, THE CONSTITUTION OF LIBERTY 198 (1960).

> one way rather than another would effect 'an enduring contribution to the quality of our society.' What I did say is that it is not enough that a decision makes such a contribution unless it also rests on neutral principles, i.e., was not merely an ad hoc disposition of its immediate problem unrationalized by a generalization susceptible of application across the board.[50]

It seems that, at least in some measure, I had misread Professor Wechsler. He apparently would permit his model judge to consider the "contribution to the quality of our society" which might ensue from one or another constitutional choice. But his judge's estimate of the likely impact on American life of a proposed constitutional decision remains a thing apart from the competing constitutional principles whose neutral accommodation yields one or another constitutional result.

In my view that judicial estimate is an intrinsic component of the constitutional tension which the judge must resolve. To regard it as an inessential additive—a sort of judicial allspice mixed in after the constitutional ingredients have been beaten together—either denies its real relevance or (what would assuredly be as unpalatable to Professor Wechsler as it would be to me) invites its random, catch-as-catch-can participation in the decisional process.

The necessary relevance of such a judicial estimate is dictated by the nature of constitutional adjudication—especially adjudication addressed to the fourteenth amendment and to cognate provisions declaring broadly directive principles. Such provisions, as Professor Wechsler said of the equal protection and due process clauses, embody "the basic values of a free society." But these values do not live in limbo. They live, or perish, in the real world. They have meaning only as they give actual definition to America's day-by-day experience. A constitutional case is an apt mechanism for testing our basic values as they operate in the real world because such a case arises out of a genuine human controversy. The decision of a constitutional case resolves that controversy. And it does more. It prophesies the comparable resolution of comparable future controversies —and it thereby draws lines of growth for our society. A judicial choice which moulded our values in the abstract—which shaped the future of America without avowing the process and without exploring its likely impact—would be irresponsibly made. This would not be the process Holmes contemplated when he talked of "the sovereign prerogative of choice."

This is why the Supreme Court was not merely entitled but obliged to consider "the contribution to the quality of our society" which would ensue from one or another disposition of the three great series of cases Professor Wechsler challenges.

[50] Letter From Professor Wechsler, April 9, 1962.

Perhaps my thesis can be illustrated by one last case—one which has not yet reached the Court.

In the introduction to his recent book, Professor Wechsler writes:

> Whether the Fourteenth Amendment should be read to outlaw race or color as determinants of all official action must be tested not alone by the effect of such a principle on state-required segregation but also by its impact upon measures that take race into account to equalize job opportunity or to reduce *de facto* segregation, as in New York City's schools.[51]

If the Supreme Court were to construe the amendment "to outlaw race or color as determinants of all official action," the neutrality Professor Wechsler rightly insists upon would of course demand the invalidation both of laws requiring segregated public schools and of "measures that take race into account ... to reduce *de facto* segregation...." Discrepant results could only mean that "the law has thus fallen victim to a tendency of creating law for one special occasion only: legal occasionalism, one might well call it." [52]

But the Supreme Court has not thus far announced so sweeping a construction of the amendment. At most its cumulative holdings collectively proclaim the invalidity of measures dividing the races with hostile purpose and effect.[53] A broader ruling—one which sought "to outlaw race or color as determinants of all official action"—would have been uncalled for by any issue which the Court has thus far faced.

Let us suppose, then, that within the near future the Supreme Court considers a case in which Negro parents challenge a directive of New York City's school superintendent transferring their child, because of his race, from the school nearest their Harlem home to a school in a predominantly white residential area a mile or so away. If judicial attention is confined to the fact that the school authorities have accorded the Harlem child differential (and inconvenient; and conceivably, as to him, even detrimental) treatment solely because of his race, his case seems indistinguishable from those of the disadvantaged Negro children in Kansas, Delaware, Virginia, South Carolina and the District of Columbia, who prevailed in the *School Segregation Cases.* If the "basic value" embodied in the equal protection clause is conceived simply to be a ban on all officially ordained racial differentiation, the cases coincide and judicial inquiry is at an end. If the "basic value" of the equal protection clause proscribes official racial differentiation only when it inflicts injury, then judicial inquiry is needed to determine whether the Harlem child can show

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[51] WECHSLER, *op. cit. supra* note 15. *Cf.* Navasky, *The Benevolent Housing Quota,* 6 How. L.J. 30 (1960); Note, 107 U. PA. L. REV. 515, 538 (1958-1959).

[52] Cohn, *The Nullity of Marriage,* 64 L.Q. REV. 324, 329 (1948).

[53] *Cf.* Pollak, *The Supreme Court and the States: Reflections on Boynton v. Virginia,* 49 CALIF. L. REV. 15, 20 n.23 (1961).

injury, as the children in the *School Segregation Cases* were able to do. But there remains the nagging recollection that even differential treatment which inflicts injury has not in the past affronted the equal protection clause where the state has demonstrated an appropriate governmental interest in classifying and imposing selective disadvantage. "Segregation in public education is not reasonably related to any proper governmental objective. . . ." [54] But integration in public education is reasonably related to a proper governmental objective—realization of the "basic value" of equality written into the American conscience by war and constitutional amendment. If this is so, the Court would have to ask not simply whether the Harlem child can demonstrate any injury, but whether the injury is one which so affronts the "basic value" of equality as to nullify official action taken to implement that value—the kind of injury, in short, which was shown by the children in the *School Segregation Cases.* To ask and answer these questions responsibly, the Court would clearly have to estimate, in terms of the "basic value" of equality, the impact "on our society" of a decision one way or another. To strike down New York's program—in the individual instance, or in general—without such an inquiry and such a prophecy would be irresponsible. In the absence of such an inquiry and an attendant prophecy of net detriment to the constitutional "quality of our society," it would appear that, as Mr. Justice Frankfurter observed in a comparable context, "To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment." [55]

[54] Bolling v. Sharpe, 347 U.S. 497, 500 (1954).
[55] Railway Mail Ass'n v. Corsi, 326 U.S. 88, 98 (1945) (concurring opinion).