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Neutrality and Judicial Review

Frederick Schauer

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NEUTRALITY AND JUDICIAL REVIEW

Frederick Schauer[1]

Blame it on Herbert Wechsler. In urging "neutral" principles in constitutional law, and in attaching the words "neutral principles" to his most famous and most controversial article,[2] Wechsler fostered about neutrality in law which is still with us. Yet although neutrality as a legal and judicial ideal is sometimes urged and oftentimes ridiculed, it turns out that the debate about neutrality is in fact four different debates. In this Article I want to distinguish among these four debates and to say something about each of them. But the running theme here is that although the search for neutrality is often a straw with no real adherents except in the minds of the opponents, the four debates about neutrality can be understood as reflecting genuine and

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[1]Frank Stanton Professor of the First Amendment, John F. Kennedy School of Government, Harvard University, Fellow of the Radcliffe Institute for Advanced Study, Harvard University, and Professor in Residence, New York University School of Law. This Article was prepared for and presented at the University of North Carolina's Workshop on the Law and Philosophy of Judicial Review, October 18-20, 2002.

[2]Herbert Wechsler, "Toward Neutral Principles in Constitutional Law," Harvard Law Review, 73 (1959): 1.

deep disagreements about many of the central issues of judicial review.

I. The Neutrality of Principles

Wechsler's attack on what he saw as non-neutrality encompassed a large number of Supreme Court opinions in various areas of constitutional law, including the First Amendment and congressional power under the Commerce Clause. But among Wechsler's primary targets, and the target that has given his article much of its notoriety, is the series of desegregation cases that included not only Brown v. Board of Education,[3] but also Smith v. Allwright[4] and the other "white primary" cases, as well as Shelley v. Kraemer,[5] which invalidated racially restrictive real estate covenants. With respect to each of these cases, Wechsler accused the Supreme Court of abandoning "neutral principles" in its decision and of engaging in "ad hoc" decision-making in order to reach a result that struck the Court as politically and morally appealing even though the result was not susceptible to a constitutionally and legally acceptable justification.

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[3] 347 U.S. 483 (1954).

[4] 321 U.S. 649 (1944).

[5] 334 U.S. 1 (1948).

As Martin Golding[6] and Kent Greenawalt[7] have made so clear, there was one crucial respect in which Wechsler used one word too many. His chief complaint was about the lack of "principled" adjudication, but principled adjudication neither entails nor presupposes anything whatsoever about neutrality. In criticizing Shelley v. Kraemer, especially, Wechsler started by taking the Supreme Court at its word. The Court said (a very important word in this context, and not a synonym for "held" or "concluded" or "decided") that the state's enforcement of a private discriminatory agreement constituted state action, and was thus a violation of the Equal Protection Clause of the Fourteenth Amendment. What made the decision unprincipled, objected Wechsler, was that in a host of other cases and controversies that were encompassed by the same reason that the Court had explicitly stated - that a private agreement or decision became state action when enforced by the machinery of the state – Wechsler was quite sure that the Court would not have followed its own explicit statements and reasons should any of those cases have reached it. Were the Court called upon to decide whether it was state action for a state to enforce a will in which a testator bequeathed property to an heir on the condition that the heir

[6]M.P. Golding, "Principled Decision-Making and the Supreme Court," Columbia Law Review, 63 (1963): 35.

[7]R. Kent Greenawalt, "The Enduring Significance of Neutral Principles," Columbia Law Review, 78 (1978): 982.

marry within his own religion,[8] for example, Wechsler was confident that the language in Shelley would have been effectively ignored.

[8]The case most discussed at the time, and one cited by both Wechsler and his critics, is Gordon v. Gordon, 332 Mass. 197, 124 N.E.2d 228 (1955), cert. denied, 349 U.S. 947 (1955). Another contemporaneous case to the same effect is United States Bank of Portland v. Snodgrass, 202 Ore. 530, 275 P.2d 860 (1954).

Wechsler's charge of lack of principle or lack of consistency would have been more telling had any of the cases that he speculated about actually been before the Supreme Court.[9] Lack of principle in this precise sense requires at least two decisions, and without two or more decisions to be inconsistent with each other Wechsler could only be guessing that the Court would do something different in subsequent cases than would it had implicitly announced it would do in Shelley. But given that Wechsler's prediction of the Court's refusal to follow what it had said in Shelley turned out to be largely correct,[10] we can give him the benefit of the doubt, and consequently focus on the Court's eventual unwillingness to follow through on the reasons that it itself had offered in Shelley, an unwillingness that Wechsler understood to be, at bottom, about integrity in the narrow sense – a willingness to be faithful to one's own articulated principles.

Wechsler's objection to the Court's unwillingness to follow its own articulated reasons, however, has nothing to do with neutrality. Had the Court in Shelley based its decision on the stated reason that its result would facilitate the movement of Democratic-voting African-Americans into Republican-voting white suburbs, and if it had subsequently decided all future cases in which the same phenomenon was present in the same way, the Court's aggregate decisions would have been entirely principled in this sense of principle. The principle would

[9]Gordon and several other cases had at the time Wechsler wrote had resulted in denials of certiorari, but it is doubtful that Wechsler intended to include denials of certiorari or othjer summary dispositions within his compass.

[10]See Adickes v. S.H. Kress & Co., 398 U.S. 144, 161 (1970); Evans v. Abney, 396 U.S. 435 (1970); Bell v. Maryland, 378 U.S. 226 (1964).

have been a flagrantly political one, and thus a bad principle, but it would have been a principle, and the Court's willingness to adhere in future cases to the principle it itself had announced would not in Wechsler's sense have been unprincipled. To understand decision according to principle, in the judicial context, as a court's willingness to decide cases subsumed within the reason that it announces in accordance with that reason does not require that the reason (or principle) be in any way neutral.[11]

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[11]Stanley Fish's The Trouble With Principle (Cambridge, Massachusetts: Harvard University Press, 1999) is evasive as to whether principles are impossible or merely undesirable. Although some principles may of course be so broad as to provide little decisional assistance, a point that Fish stresses, this point about some principles hardly applies to all of them. If a principle is understood, at least in this context, as a rule articulated in the form of a reason – "I am carrying an umbrella because the weather forecast is for rain" embodies the rule that one should carry an umbrella when the forecast is for rain – then the view that principles are impossible is implausible. But if insofar as Fish and others believe that principle-based decision-making is possible but undesirable because few principles can anticipate and keep pace with the diversity of human experience and preference. Then the argument against principles is merely one side of a debate about the desirability of rules. For the other side of the debate see, for example, Larry Alexander and Emily Sherwin, The Rule of Rules: Morality, Rules, and the Dilemmas of Law (Durham, North Carolina: Duke University Press, 2001); Frederick Schauer, Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life (Oxford: Clarendon Press, 1991).

This understanding of the nature of principled adjudication as being at its core about faithfulness and consistency to previously articulated reasons flows from the very fact that we expect courts to offer reasons for their decisions.[12] Because a reason is of necessity more general than the result that it is a reason for,[13] the reason given by a court (or anyone else) encompasses cases other than the one then decided. By giving a reason, a court in effect decides a group of cases and not just one.[14] But having "decided" these other cases, if the court subsequently then says "we didn't mean it" (which is not the same as overcoming a non-absolute presumption in favor of following the reason), then there was little point in providing a reason in the first place. That Wechsler expected the Supreme Court to be at least presumptively true to its own previously articulated reasons, and thus to give reasons with at least a presumptive expectation that they would be followed in the future, was hardly a Wechslerian peculiarity, but was rather an essential feature of the very idea of giving reasons.[15]

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[12]See N.R. Campbell, "The Duty to Give Reasons in Administrative Law," Public Law, 1994: 184; Michael Dorf, "Courts, Reasons, and Rules," in Linda Meyer, ed., Rules and Reasoning: Essays in Honour of Fred Schauer (Oxford: Hart Publishing, 1999), p. 129; James L.H. Sprague, "Remedies for the Failure to Provide Reasons," Canadian Journal of Administrative Law and Practice, 13 (2000); 209.

[13]See Frederick Schauer, "Giving Reasons," Stanford Law Review, 47 (1995): 633.

[14]By giving a reason, therefore, a court decides cases as to which there may not then be a live case or controversy, and thus there is some tension between the practice of giving reasons and the aversion in American federal judicial practice to giving advisory opinions. See Michael Dorf, "Dicta and Article III," University of Pennsylvania Law Review, 142 (1994): 1997; Evan Tsen Lee, "Deconstitutionalizing Justiciability: The Example of Mootness," Harvard Law Review, 105 (1992): 603; Schauer, op. cit.

[15]It is important to emphasize that this is all just about the Court's stated reasons, and has nothing to do with whether the reasons are good ones, and nothing to do with whether there could have been other (and/or better) reasons supporting the same outcome. The issue here is solely one of faithfulness with and consistency to one's own explicit statements, and thus of the

differences between the obligations of a decision-maker who provides reasons, as courts often do, and the obligations of a decision-maker who does not provide reasons, such as the Supreme Court in denying certiorari or a baseball umpire in calling balls and strikes.

Wechsler's concern about fidelity to articulated reasons[16] was also supported, at least for him, by his analysis of the school desegregation cases, but here the nature of the complaints seems quite different. As is well-known, the Supreme Court's articulated reason in Brown was that segregating African-American children in the schools would have a detrimental effect on the education of those children, those giving them in fact an education less than equal to the education received by white children. But although the Court gave this education-focused reason in Brown itself, it then proceeded, in short order, and without opinion, to apply Brown to cases of official segregation of municipal golf courses,[17] public beaches,[18] public parks,[19] and public transportation.[20] Wechsler objected to this method of proceeding, and so have others, but the nature of the objection is quite different from the objection to Shelley. Unlike the reasons the Court gave for invalidating racially restrictive real estate covenants, here there was no reason to believe that the school-specific reasons the Court provided in Brown were not reasons the Court would not follow in subsequent cases, and of course we know that the Court did indeed follow them. The Court almost certainly subsequently expanded on the reasons it offered in Brown,[21]

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[16]Note that fidelity to an articulated reason is analytically distinct from the different and less important – here – issue of whether the articulated reasons must represent sincere statements of the actual motivations of the Court. As long as the articulated principles were indeed constraining, it would make little difference to the idea of principled adjudication if the principles were ex post rationalizations rather than accurate portrayals of motivating reasons.

[17]Holmes v. Atlanta, 350 U.S. 879 (1955).

[18]Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955).

[19]New Orleans City Park Improvement Association v. Detiege, 358 U.S. 54 (1958).

[20]Gayle v. Browder, 352 U.S. 903 (1956).

[21]There is an interesting question about the extent to which, if at all, an expansion on a reason is also a repudiation of it. Because a reason articulated in a decision often represents a

but there is no indication that the Court did not or would not have refused in subsequent cases falling within the Brown reasons to follow the reasons it first set out explicitly in Brown itself.

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resolution of competing arguments and competing claims, enlarging in a second or subsequent case a reason set forth in the first case may give shorter shrift to the reasons that produced part of the resolution in the first case. But having noted this possible complication, will say nothing further about it on this occasion.

This being the case, Wechsler's objection with respect to the official segregation cases is largely to the fact that the Court offered no reasons at all in the park, beach, transportation, and golf course cases, despite the fact that these institutions, not being schools, were not within the compass of the reasons the Court set forth in Brown. Because the Brown reasons are plainly so school-specific, Wechsler's complaint is not about refusing to follow stated reasons, but instead of enlarging, without explanation, what those reasons could plausibly be taken as supporting. This is quite different from the objection to Shelley. As with the Court's later claim that Brandenburg v. Ohio[22] was dictated by its earlier First Amendment precedents, the Court in the golf course, park, beach, and transportation cases claimed by simple citation that its results in those cases were dictated by Brown. Yet in neither Brandenburg nor Brown was the Court's, shall we say, healthy understanding of its own previous precedents warranted on the basis of what those precedents had actually said.

Although this kind of revisionist recharacterization of precedent strikes us (and Wechsler) as problematic, it is a problem quite different from the problem of refusing to follow the Court's own previously articulated reasons. The Brown/Brandenburg problem could be a problem of disingenuousness, or it could simply be the fact that to rely simply on an erroneous characterization of precedent is in effect to give no reason at all. But in either case, what made the post-Brown segregation cases unprincipled to Wechsler was not because the Court was

[22]395 U.S. 444 (1969) (holding that the First Amendment allowed punishment for advocacy of illegal activity only when the speaker intentionally and explicitly incited imminent unlawful action under circumstances in which that imminent unlawful action was likely to take place).

unwilling to follow the principle it had previously offered, but rather that the Court was following no principle at all.

Yet although there is a substantial difference between not following any principle and not following a previously-articulated principle, the connection, for Wechsler, appears to be that both of these distinct decisional pathologies make it too easy for a court to make ad hoc decisions, thus reaching perhaps politically or morally wise decisions, but reaching decisions undisciplined by the reasons given in previous decisions. Yet although it may be true that these are two different types of decision undisciplined by decisions in other cases, the question would still remain whether the other forms of decision without articulated reason in the legal system – denials of certiorari, jury verdicts, and administrative discretion, most obviously – are also not unprincipled. And if this is so, then there still remains the question whether the advantages of being unprincipled – primarily that of leaving more future options unforeclosed[23] – at times outweigh the disadvantages. Yet although this is a real issue and the basis for a real debate, the deficiencies of outcome without reason, as in the post-Brown segregation cases, are once again deficiences, if deficiencies they are, that have nothing at all to do with the idea of neutrality.

[23]See Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (Cambridge, Massachusetts: Harvard University Press, 1999).

Yet although neutrality is now exposed as not being at issue with respect to either Shelley or Brown, the issue of principled adjudication does appear to relate closely to what Wechsler and many of his contemporaries supposed they were getting at with their criticisms, and that is whether there is any connection between judicial review and the characteristic modalities of legal and judicial thought. Let us assume that there are such modalities, and that there is something that can plausibly lay claim to the title of "legal reasoning."[24] If that is so, then we can understand Wechsler as believing that the argument for judicial review rests almost entirely on the comparative advantage that lawyers and judges have in being able to apply their distinctive mode of thought and reasoning to the task of interpreting and applying constitutional values. For Wechsler and his generation, the argument for judicial review starts with the premise that the Constitution is law, that law is what lawyers and courts are good at, and that if

[24]The serious claims (which may still not be true, see Larry Alexander, "The Banality of Legal Reasoning," Notre Dame Law Review, 73 (1998): 517) that there really is something called legal reasoning are not claims that there is a totally unique form of thought dominant in law but non-existent elsewhere. Rather, the case for legal reasoning is that certain forms of reasoning – possibly reasoning from rules, possibly reasoning from precedent, possibly giving reasons, and possibly other forms of reasoning in which both authority and generalization loom large – are sufficiently more present in law than elsewhere that the claim of there being something worthy of being called legal reasoning is justified.

courts are not going to do law – as he believed they did not when they made ad hoc and unprincipled decisions unsupported by articulated reasons the Court is willing itself to follow in subsequent cases – then the argument for judicial review collapses.[25]

[25]For an important analysis so situating Wechsler within the political and jurisprudential milieu of the 1950s, see Gary Peller, "Neutral Principles in the 1950s," University of Michigan Journal of Law Reform, 21 (1988): 561.

Wechsler's argument, however, is replete with contestable assumptions. Chief among them is the assumption that the best or only argument for judicial review rests on the reviewer behaving in law-like fashion. This was one of Wechsler's assumptions, yet to take acting in a law-like fashion as either a necessary or a sufficient condition for judicial review appears mistaken. If, after all, part of the argument for judicial review rests on the undesirability of majoritarian decision-making about issues that are at their core anti-majoritarian,[26] then there is no reason to suppose that lawyers or judges are the exclusive or best repository of anti-majoritarian wisdom. Nine politicians appointed for life[27] and relying not at all on legal skills could still put the protection of non-majoritarian interests in non-majoritarian hands. Indeed, something like this is one of the arguments for continuing the House of Lords in the United Kingdom, and perhaps even for establishing the United States Senate.

Alternatively, the argument for judicial review may be an argument from redundancy. The argument from redundancy[28] – two heads are better than one – is again an argument that does not rest on the existence or use of the characteristic modes of legal reasoning. Judicial

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[26]See especially Ronald M. Dworkin, Taking Rights Seriously (Cambridge, Massachusetts: Harvard University Press, 1978). Not all constitutional rights are intrinsically anti-majoritarian in nature, but many of the most important ones – such as freedom of unpopular speech, freedom for minority religions, the equality of discrete and insular minorities, and the rights of criminal defendants – appear to fit this characterization.

[27]Of course many people think this is a pretty fair description of the Supreme Court.

[28]See Robert M. Cover, "The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation," William and Mary Law Review, 22 (1981): 639; Robert M. Cover and T. Alexander Aleinikoff, "Dialectical Federalism: Habeas Corpus and the Court," Yale Law Journal, 86 (1977): 1035.

review may be based, just like the institution of the jury or any other institution of multiple decision-makers, on the simple advantages of multiplicity, and if this is so there is no reason to believe that the advantages of multiple-decision-makers, whether concurrent or consecutive, require that any of those decision-makers operate in characteristically legal fashion.

There are, of course, other arguments for judicial review. And it may even be the case that some of them require the distinctive modalities of legal thought more so than do the ones I have just briefly mentioned. But even if interpreting a constitution is a characteristically legal task – itself an open question, especially with a Constitution marked by what Justice Jackson famously referred to as a document riddled with "majestic generalities"[29] – it is not necessarily the case that legislatures or executives could not engage in that task themselves.[30]

Yet although the question of what, if anything, supports the idea of judicial review and the related but not identical idea of judicial primacy in interpreting the Constitution is an important one, it is somewhat far afield from our primary task here. For now, it is sufficient only that we keep on the table the way in which Wechsler's call for principled adjudication was premised on his belief that judges, operating in characteristically legal mode, represent the underlying and necessary premise for judicial review. If that is the case, then the failure of judges to be faithful to the norms of principled decision-making undermined, for him, not only the particular cases in which that failure was manifested, but also, and more importantly, the

[29]West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).

[30]This possibility

institution of judicial review itself.

If, however, the institution of judicial review is not built on the foundation of the idea of legal reasoning, and thus if the arguments for judicial review do not rest on the thinly veiled conceit that the country will work better of lawyers and judges are at the helm of the ship of state, then the failure to operate in lawyerly fashion says little about judicial review. In this first sense of neutrality, therefore, the call for neutral principles, although not about neutrality at all, is about the central question of the relationship, if any, among generality, legal reasoning, and judicial review. Wechsler's complaint was that the decisions he castigated were not general, and therefore not legal, and therefore outside of the proper bounds of judicial review. And if judicial review does indeed presuppose legal reasoning, and legal reasoning presupposes generality, then at least some of Wechsler's salvos were on target. But if judicial review does not rest on legal reasoning, or if characteristically legal reasoning does not rest on generality, then the absence of decisions anchored to other decisions – the essence of principled decision-making – says little about judicial review itself.

II. The Neutrality of Application

Wechsler's objections to Brown, however, go deeper than being only objections to the Court's seeming lack of principled consistency. In criticizing Brown, Wechsler also objected to the Court's reliance on social science evidence, its reliance on legislative motivation, and its reliance on the subjective feelings of those who would be injured by official segregation on the basis of race. For Wechsler all of these factors relied too heavily on non-objective factors as to

which few judges and few lawyers would be in agreement. As a result, maintained Wechsler, reliance on factors such as these would make it too easy for a court to impose its own subjective preferences rather than apply something existing external to the Justices' own subjective beliefs. And so here Wechsler's objections to the Brown opinion seem to bring us closer to ideas of neutrality itself, because now Wechsler appears to desire constitutional outcomes that are "neutrally" derivable from the constitutional raw materials.[31]

Here we have arrived at the heart of a genuine debate about neutrality and judicial review. In order to consider it, we can turn briefly to a different constitution, and take up Articles 35(1)(d)(i) and (ii) of the Constitution of the Republic of South Africa, which together provide that a person arrested must be brought before a court not later than "48 hours after the arrest, or at the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day." Against the background of these clauses, consider the possibility that a court would find the requirements of the constitution satisfied by police who brought an accused before a court 41 hours after an arrest, or violated by police bringing an accused before a court 53 hours after an arrest.

[31]What that raw materials is – text, original intent, precedent, and possibly other sources and materials – constitutes the bulk of the field that has come to be known as "constitutional theory," but there is no need in this context to survey that entire field here. For a useful overview, see the readings collected in John Garvey and Alexander Aleinikoff, Modern Constitutional Theory: A Reader (St. Paul, Minnesota: West, 1999).

Under one conception of neutrality, and plainly one to which Wechsler subscribed, a court could find the 48 hour requirement in the constitution satisfied in the first example and violated in the second without recourse to political, philosophical, cultural, sociological, historical, or even empirical resources other than the factual determination of what actually happened in this particular case. If it were established factually that no more than 41 hours had transpired between arrest and court appearance, then an applier (whether we call an applier an "interpreter" is part of the very matter at issue) of the relevant provision could determine mechanically that the constitutional requirement had been satisfied, and this determination could be made even by someone who thought that the defendant was being railroaded and ought to be freed by all means possible, as well as by someone who thought that the defendant was truly wicked and ought to be imprisoned for a series of consecutive 99 year terms. And so too with the 53 hour case as well, albeit in reverse. To Wechsler, the fact that the provision could be applied without reference to background normative views of any kind, and thus without reference to potentially contestable political or moral or ideological views of the Justices themselves, made the provision neutral in the important respect that its mechanical application would be an exercise in divorcing the application from any judicial preferences about outcome. For Wechsler and many of his contemporaries, this sense of neutrality as divorcing the application of a legal (or constitutional) rule from the substantive views of the applier – the rule of law and not the rule of "men" – was the essence of law itself.

It is important to note that this sense of neutrality, like the idea of principled decision-making, exists independently of the neutrality or lack thereof (which we will address in the

ensuing section) of the provision itself. If we were to alter Article 35 of the South African constitution so that enrolled members of the African National Congress were required to be brought before a court within 24 hours, but that enrolled members of the National Party could be detained for as long as 72 hours before being brought before a court, or that Blacks were entitle to the protection of the provision but Afrikaaners were not, it would become stunningly clear that the provision was in no way substantively neutral. Yet despite its lack of underlying substantive neutrality, there would be every reason to believe that this hypothetical provision would be as capable of mechanical application as is the actual provision. In this sense of neutrality, neutrality is the ability to apply a rule without the applier taking moral or political substance into account, and this ability, putting aside that some appliers might find it psychologically harder to apply distasteful rules than ones to which they substantively subscribed, need not vary with the presence or absence of contestable and plainly non-neutral political and moral substance in the rule itself.

A few decades ago there were debates, at times interesting and at times amusing, about whether this form of neutral application was possible even for the most linguistically precise of rules, and there is no point in rehearsing those debates here.[32] But one thing is clear to those on all sides of those debates, and that is that there is not much in the way of useful similarity between the Equal Protection Clause of the Fourteenth Amendment and the above-quoted Article

[32]The flavor of the debates can be sampled by comparing Mark Tushnet, "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles," Harvard Law Review, 96 (1983): 781, with Frederick Schauer, "Easy Cases," Southern California Law Review, 58 (1985): 399.

35 of the South African constitution. Even the archest of arch-formalists[33] recognizes that the process of applying vague language – "equal protection of the laws," "due process of law," "cruel and unusual punishment," "privileges and immunities," "unreasonable searches and seizures," "commerce among the several states," "case or controversy," "freedom of speech," "establishment of religion," – to real problems is hardly mechanical,[34] and is thus hardly neutral in the sense now under consideration. Wechsler, it appears, might plausibly be understood as believing that there is or ought to be a canon of constitutional construction such that all constitutional provisions ought to be understood or interpreted in such a way – originalism is a common candidate[35] – as to maximize the possibility of mechanical, and thus neutral in this sense, interpretation. Such a canon would of course itself be non-neutral in inspiration and substantive valence, and at the very least it would presuppose certain non-neutral views about the desirability and style of judicial review. But we can let that pass here, for the main point is only that just as it is possible to imagine principled adjudication without supposing that the principles themselves would be neutral, then so too can we imagine mechanical – neutral – application of

[33]I speak with some authority here. See Frederick Schauer, "Formalism," Yale Law Journal, 97 (1988): 509.

[34]The charge of "mechanical" jurisprudence, which originated with Roscoe Pound, Roscoe Pound, "Mechanical Jurisprudence," Columbia Law Review, 8 (1908): 605, is a curious one. Mechanical jurisprudence is plainly a bad thing from the perspective of a judge seeking to maximize the intellectual challenge of his or her own job, but it hardly follows that the rest of society ought to be equally concerned as judges are with judicial job satisfaction. With judicial job satisfaction aside, the question is then one of which form of judicial function and empowerment will be more legitimate, or will produce in the aggregate more just results, and on these questions of institutional design it is hardly clear whether mechanical or non-mechanical approaches are preferable.

[35]See Robert Bork, "Neutral Principles and Some First Amendment Problems," Indiana Law Journal, 47 (1971): 1.

non-neutral rules, including at least a few of the rules in the Constitution or in the judge-made corpus of constitutional law.

Neutrality in the mechanical application sense relates also to the foundations of judicial review, but in a different way from neutrality in the sense of principled adjudication. If the concern is about the so-called counter-majoritarian difficulty, as it was for Wechsler and many of his contemporaries,[36] then mechanical and non-value-laden application of admittedly value-laden constitutional rules provides a way in which the power of unelected judges to nullify the products of elected legislatures and executives can be justified. For those who believe that value neutrality in the process of exercising judicial review is the essential precondition for justifying judicial review, then the possibility of neutrality in the application of constitutional rules is important.

[36]See Laura Kalman, The Strange Career of Legal Liberalism (New Haven: Yale University Press, 1998); Barry Friedman, "The Birth of an Academic Obsession: The History of the Countermajoritaran Difficulty, Part Five," Yale Law Journal, 112 (2002): 153; Barry Friedman, "The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship," Northwestern University Law Review, 95 (2001): 933.

Unfortunately for Wechsler and others who held or hold this view, however, a constitution whose degree of linguistic precision rarely approaches that of Article 35 of the South African constitution does not appear to provide the appropriate raw material for these aspirations. At the heart of Wechsler's call for neutrality in the application of constitutional rules, therefore, may be a desire to make the Constitution of the United States into something that it is not. That the Supreme Court's overt reliance in brown on values, preferences,[37] empirical evidence,[38] and, worst of all, feelings, may have made it far too obvious for Wechsler's

[37]See Jon O. Newman, "Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values," California Law Review, 72 (1984), 200.

[38]In important but often unappreciated ways, judicial reliance on empirical evidence, especially empirical evidence not first presented and tested by cross-examination at trial, is more deeply problematic than the reliance on values. Judges who rely on values in making decisions typically display those values on their sleeves, and as a result most people will recognize the contestability of the values that are at work. When appellate courts rely on self-generated empirical evidence, however, which they do with some frequency even (and especially) when they do not provide citations to empirical studies, the contestability may be less apparent but no less real. For my extended thoughts on this phenomenon and problem, see Frederick Schauer, "The Dilemma of Ignorance: PGA Tour, Inc. V. Casey Martin," Supreme Court Review, 2001: 267; Frederick Schauer and Virginia J. Wise, "Nonlegal Information and the Delegalization of Law," Journal of Legal Studies, 29 (2000): 495.

tastes that the particular constitution he was saddled with was not a constitution susceptible of interpretation in a way that would have meshed with Wechsler's own opinions about the foundations of legitimate judicial review.

III The Neutrality of Constitutional Rules

If substantive neutrality is necessary neither to principled adjudication, which is usually a good thing, nor to mechanical application of those rules that are susceptible of mechanical application, which is sometimes a good thing, then is there any room left for neutrality? Although Wechsler appeared to believe that neutrality had an even deeper place in constitutional decision-making, he may have been mistaken in that belief.

The question now is whether there can be such a thing as a substantively neutral rule. A good place to start in addressing this question is to note that rules, constitutional or otherwise, can be more or less general. Wechsler, along with his contemporary and intellectual fellow-traveler Lon Fuller,[39] can be taken as having believed that more general rules were better than less general ones. Indeed, the virtues of generality align so closely with the virtues of principled adjudication that the belief that generality was the characteristic modality of law likely helped produce, for Wechsler, Fuller, and many others, a belief in the importance of adjudication in

[39]See especially Lon Fuller, The Morality of Law (New Haven, Yale University Press, Rev. Ed., 1978), in which Fuller lists generality as one of the conditions necessary for a system of social control to count as a legal system. To the same effect is John Austin's belief that particularized commands were not law properly so-called. John Austin, The Province of Jurisprudence Determined and Uses of the Study of Jurisprudence (I. Berlin, S. Hampshire, & R. Wollheim, eds., London: Athlone Press, 1954).

accordance with articulated principles faithfully (even if only presumptively) adhered to.

But is there a connection between generality and neutrality. Although the dimension of generality is a scalar one with infinite gradations, if we look towards the end of the scale occupied by particularity rather than generality, we see that rules characterized by high particularity also seem more partial, and thus in some way less neutral. Take, as the limiting case, a rule that benefits or burdens only one party, as with the typical case of special legislation, as with rules that single out a particular business for special privileges,[40] and as with rules that, though not couched in terms of a proper name, still single out one person or business, or a small number of persons or businesses in a closed class, for special treatment.[41] Such less legislation not only seems non-neutral in some important way, but is also non-neutral precisely because of its particularity.

When we cure such extreme partiality by increasing the semantic generality of a rule, it becomes more neutral in one respect. When legislation encompasses open and not closed classes, and when the number of actual and potential members of the open class is large, the legislation shows less favoritism, is less partial, and in this sense is more neutral.

This relationship between generality and neutrality appears to be the starting point for

[40]See Morey v. Doud, 354 U.S. 457 (1957), overruled by New Orleans v. Dukes, 427 U.S. 297 (1976).

[41]See Mayflower Farms, Inc. V. Ten Eyck, 297 U.S. 266 (1936); Cotting v. Kansas City Stock Yards Co., 183 U.S. 79 (1901).

Wechsler's notorious worry that the Supreme Court in Brown had in effect recognized the freedom of African-Americans to associate with whites but had not recognized the freedom of association of those whites who chose not to associate with African-Americans. Now the Supreme Court in Brown never said anything about freedom of association, so principled adjudication in the sense of following an articulated principle within the boundaries of the principle as stated was not at issue. What was at issue was whether the principle of freedom of association is rendered non-neutral by virtue of being restricted to African-Americans, and would become neutral by virtue of its expansion to whites.

If the principle of freedom of association as Wechsler imagined it operating in Brown had been expanded to include whites, a number of substantive questions would still loom large. One is the question whether freedom of association is constitutionally cognizable at all, and, if so, whether it outweighs the commands of equality. But even if we assume that the answer to both of these questions is a non-neutral yes, the resultant principle, even if applied universally, is itself non-neutral. It applies to Americans but not in general to those citizens of and resident in other countries, to human beings but not to non-human animals, possibly to individuals but not to corporations, and so on. In each of these respects, the specification of the domain of a principle that is anything other than infinite is itself a non-neutral specification, at least as between those who are included and those who are excluded.

Even if the domain were to be infinite, the contours of the principle would themselves be based on substantive values and choices. Would Wechsler's freedom of association render unconstitutional consensual sex between adults and juveniles? Would it make the law of

criminal conspiracy unconstitutional, and what about laws imposing substantive constraints on the activities of corporations and associations? All of these are substantive choices, and thus substantively non-neutral, even though making them is an unavoidable task in filling out the contours of freedom of association, or for that matter of any other rule or principle.

Wechsler, possibly influenced by his own involvement in First Amendment litigation and scholarship (some of which is described in the "Neutral Principles" article itself), appears to have supposed that the First Amendment principle of what is now (but was not then) referred to as content or viewpoint neutrality[42] is in some way a larger principle of thought, or even a principle of global neutrality, but that is hardly the case. As Gerald Dworkin convincingly demonstrates in one of the masterpieces of modern applied political philosophy,[43] a principle of, say, preferring socialism to capitalism, equality to oppression, or democracy to monarchy, is not solely by virtue of drawing a substantive distinction violative of any principle of fairness, rationality, or equality. Substantive choices are built into any principle, and the charge that preferring democracy to monarchy is unfairly non-neutral overextends the narrow lessons of American First Amendment doctrine. It is probably right to allow the monarchists to speak as

[42]See Elena Kagan, "The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion," Supreme Court Review, 1992: 29; Geoffrey R. Stone, "Anti-Pornography Regulation as Viewpoint-Discrimination," Harvard Journal of Law and Public Policy, 9 (1986): 461; Geoffrey R. Stone, "Content Regulation and the First Amendment," William and Mary Law Review, 25 (1983): 189; Susan H. Williams, "Content Discrimination and the First Amendment," University of Pennsylvania Law Review, 139 (1991): 615.

[43]Gerald Dworkin, "Non-Neutral Principles," in Norman Daniels, ed., Reading Rawls: Critical Studies of a Theory of Justice (Stanford, California: Stanford University Press, 1975), p. 124.

well as the democrats, but that does not support the conclusion that preferring democracy to monarchy as a matter of policy is unfair to monarchists in the same way or that the judicial creation of constitutional principles can in any comprehensible form be neutral as between competing visions of just what those principles should be. To put it more bluntly, there simply cannot be a neutral principle.

Wechsler's mistaken belief that there could be neutral principles, except insofar as more general principles are often less partial than less general ones,[44] and except in the case of value-free application of some higher non-neutral principle, is reflected in modern debates about affirmative action. Affirmative action may be right and it may be wrong, but it is no more illogical to say that Blacks and whites are dissimilarly situated for equality purposes than it is to say that equality and inequality are different. The equality principle is itself non-neutral vis-a-vis inequality, and although the equivalence or non-equivalence of discrimination against men and discrimination against women is open to substantive contest, neither of the non-neutral sides of that debate have any greater claim either to rationality or to the intrinsic nature of legality.[45] Perhaps the Constitution's Bill of Attainder clause and the presumption against special

[44]And there is always the non-neutral decision about when less partial rules are better or worse than more partial ones.

[45]For an example of the view that those committed to non-discrimination against Blacks must in order to avoid inconsistency be equally committed to non-discrimination against whites, see William W. Van Alstyne, "Rites of Passage: Race, the Supreme Court, and the Constitution," University of Chicago Law Review, 46 (1975): 775. See also Suzanna Sherry, "All the Supreme Court Really Needs to Know It Learned from the Warren Court," Vanderbilt Law Review, 50 (1997): 459. For a sharp rejoinder to Sherry and an interesting analysis of neutrality issues, see Barry Friedman, "Neutral Principles: A Retrospective," Vanderbilt Law Review, 50 (1997): 503.

legislation reflect law's preference for generality,[46] but the instances across which the generality ranges will inevitably be selected in a non-neutral way.

[46]See Akhil Reed Amar, "Attainder and Amendment 2: Romer's Rightness," Michigan Law Review, 95 (1996): 203; Roderick M. Hills, Jr., "Is Amendment 2 Really a Bill of Attainder: Some Questions About Professor Amar's Analysis of Romer," Michigan Law Review, 95 (1996): 236.

There is, of course, a close connection among this version of the question of neutrality, the issue of neutrality of application discussed in the previous section, and the enduring (some would say tiresome) debates about constitutional theory and constitutional interpretation. If there are or can be mechanical applications of the open-ended provisions of the Constitution just as there can be of the requirements that the President be 35 years old or that treaties be ratified by two thirds of the Senate before they can become law, then judicial review becomes a process of law enforcement and not a process of value-laden interpretation and value-laden law-making. And if a constitution is largely about imposing second-order constraints on first-order policy preferences, then there are strong arguments to be made for writing constitutions that can be enforced by judges as law enforcement officers rather than explicated by philosophers or policy analysts who happen to be wearing robes. But at least in the United States, most of the constitutional text is scarcely susceptible of such limited use,[47] and the constitutional tradition surrounding that text is too entrenched to be substantially changed. As a result, the interpretation of the constitution we actually have will rarely resemble the process described in the previous section, and the process of interpretation will consequently be non-neutral in almost all important respects.

[47]It is not without interest that the South African constitution is 114 pages long, and the Brazilian constitution 238. For highly complex reasons, some of which have to do with the political dynamics of making a constitution in public rather than in secret, the American model of a short and vague constitution is one that no developing or transitioning country appears eager to adopt.

IV The Neutrality of Institutional Design

In most of the existing literature, contemplating the possibility of neutrality of substantive constitutional principles is as high up the ladder as one goes. Yet there is still a higher rung, and that is the rung of institutional design itself, the level at which we consider the largest questions of constitutionalism and constitutional design. And at this level there is still another debate about neutrality, a debate we can perceive by considering the following argument:

> In thinking about the very institution of judicial review, it is appropriate to take into account the current and likely future staffing of the judiciary, the current and likely future staffing of the other branches of government, and the current and likely future substantive proclivities of the population itself. Although institutions created at one time cannot easily be changed when political conditions change, this friction and path-dependence is merely something to be factored into a larger equation, and that equation is one in which it is entirely appropriate to conceive and design institutions, including the institution of judicial review, to serve political, social, moral, and ideological ends.

The phrasing of the argument is hypothetical, but the argument itself is not. It is a response to the view that there is a whiff of opportunism or hypocrisy in the recent conversion of left-leaning American constitutionalists who had celebrated the virtues of judicial review when Earl Warren was Chief Justice but who have reversed course now that the Supreme Court is populated differently.[48] American constitutional liberals may have waited two decades to become aware of

[48]The flavor of these suggestions comes through from the reactions to Mark Tushnet's

the fact that Earl Warren was dead, but when they finally woke up to the reality, so the charge goes, they quickly changed course about the glories of judicial review and the virtues of judicial activism.[49]

In order to consider this debate between those who would consider such a shift at least mildly inappropriate and those who see nothing wrong with it (and this could include people who disagree with the substance but who would still not see the substantive shift as disingenuous or unseemly), we need to bracket the issues considered in the first three sections of this Article. In particular, we need to set aside the possibility – indeed the certainty – that many of the defenses of 1954 to 1980 (more or less) activist judicial review were couched in non-instrumental and timeless language. To the extent that that was the case, and it was typically the case, then perhaps there was a degree of disingenuousness on the part of those who in, say, 1965,

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Taking the Constitution Away from the Courts (Princeton: Princeton University Press, 1999), many of which can be found in a Symposium on the book in the May, 2000, issue (vol. 34) of the University of Richmond Law Review.

[49]Similar charges surround those who were free speech celebrants when the speakers were largely Vietnam protesters, civil rights demonstrators, and the occasional Nazi or Jehovah's Witness to keep things honest, but who have changed their tune when many of the salient speakers are tobacco advertisers, abortion clinic protesters, or big spending Republican campaigners. The substance of the idea of free speech itself, however, makes this a different and more complex issue.

or even in 1975, applauded American-style aggressive judicial review and saw and described its substantive virtues as the necessary and not temporally or politically contingent outgrowth of something about judges (including particular judges such as Earl Warren, William Brennan, and Thurgood Marshall), about courts, and about the structure and institutions of constitutional adjudication. But suppose instead that someone had argued that active judicial review was a good thing in the 1950s, 1960s, and 1970s just because it advanced substantive values of equality, and just because of Earl Warren, William Brennan, Thurgood Marshall, and a few others, and that once aggressive judicial review was no longer serving this substantive value there was no reason to support it, and indeed there was good reason to try to contract it. Would the people who made such an argument have been guilty of hypocrisy, disingenuousness, inconsistency, or irrationality?

The answer to this question depends on the ontological status of judicial review itself. If judicial review is indeed ontologically or morally primary, then perhaps the charge of inconsistency sticks. If Bentham had in the later years of his life said that he thought that utility ought not to be pursued because utility maximization was turning out to disadvantage Bentham and those of his social class, we might have charged him with hypocrisy (especially if he refused to relinquish his basic philosophical position) precisely because utility was for Bentham and many others morally and ontologically primary. But suppose we are instead dealing with a value that is not primary but instrumental. Suppose John Stuart Mill, who argued at the conclusion of Chapter 5 of Utilitarianism that it would be good for the maximization of utility were the hoi

polloi (not Mill's term[50]) to believe not in utilitarianism but in justice,[51] were to have discovered that a widespread belief in justice was producing not more utility but less. Had that been the case, Mill could not have been charged with anything more than miscalculation, and with recognizing that empirical and instrumental assessments are contingent. Indeed, it might not even have been a miscalculation, for empirical instrumental assessments that might hold true in some times and in some places might not still hold true at other times or in other places.

[50]But see R.M. Hare, Moral Thinking: Its Levels, Method and Point (Oxford: Clarendon Press, 1981), distinguishing between "archangels" and "proles."

[51]John Stuart Mill, Utilitarianism and Other Essays (Alan Ryan, ed., New York: Viking Press, 1987). See also Henry Sidgwick, Methods of Ethics (Indianapolis: Hackett Publishing, 1981).

So too with judicial review. If judicial review is as ontologically, politically, and morally primary as utility is for utilitarians, or even as law is for some legal theorists,[52] then the possibility of having different views about judicial review at different times reflects a deep inconsistency. But if instead judicial is not primary but simply instrumental to something else – equality, democracy, justice, liberty, freedom, human flourishing, virtue, or something else – then there would be no more inconsistency in urging a change in the shape and nature of judicial review as time and people change than there would be in the case of Mill's hypothetical change in views on the effects of the empirical, contingent, and altogether instrumental relationship between utility and a popular belief in justice.

[52]See the various views on this topic in Paul Amselek and Neil MacCormick, eds., Controversies About Law's Ontology (Edinburgh: Edinburgh University Press, 1991).

A good example of the issue comes up in the context of the continuing debates about Lochner v. New York.[53] Back in the 1970s, it was fashionable to criticize Roe v. Wade[54] as being Lochner in new clothing.[55] If one were to criticize Lochner for representing judicial interference with legislative choices in the name of allegedly ethereal substantive die process values, then, so it was often said, one could not accept Roe v. Wade, for Roe involved the same institution applying the same constitutional clause as was the case in Lochner.[56] For some years the comparison was understood as a knock-down argument,[57] but it is strange why this should have been the case. One response, after all, could well have been that Lochner was an unfortunate decision just because it represented retrogressive interference with progressive (taken here as representing what the responder believes to be a collection of substantive desirable moral and political principles) legislation, that it was only to be expected that Supreme Court Justices at the time of Lochner would have been less progressive than legislatures, and that it was perfect;y appropriate to design the institutions of judicial review around those facts. In the

[53]198 U.S. 45 (1905).

[54]410 U.S. 113 (1973).

[55]See especially John Hart Ely, "The Wages of Crying Wolf: A Comment on Roe v. Wade," Yale Law Journal, 82 (1973): 920.

[56]For a good discussion of the relationship between Roe and Lochner, see Joseph D. Grano, "Teaching Roe and Lochner," Wayne Law Review, 42 (1996): 1973.

[57]Recent scholarship has recognized that the question is more complex. See, for example, James E. Fleming, "Fidelity, Basic Liberties, and the Specter of Lochner," William and Mary Law Review, 41 (1999): 147; Barry Friedman, "The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner," New York University Law Review, 76 (2001): 1383; Gary D. Rowe, "Lochner Revisionism Revisited," Law and Social Inquiry, 24 (1999): 221; Stephen A. Siegel, "Lochner Era Jurisprudence and the American Constitutional Tradition," North Carolina Law Review, 70 (1991): 1; Cass R. Sunstein, "Lochner's Legacy," Columbia Law Review, 87 (1987): 873.

1970s, however, so the argument continues, the social forces and political alignments were different, so, fully allowing for and compensating for path dependence and institutional stickiness and all of the other ways in which institutions created at one time cannot be quickly or costlessly changed when moral or political winds change, it would still be highly appropriate to promote judicial intervention 70 years after Lochner while continuing to condemn its exercise in Lochner itself.

All of these arguments can of course be run both ways, regardless of the substance of the moral or political views that are taken to be primary, but that is not the point. Rather, the question is whether there is anything inconsistent with the nature of reason or the nature of law to engage in such overtly non-neutral discourse in designing the institutions of law, of which the institution of judicial review is but one. Those who believe that there is something of a bad odor about all of this and that it is better to remain on the plateau of principle rather than to descend to the valley of opportunism and instrumentalism are likely to believe, and perhaps necessarily must believe, either that law is in some important way ontologically primary, or that the institutions of law, perhaps because of the hide-bound nature of legal thinking, are or ought to be especially difficult to change. But if law is instrumental to other things, and if law is not itself an interesting moral category, then designing legal institutions instrumentally to serve deeper moral and political goals is entirely appropriate, as is recognizing that the contingent empirical instrumental connections between legal institutions (including the institution of judicial review) and the furtherance of these moral and political goals will vary with time, with place, with people, and with circumstances. Recognizing the empirical contingency of the relationship between legal institutions and the pursuit of moral goals may show that law itself is non-neutral,

but who could ever seriously have thought otherwise?