THE MYTH OF NEUTRALITY IN CONSTITUTIONAL ADJUDICATION

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The teleological conception of his function must be ever in the judge's mind.—BENJAMIN NATHAN CARDOZO.

I. INTRODUCTION

IN TWO recent papers, responsible students of the United States Supreme Court have dealt extensively with so-called "neutral principles" of constitutional adjudication. The first was Professor Herbert Wechsler's Holmes Lecture delivered at the Harvard Law School in April 1959 and since published in the *Harvard Law Review*;¹ the other, labeled "A Reply to Professor Wechsler,"² is authored by Professor Louis H. Pollak of the Yale Law School. A third essay, by another highly regarded observer, Professor Henry M. Hart, Jr.,³ is somewhat peripherally correlated with the other two. Both Wechsler and Pollak profess credence in the notion that neutral principles of adjudication can be agreed upon and should be followed by the nine men whose fate it is to sit on the highest bench. Hart holds a similar view, although he speaks of principles which are "impersonal and durable" rather than neutral. Because this position states at best a half-truth, this commentary has been written, not to engage in contentious debate but to point up another dimension to the concept of neutrality in constitutional decision-making. What follows suggests that neutrality, save on a superficial and elementary level, is a futile quest; that it should be recognized as such; and that it is more useful to search for the values that can be furthered by the judicial process than for allegedly neutral or impersonal principles which operate within that process.

Let us begin with a brief recapitulation of what each of the commentators has said. The position of each is easily stated. Wechsler adheres to these ideas: (a) the Supreme Court has a "duty to decide the litigated case . . . in accordance with the law . . ."; (b) the products of the fulfillment of this duty are to be

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¹ Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (hereinafter cited as WECHSLER).

² Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959) (hereinafter cited as POLLAK).

³ Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959) (hereinafter cited as HART).

viewed, not as good or bad depending on the result, but in accordance with unstated other standards, these standards presumably to vary from factual situation to factual situation; (c) the Justices on the Court should employ a method which he describes as follows: "the maine constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved . . ."; and further: it is "the special duty of the courts to judge by neutral principles addressed to all the issue[s]."⁴ Finally, Wechsler tells us that the "virtue or demerit of a judgment turns, therefore, entirely on the reasons that support it and their adequacy to maintain any choice of values it decrees."⁵

Pollak's main effort is directed, not towards contradicting Wechsler in toto, but towards demonstrating that Wechsler is wrong in calling the recent Supreme Court decisions in racial matters violative of neutrality. He begins by accepting the concept of neutrality of constitutional litigation "on the assumption that what Professor Wechsler has in mind is exorcising, once and for all, 'the kadi . . . dispensing justice according to considerations of private expediency,' " although he does admit that Wechsler may really be "hunting larger game"⁶—without suggesting what that might be. Pollak reviews the *White Primary Cases*, the *Restrictive Covenant Cases*, and the *School Segregation Cases*, and is satisfied, contrary to Wechsler, that neutral principles determined the Court's decisions in those cases—even though these principles at times were hidden below the muddy water of clumsy judicial language.

Finally, Professor Hart, in building a case for the proposition that the present Court has taken on too much work and should lighten its load and thereby possibly produce opinions of higher quality, calls for what might be termed "due procedure" in the Supreme Court process. Saying that the Court is losing the "professional respect of first-rate lawyers,"⁷ he ends hortatorily by sounding the tocsin: "But the time must come when it is understood again, inside the [legal] profession as well as outside, that reason is the life of the law and not just votes for your side. When that time comes, and the country gathers its resources for the realization of this life principle, the principle will be more completely realized than it now seems to be."⁸

⁴ WECHSLER 6, 15, 16. At page 19, Wechsler summarizes his views as follows: "A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved. When no sufficient reasons of this kind can be assigned for overturning value choices of the other branches of the Government or of a state, those choices must, of course, survive. Otherwise, as Holmes said . . . 'a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions. . . .'"

⁵ WECHSLER 19-20. He goes on to say: "or, it is vital that we add, to maintain the rejection of a claim that any given choice should be decreed."

⁶ POLLAK 5.

⁷ HART 101.

⁸ HART 125.

On one level these papers are exhortations to members of the Supreme Court to pull up their "judicial socks" and to act more as judges are alleged to act in an idealized view of the Anglo-American system of jurisprudence. This is the level of what can be called superficial or elementary neutrality. It seems to mean at least this: Decisions should be reached in constitutional cases, not in accordance with who the litigants were or with the nature or consequences of the results that flow from the decision, but by the application of known or ascertainable objective standards to the facts of the case. These standards are "neutral" because they have an existence independent of litigants; they are identifiable by Supreme Court Justices (and presumably by lawyers, although none of the three authors raises the specter of conflicting neutral principles); and they are usable in making decision and in writing opinions (though it should be said here that the three authors are never entirely clear whether it is the results or the opinions explaining those results that they are criticizing). In other words, the collective view of the three commentators is one of justice blindfolded, with even-handed application of known principle to known facts. So stated, the position is both an appealing and a familiar one. But it seems to ignore some basic elements of human activity and, accordingly, has at best only a very limited usefulness. Rather than providing any viable standards for gauging judicial decision-making, it merely restates the question.

Of the three, only Professor Pollak expresses any doubt about the principle of neutrality, and then only in passing. He took as his task the more limited purpose of evaluating Wechsler's allegation of judicial non-neutrality in the field of racial discrimination. He marks his adherence to the limited view of judicial neutrality, but notes in concluding his paper that Professor Wechsler's efforts "to capture and tame the concept are plainly unavailing,"⁹ followed by a quotation from a recent address by Professor Myres S. McDougal:

The essence of a reasoned decision by the authority of the secular values of a public order of human dignity is a disciplined appraisal of alternative choices of immediate consequences in terms of preferred long-term effects, and not in either the timid forswearing of concern for immediate consequences or in the quixotic search for criteria of decision that transcend the world of men and values in metaphysical fantasy. The reference of legal principles must be either to their internal—logical—arrangement or to the external consequences of their application. It remains mysterious what criteria for decision a "neutral" system could offer.¹⁰

It is on that note adumbrated but not developed by Professor Pollak that the following discussion is based.

At the outset it is desirable to define some terms. The word "neutral," according to the *Oxford Universal Dictionary*, when used as an adjective, has four meanings, two of which seem relevant for present purposes: "2. Taking neither

⁹ POLLAK 34.

¹⁰ McDougal, *Perspectives for an International Law of Human Dignity*, 1959 AM. SOC'Y INT'L L. PROCEEDINGS 107, 121 (1959).

side in a dispute; indifferent. . . 3. Belonging to neither of two specified or implied categories; occupying a middle position between two extremes." Neutrality is defined as "a neutral attitude between contending parties or power" and "the condition of being inclined neither way; absence of decided views, feeling, or expression; indifference." And "objective" has *inter alia* this definition: "opposite to subjective in the modern sense: That is the object of perception or thought, as distinguished from the perceiving or thinking subject; hence, that is, or is regarded as, a 'thing' external to the mind."¹¹ (The terms, "neutrality" and "objectivity," are used synonymously in this paper, although philosophers would probably distinguish between them.)

The first point we want to make is this: Adherence to neutral principles, in the sense of principles which do not refer to value choices, is impossible in the constitutional adjudicative process. (We limit ourselves to constitutional adjudication at this time, although much of what is said here is applicable to litigation generally.)¹² Strive as he might, no participant in that process can be neutral. Even though this should be thought of as being self-evident, it is desirable to set it out in some detail. Before doing so, however, it should be noted that neutrality of *principle*, as distinguished from neutrality of attitude, is an obviously fallacious way of characterizing the situation. Principles, whatever they might be, are abstractions, and it is the worst sort of anthropomorphism to attribute human characteristics to them. Neutrality, if it means anything, can only refer to the thought processes of identifiable human beings. Principles cannot be neutral or biased or prejudiced or impersonal—obviously. The choices that are made by judges in constitutional cases always involve value consequences, thus making value choice unavoidable. The principles which judges employ in projecting their choices to the future, or in explaining them, must also refer to such value alternatives, if given empirical reference. A principle might, in Professor Hart's term, be "durable," but only because enough human beings want it to be so. Can there be neutrality of attitude in constitutional adjudication?

II. NEUTRALITY IN OTHER DISCIPLINES

The process of judicial decision-making is a species of human thought and human choice and should be viewed against the background of what is known about human knowledge and thought processes. The study of the United States Supreme Court is a significant facet of the study of man, both metaphysically and epistemologically. Although this is neither the time nor the place to review all of what is accepted in the sociology of knowledge, it is desirable and relevant

¹¹ OXFORD UNIVERSAL DICTIONARY 1323, 1350 (Onions ed. 1955).

¹² See the article by Julius Stone, *The Ratio of the Ratio Decidendi*, 22 MODERN L. REV. 597 (1959), for a discussion of the general idea. And see James, *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 BUFFALO L. REV. 315, 327 (1959): The distribution of responsibility in a tort is basically not a legal problem, but is "fundamentally a human, economic or social problem."

to indicate what some leading students of various other disciplines have concluded regarding neutrality or objectivity in thought and decision-making. In this section we shall set out, in very brief form, the opinions of a classical philosopher (Plato), a natural scientist (P. W. Bridgman), a physical chemist who is also a social philosopher (Michael Polanyi), a sociologist (Karl Mannheim), a social scientist (Gunnar Myrdal), a political philosopher (Leo Strauss), a historian (Isaiah Berlin), and a theologian (Reinhold Niebuhr). The consistent teaching of these respected observers is that neutrality or objectivity is not attainable, either in the social sciences or in the natural sciences. (Needless to say, it is rarely pretended to in the humanities.) Knowledge, therefore, is primarily *decisional* in nature. This means that the human agency cannot be eliminated from any subject to which man addresses his attention, that value preferences inescapably intrude to guide decisions made among competing alternatives. Professor Wechsler agrees that a judge must make a choice among conflicting values, but maintains that such a choice itself can be guided by adherence to neutral principles. This we deny, and we begin our discussion of the students of other relevant disciplines with a statement by sociologist Louis Wirth:

In studying what is, we cannot totally rule out what ought to be. In human life the motives and ends of action are part of the process by which action is achieved and are essential in seeing the relation of the parts to the whole. Without the end most acts would have no meaning and interest to us. But there is, nevertheless, a difference between taking account of ends and setting ends. Whatever may be the possibility of complete detachment in dealing with physical things, in social life we cannot afford to disregard the values and goals of acts without missing the significance of many of the facts involved. In our choice of areas for research, in our selection of data, in our method of investigation, in our organization of materials, not to speak of the formulation of our hypotheses and conclusions, there is always manifest some more or less clear, explicit or implicit assumption or scheme of evaluation.¹³

Plato stressed the distinction between rigorous apodictic knowledge and decisional knowledge, and believed the latter to be immensely more valuable than the former. In fact, Plato really doubted whether apodictic knowledge was possible other than within the pre-existing framework of decisional knowledge. By the former he meant that kind of definitional, axiomatic knowledge in which a valid syllogism culminates in a necessary conclusion and in which the mathematical equation $a = b$ permits predicate b to add nothing to subject a . Decisional knowledge, on the other hand, recognizes as unavoidable and indeed considers appropriate value-judgments grounded on value-preferences, choices, alternatives.¹⁴ As theologian Robert Cushman recently commented:

Plato... takes the position that there are various possible premises of thought because there are differing orders of reality with appropriately diverse avenues of

¹³ Wirth, *Preface* to MANNHEIM, *IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY OF KNOWLEDGE*, at xx (Wirth & Shils transl. 1936).

¹⁴ CUSHMAN, *THERAPEIA: PLATO'S CONCEPTION OF PHILOSOPHY* (1958).

apprehension. Therefore, what a man "knows," what he judges to be "real" is determined by which avenue he customarily employs and what data he usually accredits as actually "given" for reflection.¹⁵

Decisional knowledge is knowledge issuing from the dialectic.¹⁶ And the dialectical process eventuates in a decision.¹⁷ For, "if such knowledge were rigorous [apodictic], a decision . . . would have no legitimate part in judgments."¹⁸ That "truth is no higher in honor than the value-judgment by which its discernment is implemented"¹⁹ is an assertion we accept and from which we infer the necessity of a hierarchy of values.

So far as the physical sciences are concerned—those which in the popular mind are devoid of the "human element"—recent testimony by one of the more notable scientists, P. W. Bridgman, points to similar conclusions. Writing in 1959, Bridgman, Nobel Prize winner in physics and long highly regarded as a thoughtful analyst of human behavior, tells us that "even in pure physics . . . it is becoming evident that the problem of the 'observer' must eventually deal with the observer as thinking about what he observes."²⁰ Further, in a

¹⁵ *Id.* at 261-69. At 261, 267 and 270, Cushman says: "The decisional character of working hypotheses means that, for Plato, the sum of available truth has a direct correlation with the totality of *bona fide* human preference. . . . But the truths which are derived by way of dialectic have, for Plato, a privileged position and significance as well as greater certainty. They possess greater certainty despite the fact that the truths of dialectic are decisional from first to last. . . . By "existential" it is here specifically meant only that the truths of dialectic are not available except through personal decision. . . . The way to truth is not one, but many. There are different avenues suitable to different spheres of reality. . . . Plato's analysis of the knowledge-process seems to suggest, then, that there is no achievement of knowledge which is not conditioned by a prior decision . . . about what is worth knowing. If this circumstance entails the consequence that there is an element of so-called "subjectivity" in knowledge, Plato accepts the inevitable with equanimity. . . . In Plato's view, the quest for certainty by way of *apodeixis* is both inadequate and futile."

¹⁶ *Ibid.*

¹⁷ Is it perhaps a valid hypothesis that the "dialectical process" in operation may inhere in a judicial conference of the Supreme Court, the outcome of which is a *decision*?

¹⁸ CUSHMAN, *op. cit.* *supra* note 14, at 267.

¹⁹ *Ibid.*

²⁰ BRIDGMAN, *THE WAY THINGS ARE* 2 (1959). See BRIDGMAN, *THE LOGIC OF MODERN PHYSICS* (rev. ed. 1957); JEANS, *PHYSICS AND PHILOSOPHY* (1942) (reprinted as an Ann Arbor Paperback, 1958).

"I will not attach as much importance as do apparently a good many professional lawyers to getting all law formulated into a verbally consistent edifice. No one who has been through the experience of modern physics . . . can believe that there can be such an edifice, but it seems to me that nevertheless I can sometimes detect an almost metaphysical belief in the minds of some people in the possibility of such an edifice. If one needs specific details to fortify his conviction that there is no such edifice, plenty can be found. . . . The situation . . . for the lawyer resembles somewhat the general situation for the scientist. We have seen that in the popular view the scientist assumes that nature operates according to certain broad sweeping generalities. This is paraphrased by saying that the scientist must have 'faith' that there are natural laws. We have not accepted this view. It seems to me that a better description of how the scientist operates is to say that he adopts the *program* of finding as much regularity as he

statement particularly relevant to the latter part of this paper, Bridgman states: "In my own case, pursuit of operational analysis has resulted in the conviction, a conviction which has increased with the practice, that it is better to analyze in terms of doings and happenings than in terms of objects or static abstractions."²¹ If a physicist cannot divorce the personal element of preferences from his study, it would seem to be an *a fortiori* proposition that the social scientist (including the lawyer and judge) cannot.

Bridgman is weightily supported by Michael Polanyi, who, in two recent books,²² argues that fact is inseparable from value and that the sciences cannot be severed from the humanities. How then does the personal factor manifest itself in the very structure of science? Polanyi discovers it wherever there is an act of appraisal, choice, or accreditation. Each science operates within a conceptual framework which it regards as the "most fruitful" for those facts which it "wishes" to study because they are "important," and it thereby chooses to ignore other facts which are "unimportant," "misleading," and "of no consequence."²³ Polanyi's position is aptly summed up in the following statement:

The ideal of a knowledge embodied in strictly impersonal statements now appears self-contradictory, meaningless, a fit subject for ridicule. We must learn to accept as our ideal a knowledge that is manifestly personal.²⁴

Strong support for the views of Bridgman and Polanyi is found in actual laboratory "decision" in contemporary physics. In the theorem of uncertainty, Heisenberg's Principle of Indeterminacy, there is major substantiation for the hypothesis of dynamic "creativity" not merely in human interaction but also in the world of physical phenomena. Heisenberg's Principle is a "new law . . . regarding the behavior of those infinitesimal units of matter which are studied in micro-physics. Knowing the position and velocity of a body, we should be able to predict where it will be the next instant; but the particles in question

can in the operation of nature, without any prior commitment as to how much he will find. So too it seems to me that the lawyer should and can make no prior commitment about the possibility of erecting a self-contained self-consistent verbal legal edifice, but all that he can strive for is as self-contained and logically consistent an edifice as he can erect." BRIDGMAN, *THE WAY THINGS ARE* 308-09 (1959).

²¹ *Id.* at 3.

²² POLANYI, *PERSONAL KNOWLEDGE* (1958); POLANYI, *THE STUDY OF MAN* (1958).

²³ See Earle, Book Review of Polanyi, *Personal Knowledge*, 129 *SCIENCE* 831 (1959).

²⁴ POLANYI, *THE STUDY OF MAN* 27 (1958). "Such a position is obviously difficult; for we seem to define here as knowledge something that we could determine at will, as we think fit. I have wrestled with this objection in a volume entitled *Personal Knowledge*. There I have argued that personal knowledge is fully determined, provided that it is pursued with unwavering universal intent. I have expounded the belief that the capacity of our minds to make contact with reality and the intellectual passion which impels us towards this contact will always suffice so to guide our personal judgment that it will achieve the full measure of truth that lies within the scope of our particular calling." *Ibid.*

do not behave in this way, as sober bits of matter should. Statistical laws governing their behavior we can safely formulate but not the behavior of the single particle."²⁵ It does little good to retort that the failure is not that of the scientist but rather of his instruments, on the supposition that "some day" more reliable instruments will be invented to make exact predictability possible. Nor does it help to be told that completely reliable physical laws are lacking only because the observer adds something to the observed by the very act of observation. For, with Kant, that is precisely the point on which we would insist and will later apply to an analysis of the judicial process.²⁶

What Bridgman and Polanyi (and Heisenberg) find valid in the physical sciences and are willing to carry over to the social sciences is buttressed by the conclusions of Karl Mannheim in his study of the sociology of knowledge. In *Ideology and Utopia* Mannheim confronts the problem of objectivity and decides that the contextual pattern "colored by values and collective-unconscious, volitional impulses"²⁷ is crucial, and then seeks a new type of objectivity in the social sciences not through the exclusion of evaluations but "through the critical awareness and control of them."²⁸ This assertion, which coincides in concept with the "operational" thesis of Bridgman noted above, seems to show the way to a more meaningful analysis of the judicial function in constitutional adjudication. (We shall return to it in Section IV, below.) Because constitutional law is for the most part political theory expressed in lawyers' language, the Justices of the Court in reaching their decisions manipulate juristic theories of politics. Mannheim's views of objectivity and neutrality in the area of politics thus are presently relevant:

When . . . we enter the realm of politics, in which everything is in process of becoming and where the collective element in us, as knowing subjects, helps to shape the process of becoming, where thought is not contemplation from the point of view of a spectator, but rather the active participation and reshaping of the process itself, a new type of knowledge seems to emerge, namely, that in which decision and standpoint are inseparably bound together. In these realms, there is no such thing as a purely theoretical outlook on the part of the observer. It is precisely the purposes that a man has that give him his vision, even though his interests throw only a partial and practical illumi-

²⁵ PATRICK, INTRODUCTION TO PHILOSOPHY 26 (1935). See NORTHERP, INTRODUCTION TO HEISENBERG, PHYSICS AND PHILOSOPHY: THE REVOLUTION IN MODERN SCIENCE 1, 25 (1958): "Unquestionably, one other thing is clear. An analysis of the specific experimentally verified theories of modern physics with respect to what they say about the object of human knowledge and its relation to the human knower exhibits a very rich and complex ontological and epistemological philosophy which is an essential part of the scientific theory and method itself. Hence, *physics is neither epistemologically nor ontologically neutral.*" (Emphasis added.) See also Bridgman, *The New Vision of Science*, Harper's Magazine, March 1929.

²⁶ KANT, *Preface to the Second Edition*, CRITIQUE OF PURE REASON (Everyman's ed. 1934).

²⁷ MANNHEIM, IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY OF KNOWLEDGE 5 (Wirth & Shils transl. 1936) (Harvest Book).

²⁸ *Ibid.*

nation on that segment of the total reality in which he himself is enmeshed, and towards which he is oriented by virtue of his essential social purposes.²⁹

Gunnar Myrdal, the Swedish political economist, places great importance on the idea that social scientists should work from explicit value premises; that is to say, a person should set out his personal preferences and predilections as clearly as possible when dealing with social data. By so doing, he will enable one who reads his exposition to evaluate what he says in the light of those preferences. It is only in this way, according to Myrdal, that any manageability and real intelligibility may be attained in handling social phenomena. The idea has been set out with some particularity in a collection of his essays entitled *Value in Social Theory*. Myrdal adheres to "the fundamental thesis that value premises are necessary in research and that no study and no book can be *wertfrei*, free from valuations."³⁰

Quite apart from drawing any policy conclusions from social research or forming any ideas about what is desirable or undesirable, we employ and we need value premises in making scientific observations of facts and in analysing their causal interrelation. Chaos does not organize itself into cosmos. We need viewpoints and they presume valuations. A "disinterested social science" is, from this viewpoint, pure nonsense. It never existed, and it will never exist. We can strive to make our thinking rational in spite of this, but only by facing the valuations, not by evading them.³¹

"Analysis and prognosis," to Myrdal, "cannot be neutral, in the sense that they belong to a sphere of actual and possible causal relations which can be permanently separated from valuations and the programmes which they inspire."³²

Myrdal's point has two facets: first, value preferences cannot be divorced from the study of social phenomena; and second, it is desirable for one who works in the field to set out the preferences he is seeking to further, for in this way a greater degree of objectivity is attained. "Specification of valuations aids in reaching objectivity since it makes explicit what otherwise would be only implicit. . . . Only when the premises are stated explicitly is it possible to determine how valid the conclusions are."³³

²⁹ *Id.* at 170. At p. 119, Mannheim states: "The juristic administrative mentality constructs only closed static systems of thought, and is always faced with the paradoxical task of having to incorporate into its system new laws, which arise out of the unsystematic interaction of living forces as if they were only a further elaboration of the original system."

³⁰ MYRDAL, *VALUE IN SOCIAL THEORY* 261 (Streeten ed. 1958). See Streeten, *Introduction*, *id.* at ix, xxxiv-xxxvi, and particularly at xlv, where Streeten summarizes Myrdal's position in this way: "Analysis and prognosis cannot be neutral, in the sense that they belong to a sphere of actual and possible causal relations which can be permanently separated from valuations and the programmes which they inspire. . . . Analysis and prognosis presuppose programmes in the sense of interests which determine selection and appraisal of evidence. To ignore this side of the picture is analogous to adhering to naive empiricism in the theory of knowledge."

³¹ MYRDAL, *op. cit. supra* note 30, at 54.

³² Streeten, *op. cit. supra* note 30, at xlv.

³³ MYRDAL, *op. cit. supra* note 30, at 155.

Leo Strauss in *Natural Right and History*, along slightly different but contiguous lines, maintains that "historical objectivity" also is actually *abetted* by the retention of value-judgments:

The rejection of value judgments endangers historical objectivity. In the first place, it prevents one from calling a spade a spade. In the second place, it endangers that kind of objectivity which legitimately requires the forgoing [*sic*] of evaluations, namely, the objectivity of interpretation. The historian who takes it for granted that objective value judgments are impossible cannot take very seriously that thought of the past which was based on the assumption that objective value judgments are possible, *i.e.*, practically all thought of earlier generations. Knowing beforehand that all thought was based on a fundamental delusion, he lacks the necessary incentive for trying to understand the past as it understood itself.³⁴

Moreover, in Strauss' assessment of the special positivism of Max Weber may be located the position of value judgments vis-à-vis the principle of neutrality.³⁵ "Reference to values is incompatible with neutrality; it can never be 'purely theoretical.' But non-neutrality does not necessarily mean approval; it may also mean rejection."³⁶

An additional dimension to the limitations which must be faced in any analysis of human thought is set out by the historian, Isaiah Berlin, in this manner:

For it is plainly a good thing that we should be reminded by social scientists that the scope of human choice is a good deal more limited than we used to suppose; that the evidence at our disposal shows that many of the acts too often assumed to be within the individual's control are not so; that man is an object in nature to a larger degree than has at times been supposed, that human beings more often than not act as they do because of characteristics due to heredity or physical or social environment or education, or biological laws of physical characteristics or the interplay of these factors with each other, and with the obscurer factors loosely called psychical characteristics; and that the resultant habits of thought, feeling and expression are as capable of being classified and made subject to hypotheses and systematic prediction as the behavior of material objects. And this certainly alters our ideas about the limits of freedom and responsibility.³⁷

Finally, Reinhold Niebuhr, without peer among native American theologians, has firmly denied that science is now able, or ever will be able, completely and perfectly, to analyze and predict the power and decisional factors in human relationships. His fundamental stricture against the "scientific approach" is that science cannot understand human motives, for "even the natural sciences are based on metaphysical suppositions." The *human* world, furthermore, is too dimensionally varied for any unilinear interpretation to have validity:

³⁴ STRAUSS, *NATURAL RIGHT AND HISTORY* 61-62 (1953).

³⁵ *Id.* ch. 2.

³⁶ *Id.* at 64.

³⁷ BERLIN, *HISTORICAL INEVITABILITY* 35-36 (1954). Cf. FRANK, *FATE AND FREEDOM* (1945).

The importance of hypotheses increases with the complexity and variability of the data into which they are projected. Every assumption is an hypothesis, and *human nature is so complex that it justifies almost every assumption and prejudice with which either a scientific investigation or an ordinary human contact is initiated.*³⁸

What we have said thus far may appear to some to be an exercise in belaboring the obvious. Although the foregoing is but the briefest of summaries of what some of the seminal thinkers in their respective disciplines have said about neutrality and objectivity, the central inferences are clear: (a) choices among values are unavoidable in human knowledge and human activity; and (b) when those choices are made, they are motivated not by neutral principles or objective criteria but by the entire biography and heredity of the individual making them. The wholly disinterested person, be he judge or scholarly observer, does not exist; it can, nevertheless, be said that distinctions may be drawn between decisions in fact made by courts and those recommended by an outside observer who is not a participant in the process.

Professor Wechsler admits that value choices are inevitable, but diverges on the second point of *how* they are made.³⁹ What we suggest is that his quest for neutrality is fruitless. In the interest-balancing procedure of constitutional adjudication, neutrality has no place, objectivity is achievable only in part, and impartiality is more of an aspiration than a fact—although certainly possible in some degree. In making choices among competing values, the Justices of the Supreme Court are themselves guided by value preferences. Any reference to neutral or impersonal principles is, accordingly, little more than a call for a return to a mechanistic jurisprudence and for a jurisprudence of nondisclosure as well as an attempted denial of the teleological aspects of any decision, wherever made. The members of the high bench have never adhered to a theory of mechanism, whatever their apologists and commentators may have said, in the judicial decision-making process. Even in the often-quoted assertion by Mr. Justice Roberts about the duty of the Court to lay the statute against the Constitution to ascertain if the one squares with the other, one would indeed have to be naive to believe that this statement in fact described the process. Some reference to Supreme Court history will serve to substantiate the point.

III. JUDICIAL NON-NEUTRALITY

Throughout the history of American constitutional development may be found recurring evidence of the fact that Supreme Court Justices have been motivated by value preferences in reaching decisions. At no time have they resorted to neutrality or impersonality of principle in making choices between

³⁸ NIEBUHR, DOES CIVILIZATION NEED RELIGION? 41 (1927) (Emphasis supplied.)

³⁹ Cf. FRIEDMANN, LAW IN A CHANGING SOCIETY 47-48 (1959): "But if, as Professor Wechsler concedes, a value choice is inevitable and the Court should not be strictly bound by precedent, a 'principled' approach can mean little more than that the conflict of values should be frankly articulated and that the Court should not simply be guided by its preference in the case before it, but by consistency of reasoning."

competing alternatives. Although it is true that from time to time an individual justice has alleged adherence to such a posture—notably Mr. Justice Roberts in his statement in the *Buller* case⁴⁰—the main thread clearly is contrary. The opinions of the members of the Court, particularly those often called the “strong” Justices, such as Chief Justice John Marshall, provide ample evidence of the purposive nature of constitutional adjudication since 1789. The history can be divided into three periods: (a) that to about the time of the Civil War, in which the thrust of Court decision was directed toward forging as strong a national union as law could produce; Chief Justice Marshall is of course the chief exponent of this period and this drive; (b) that from about 1870 to 1937, when the main focus of the Court’s decisions was toward providing a favorable climate for business affairs, one free from adverse governmental control; Justice Field early set the tone for this period and the “conservatives” of the 1920’s and 1930’s embellished it; (c) the post-1937 period, beginning with the constitutional revolution of the 1930’s and continuing with the intramural jousting between the Frankfurter and Black wings of the Court. In each of these, it is clear that something far different from neutrality motivated the Justices.

In making such statements, we do not wish it to be assumed that we are trying to rewrite history or to engage in seeking in the historical record only that evidence that will support the position set out in this paper. It is noteworthy in this connection that neither Wechsler nor Hart cites any valid examples of what they consider to be judicial reference to neutrality or impersonality of principle; while Pollak’s effort to find neutrality in the recent race decisions simply does not wash. This failure may be traceable either to a fundamental oversight on the part of those commentators or to a complete lack of empirical data to buttress their positions. The latter seems the more likely.

A rundown of some of the better known constitutional decisions of the past will serve to underscore the proposition that non-neutrality has characterized the Court’s decision-making. First, however, it is appropriate to point out that the rewriting of history is not merely the assumed prerogative of historians of the Soviet Union or of the fictional bureaucrats of George Orwell’s *1984*. It has been the unconfessed though less flagrant practice of both historians since Thucydides and Justices of the Supreme Court. Historians must strive to be empirical while realizing they can never be “objective,” Von Ranke not excluded.⁴¹ Herbert Butterfield in his masterful *Whig Interpretation of History*⁴² and Leo Strauss in his equally perceptive *Natural Right and History*⁴³ have ar-

⁴⁰ *United States v. Butler*, 297 U.S. 1 (1936).

⁴¹ An interesting brief biography and criticism is Bourne, *Leopold Von Ranke*, 1 AM. HIST. ASSN. ANNUAL REP. (1896). See *RANKE, WELTGESCHICHTE*, 9 vols. (1883-1888). See also *Detachment and the Writing of History: Essays and Letters of Carl L. Becker* (Snyder ed. 1958).

⁴² BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* (1950).

⁴³ *Op. cit. supra* note 34.

gued persuasively against the "historicist fallacy." That fallacy takes two forms. One is the pretense that history may be categorically outlined in accordance with discoverable "scientific" laws to permit its periodization and prognostication about its future. Proponents include Vico, Hegel, Marx, and Comte.⁴⁴ The other is to appraise a former historical era by the criteria of values that have become important since, or conversely, to assume that the standards of an earlier epoch were good for all time, and thus the present is condemned, since the world commenced its decline with the disintegration of the supposed medieval synthesis, or earlier.⁴⁵

The United States Supreme Court cannot claim innocence where, for legal purposes, the rewriting of American history is concerned. Is any decision respecting the origins of the American Commonwealth more notoriously expedient and historically illogical than *Texas v. White*?⁴⁶ From the standpoint of every traditional definition of sovereignty, what *can* be "an indestructible union of indestructible states"? A more recent illustration of the judicial "rewriting of history," now valid for judicial purposes, is *United States v. Curtiss-Wright Export Corp.* (1936).⁴⁷ The decision spelled bad history but good law. Justice

⁴⁴ Giambattista Vico (1668-1747) structured world history into three stages: the Age of the Gods, the Age of Heroes, and the Human Age. While Vico insisted that we must attempt to understand an earlier period of history as the earlier period understood itself, by a sympathetic study of its language, law, myths, and poetry, he did commit the historicist fallacy in its first form—namely, by presupposing that history may be ordered in a discernible triad, and that the triad recurs. His doctrine of *ricorsi* (literally but not precisely "recurrence") stipulates that history progresses in spiral fashion, but that the triad is always repeated, actual historical units being grafted upon each stage. See VICO, *LA SCIENZA NUOVA* (1725).

G. W. F. Hegel (1770-1831) assumed that *Geist* (or "spirit" or God) imposes itself dialectically upon historical movement and that the tense head-on clash between the polarities of thesis and antithesis inevitably eventuates in a synthesis, which, at once, becomes the thesis attracting another antithesis. The final synthesis, somehow preordained, would, according to Hegel, be the "perfected" state (probably Germany), the ultimate realization of *Geist* on earth, "the march of God in the world." See HEGEL, *THE PHILOSOPHY OF RIGHT* (Knox ed. 1942); MORRIS, *HEGEL'S PHILOSOPHY OF THE STATE AND OF HISTORY: AN EXPOSITION* (1887).

Karl Marx (1818-1883) turned the Hegelian dialectic "upside-down." Dialectical idealism was transformed into dialectical materialism, but the dialectical process was retained: now, however, that which moved dialectically in history was not *Geist* but raw material (economic) forces. Marx maintained as inevitable that just as the bourgeois era had overcome and succeeded the feudal age, so would the communist world-state (the "final synthesis," the stateless, classless world) eventually replace the capitalist. This, to Marx, was the iron law of history. See MARX & ENGELS, *THE COMMUNIST MANIFESTO* (1848); MARX, *DAS KAPITAL* (1867). Also consult HOOK, *TOWARDS THE UNDERSTANDING OF KARL MARX* (1933).

Auguste Comte (1798-1857), the leading positivist of the nineteenth century, who developed his denial of metaphysics into a theology and was not averse to having a "church" built upon his principles, "scientifically" divided world history into three periods, the theological age, the metaphysical age, and the positive (scientific) age. See COMTE, *POSITIVE PHILOSOPHY*, 5 vols. (1830-1842); COMTE, *POSITIVE POLICY*, 4 vols. (1851-1854).

⁴⁵ See CARLYLE, *A HISTORY OF MEDIEVAL POLITICAL THEORY IN THE WEST* (1928) and TELLENBACH, *CHURCH, STATE, AND CHRISTIAN SOCIETY* (1940).

⁴⁶ 74 U.S. (7 Wall.) 700 (1869).

⁴⁷ 299 U.S. 304 (1936).

Sutherland, spokesman for the Court, proclaimed that at the time of the American Revolution sovereignty was transferred immediately from the British Crown to the United States in its collective capacity and competence. A direct transfer to the various states he would not contemplate. Yet the prevailing opinion of American historians, and the plain reading of historical events, show clearly that individual states considered themselves individually the recipients of sovereignty from the Crown *before* they delegated the authority they were willing for the government of the Union to exercise. In law, however, the value-opinion of Sutherland rather than any consensus of trained historians is controlling. And even in their reading of the historical record the Justices of the Court are not neutral.⁴⁸

Judicial value-choice through personal-value-preference was most obvious, perhaps, in the period when a majority of the Court tried to stem the tide of the onrushing welfare state in the 1930's. Yet it was no less so in the pre-Civil War time and is certainly apparent in the flow of decisions since 1937. The rewriting of history by Mr. Justice Sutherland has been mentioned. Another opinion by the same judge indicates a clear case of non-neutral adherence to principles of economic theory. In *Adkins v. Children's Hospital*,⁴⁹ Sutherland, after maintaining that "the meaning of the Constitution does not change with the ebb and flow of economic events," went on to say that "to sustain the individual freedom of action contemplated by the Constitution is not to strike down the common good but to exalt it," for in no other way could the "good of society as a whole" be served. But there is no need to provide further documentation of the point that the "conservative" wing of the Court was non-neutral in the 1930's—that, in other words, they were "judicial activists."⁵⁰ The ideal is too well known and too widely accepted to require more than its statement. Suffice it only to say that the observation of Mr. Justice Holmes in *Lochner*,⁵¹ that the majority was deciding that case on an economic theory not adhered to by most Americans, tersely and well illustrates the general point.

What we wish to emphasize here is that the embattled minority of Justices, who with the flip-flop of 1937 became the majority, were themselves actuated by belief systems no more neutral than their adversaries. One or two of the more

⁴⁸ It is, for example, rather doubtful that the historical record is so "inconclusive" as Chief Justice Warren asserted in *Brown v. Board of Education*, 347 U.S. 483 (1954), insofar as the framers of the fourteenth amendment had any intent regarding racially segregated schools. See Pollak, *The Supreme Court Under Fire*, 6 J. PUB. L. 428, 438-43 (1957).

⁴⁹ 261 U.S. 525 (1923). See MASON AND BEANEY, *THE SUPREME COURT IN A FREE SOCIETY* (1959).

⁵⁰ Cf. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 57-58 (1955): "A cult of libertarian judicial activists now assails the Court almost as bitterly for renouncing power as the earlier 'liberals' once did for assuming too much power. . . . I may be biased against this attitude because it is so contrary to the doctrines of the critics of the Court, of whom I was one, at the time of the Roosevelt proposal to reorganize the judiciary."

⁵¹ *Lochner v. New York*, 198 U.S. 45 (1905).

celebrated opinions by Mr. Justice Holmes will serve to indicate this. Thus, for example, in enunciating his famous "marketplace" theory of truth in the *Gillow*⁵² and *Abrams*⁵³ cases, Holmes followed what might be called a preference for the theories of the philosophers of the Enlightenment. He stated the classical case for freedom of expression.⁵⁴ Thus if the development of substantive due process doctrine in the post-Civil War to Great Depression period of Court history reveals a judicial bias for the economic theories of Adam Smith and Ricardo, so too were the Holmes-Brandeis-Stone series of dissenting opinion illustrative of a set of preferences of those worthies.⁵⁵ The question is not whether the Justices during this time followed neutral principles, but rather what value preferences did they espouse.

If that be true in the two periods of time since the Civil War, then it was certainly also true in the pre-Civil War years, particularly those in which Chief Justice John Marshall exercised such a strong controlling hand on the course of Supreme Court decision. Beginning with *Marbury v. Madison*⁵⁶ and continuing for the next several decades, a series of landmark decisions issued from the Court. These had the consequence of forging strong legal chains of national unity, chains which became indissoluble with the civil strife of the 1860's. It is not only the "bad" (by hindsight, at least) decisions, such as those in the *Dred Scott*⁵⁷ case, that illustrated the point. A rundown of the leading constitutional decisions of the first part of the nineteenth century will show as much. Often Marshall seized upon a likely case to write an essay in political economy, sometimes with only incidental relevance to the precise legal issue before the Court. A ready examples is *McCulloch v. Maryland*.⁵⁸ And a comparison of the Marshallian method in, say, the *Marbury* case with that in *McCulloch* or in *Gibbons v. Ogden*⁵⁹ will indicate that the Chief Justice chose his technique to suit the case at hand.⁶⁰ What Marshall started, Taney continued.

The process of non-neutrality continues today and will continue as long as the judiciary is a part of our governmental system. The alleged controversy

⁵² *Gitlow v. New York*, 268 U.S. 652 (1925).

⁵³ *Abrams v. United States*, 250 U.S. 616 (1919).

⁵⁴ See Champney, *Liberty and Communication*, 13 ANTIOCH REVIEW 303 (1953).

⁵⁵ Cf. Howe, *Faith and Skepticism in American Constitutional Law*, PERSPECTIVES USA No. 9, p. 5 (1954). And for an illuminating comparison of the American and Australian practice, see Kadish, *Judicial Review in the United States Supreme Court and the High Court of Australia*, 37 TEXAS L. REV. 1, 133, 162-78 (1958).

⁵⁶ 5 U.S. (1 Cranch) 137 (1803).

⁵⁷ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

⁵⁸ 17 U.S. (4 Wheat.) 316 (1819).

⁵⁹ 22 U.S. (9 Wheat.) 1 (1824).

⁶⁰ For a discussion of Marshallian jurisprudence, see Frankfurter, *John Marshall and the Judicial Function*, in GOVERNMENT UNDER LAW 6 (Sutherland ed. 1956).

today over a "preferred freedoms" doctrine clearly demonstrates a conflict in values among members of the present Court, not one of whom can be said to be neutral in attitude. If the "activist" wing of the Court—Black, Douglas, Warren—is quick to speak up for individual liberties and personal freedoms, Frankfurter and the other espousers of judicial self-restraint are also furthering their own set of values. No real need for additional documentation of the point exists. It should, with a moment's reflection, be obvious.⁶¹

But in saying this—in stating that neutrality or objectivity is essentially impossible of attainment—it should not be inferred that we feel the judge is wholly free and that he does sit kadi-like under a tree dispensing "justice" by whim or caprice. It is one thing to attribute a degree of creativity to the judge and quite another to say that he is at liberty to roam at will. Most judges do not feel such a freedom, as Judge Cardozo said almost 40 years ago:

[L]ogic and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will thereby be promoted or impaired. One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or even arbitrary whim or fitfulness. Therefore, in the main there shall be adherence to precedent.⁶²

There is enough evidence available to show, furthermore, the institutional influence that a judgeship has on the person who mounts to the bench. A man is transformed to some extent when he dons the black robe. And any analysis of the mountains of decisions which flow from our courts provides ample testimony to the high degree of adherence to precedent in the judicial process. This is true even of the United States Supreme Court, though members of that bench have often felt freer to disregard established doctrine than does a common law judge.⁶³ Another limiting factor on the activities of judges is the esteem in which they are held by members of the legal profession and by people generally. Judges, being human, want "to be liked."

Of this latter fact there seems to be rather strong inferential evidence in southern states, where lower federal court judges find themselves in the awkward position of wanting the respect and friendship of their neighbors off the bench at the same time that they are committed by their constitutional oath to render decisions often highly distasteful to those neighbors. The resolution of that dilemma, frequently casuistical and requiring considerable judicial legerdemain,

⁶¹ It remains mysterious how there can be any serious talk about judicial neutrality in the face of the uncontroverted evidence, both historical and contemporaneous, that indicates precisely the contrary. The entire development of the common law, for that matter, reflects a conscious application of a process of normation by the English and American judges.

⁶² CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112 (1921).

⁶³ For a recent analysis of overruling decisions, see Ulmer, *An Empirical Analysis of Selected Aspects of Lawmaking of the United States Supreme Court*, 8 J. PUB. L. 414 (1959).

has its amusing aspects. Major issues have been evaded or "distinguished."⁶⁴ Obvious judicial questions have been called "political" and therefore non-justiciable.⁶⁵ The desegregation decision has seldom been extended by these lower courts to other areas than education, even though the Supreme Court has applied the *Brown* ruling to public transportation, parks, golf courses, bath houses, and beaches. State efforts to avoid compliance have been upheld.⁶⁶ Per curiam opinions, often exhibiting judicial secrecy or judicial indecision, have been issued.⁶⁷ Professor Walter Murphy has characterized judicial behavior in terms usually employed to characterize government bureaucrats: "Officials down the line have interests, loyalties, and ambitions which go beyond and often clash with the allegiance accorded a given tenant in the White House."⁸ Each judge obviously has his own ideas about correct public policy. Murphy continues: "The Supreme Court typically formulates general policy. Lower courts apply that policy, and working in its interstices, inferior judges may materially modify the High Court's determinations."⁶⁹ We feel that far too little research has been devoted to the policy-making role of these judges and to the personal *whys* of their decisions, and we favor converting such inferential evidence as there is into explicit, empirical findings.

We agree, moreover, that the bulk of American law is stable, quantitatively speaking. If Professor Wechsler is essaying to demonstrate that many cases can be relatively easily decided in accordance with principles derived from past experience, there can be little argument, as indeed there can be little purpose in underscoring the obvious. Numerous cases are considered with maximum dispatch through the issuance of per curiam opinions founded on fairly clear precedents—indicative, be it noted, of a preference for stability over change and also of an inescapable choice among the values involved in the controversy. So much of American law, which when first judicially tested seemed controversial and, to many, unconstitutional, has now been received into the corpus of law and is taken for granted. Yet in areas of law where definitive decisions have not been given, in areas criss-crossing so inextricably with policy formulation of one kind or another, "neutral" principles seem impossible because policy therein has not been finally formulated, because *decisions* have still to be made. It is with particular reference to those peripheral areas, occasioning so much publicity which suggests that American law is in constant flux, that we direct criticism

⁶⁴ *E.g.*, *Bell v. Rippy*, 146 F. Supp. 485 (N.D. Tex. 1956). A grimly amusing case, one displaying some degree of federal pusillanimity, is *Williams v. Georgia*, 210 Ga. 665, 82 S.E.2d 217 (1955), *rev'd. & rem.*, 349 U.S. 375 (1955), 211 Ga. 763, 88 S.E. 2d 376 (1956), *cert. denied*, 350 U.S. 950 (1956).

⁶⁵ See, *e.g.*, *Dawley v. City of Norfolk*, 159 F. Supp. 642 (E.D. Va. 1958).

⁶⁶ See, *e.g.*, *Florida ex rel. Hawkins v. Board of Control*, 162 F. Supp. 851 (N.D. Fla. 1958).

⁶⁷ This practice of the Supreme Court is criticized by Hart. See HART 100-01.

⁶⁸ Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017 (1959).

⁶⁹ *Id.* at 1018. Cf. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 271 (Bradley ed. 1945).

against any theory of allegedly neutral principles. It is precisely in these "new" areas (e.g., national security) that choice must be made among conflicting alternatives. We advocate merely that the value-preferences which determine the choice be stated explicitly. That done, the resulting judgment, were it not for the semantic problem, might even be termed "objective."⁷⁰

In considerable measure Supreme Court Justices themselves are accountable for the recent public image of the judiciary as being everything but objective and neutral. Human nature being what it is, judges who confess that they are not neutral are more readily believed than judges who insist that they are. If the Supreme Court will not first defend its own honor, it is hardly to be expected that anyone outside the Court can do more than take the judges at their word. The issue of judicial neutrality versus judicial interventionism began to be embarrassing in American constitutional law in the 1930's, when the so-called conservatives accused the so-called liberals of judicial malpractice, and vice-versa. Actually the two groups were merely espousing almost opposite judicial values because they subscribed to almost opposite societal values. Far from arguing that judicial values should not reflect societal values, since we believe that they should, we contend only that the American people are entitled at the very least to have those values humbly confessed and assiduously articulated. This the Court did not do in the 1930's or the 1940's or the 1950's. The Sutherland-Stone feud concerning governmental regulation of business has been replaced by the Black-Frankfurter feud concerning the breadth of fourteenth amendment due process. The substantive sphere of conflict has changed, but the procedural feud is still with us. And essentially it is reducible to the lack of consensus on the Court as to the appropriate role of the judiciary in an age in which no national consensus is apparent and no "public philosophy" has yet been enunciated.

The "liberals" of the 1930's and the 1940's could plead piously for the need of "judicial self-restraint" precisely because their battle had already been won, both in the legislatures and in the "public consensus."⁷¹ It is easy, if somewhat sophistical, to insist that the function of the Court is to defer to the legislature in economic matters when the legislature is performing exactly as the Court majority would wish. Yet the liberals applied to their role no such self-restraint in the realm of civil liberties.⁷² That battle had not been won. Here the Court's rationale was at least convincing, perhaps meritorious; its fundamental premise as to the proper judicial *modus operandi* was clearly expressed:

⁷⁰ Compare STRAUSS, *op. cit. supra* note 34, with MYRDAL, *op. cit. supra* note 30, on this point; see also MANNHEIM, *op. cit. supra* note 27.

⁷¹ We do not mean to imply that we believe that the Court should reflect what is often called "the will of the people," whatever that might mean. There can hardly be a system of "limited" government unless the will of the people, as reflected in legislative action, is subject to some restraint. Cf. Rostow, *The Supreme Court and the People's Will*, 33 NOTRE DAME LAW. 573 (1958).

⁷² Cf. JACKSON, *op. cit. supra* note 45. See Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952).

the business of the Supreme Court was primarily the business of civil liberties because the protection of such liberties was the prerequisite of insuring "justice under law" in a free society.⁷³ The protection of such liberties, moreover, ultimately raised philosophical problems with which nine Justices were admirably equipped to cope, even when, as a practical matter, the same nine men lacked the time, the knowledge, and perhaps even the constitutional authority to pronounce on a rate regulation of the Interstate Commerce Commission. The latter was the province of the Congress and of administrative experts skilled in the local and legal technicalities of the dispute.

A question that we would urge for consideration, however, is whether, in a supposedly free society, problems of a nation's economy present any fewer philosophical implications than problems of an individual's liberty. The obvious practical difficulties involved here we hastily acknowledge. Yet it is just as logical and as proper to call upon the Court to do its share in making corporations and labor unions more responsible⁷⁴ and more responsive to the "public interest," as it is to limit its area of competence to elaborate dissertations on the "clear and present danger" test or on the meaning of "due process" and "equal protection of the laws" in particular situations. At any rate, such important considerations of the Court's function vis-à-vis the substance of law must await treatment until the Court, procedurally and methodologically, puts its own house in order. From the admission of the late 1930's that Justices were emphatically not neutral, we were confronted once more in the 1950's—and in many cases we were listening to the same men—with the adamant claim that Justices are or should be completely neutral beings.⁷⁵

Assuredly we are not imputing to the Justices of the Supreme Court that kind of rational calculatedness that Hobbes and Bentham ascribed to the human animal. We recognize that judges, addicted like all men to Homer's nodding, cannot invariably act according to conscious rational design, enlightened or otherwise. In many domains of law judges are obviously, consciously or subconsciously, indifferent. The most desirable "progress" of the law has different significations for different judges, as it does for all men. And this suggests that certain provisions of the Constitution not only have varying meanings for individual Justices, but that they also have varying importance. During the past two decades, for instance, much commentary has been devoted to the problem of a possible "priority of liberties" in the Bill of Rights.⁷⁶ As Justice

⁷³ For a discussion, see McKay, *The Preference for Freedom*, 34 N.Y.U. L. REV. 1182 (1959).

⁷⁴ See Miller, *The Constitutional Law of the "Security State"*, 10 STAN. L. REV. 620 (1958); MILLER, *PRIVATE GOVERNMENTS AND THE CONSTITUTION* (1959).

⁷⁵ Note the curious evolution of thought by journalist David Lawrence, recounted in Bickel and Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957).

⁷⁶ Justices Black and Douglas have "discovered" historical "proof" surrounding the formulation and ratification of the fourteenth amendment to justify and substantiate the inclusion of the total Bill of Rights within the protective confines of "liberty" guaranteed by the due process clause of that amendment. From an historical point of view, this discovery, to say the

Holmes earlier seemed most intense when deference to legislative action was posed for judicial advisement, so Justice Murphy later appeared most dedicated to his judicial duty when a civil liberties' dispute was being litigated. Other Justices have been most awake when commerce cases were being decided or when the right to privacy and other procedural guarantees were alleged to have been infringed. On the Court at the present time, Justices Black and Douglas are most alert when civil liberties seem endangered. Justices somewhat otherwise inclined look first to the protection of the "national interest" and thus have milder though not less decided views about legislation against subversion and disloyalty. A scholar-Justice like Frankfurter appears primarily committed to quite careful reflection upon any attempt to upset the federal balance. In each instance, a different political philosophy is furthered.

The personnel of the Supreme Court have historically differed from one another not only in value-preferences in given subject-matter areas, but also about the subject-matter areas they have deemed most significant. That they have done so, and will continue to do so, is inescapable and, though possibly to be lamented, probably not to be corrected. Here, at least, they operate "rationally" and "consciously" and may be expected to make their choices as explicit as a shrewd observer can extract from their implicit adumbrations. What is immeasurably more vexatious is to insist upon what may amount to the impossible: the demand that Justices articulate their value-preferences toward matters about which they are indifferent, uncertain, "subconscious," or irrational. To solve *that* problem would be the *summum bonum* not only in understanding the judicial process, but in understanding human nature itself. It is equally difficult to ascertain the judicial frame of mind during periods of Court retreat, as in an emergency. These constitute major lacunae in the thesis we here propound.

Finally, in the handling of the facts of a case, again there may be seen the influence of value preferences. That, contrary to popular opinion, facts do not speak for themselves should be axiomatic to any student of the judicial process.⁷⁷ The facts of a dispute, as brought forward by the briefs and record, as developed in oral argument, and as coming to the attention of the Court by way of judicial notice, are not themselves self-evident propositions requiring

least, is apocryphal. Failing victory in that attempt at historical rewriting, these Justices would "accept" a "priority of liberties," claiming that the substantive guarantees of the first amendment would, expediently, have to enjoy "priority" if the total Bill of Rights could not acquire for inclusion the approval of the Supreme Court majority. They fail either to realize or to be concerned about the fact that if the fourteenth amendment should embrace the procedural rights of the Bill of Rights, the criminal jurisdiction of the fifty states might be entirely disrupted. A proper "hierarchy of values" might appropriately include the Bill of Rights, but would not be restricted to the Bill of Rights. See Justice Murphy's dissenting opinion in *Adamson v. California*, 332 U.S. 46 (1947).

⁷⁷ Cf. Jerome Frank's "fact skepticism," for a discussion of which see Cahn, *Fact-Skepticism and Fundamental Law*, 33 N.Y.U. L. REV. 1 (1958). See FRANK, *COURTS ON TRIAL* ch. 3 (1949); PAUL, *THE LEGAL REALISM OF JEROME N. FRANK* (1959).

no interpretation. They exist only as contemplated by their recipient and are unavoidably colored by the reception given.⁷⁸ As (or more) important as the facts themselves in the judicial process is the opinion based upon them—the reaction they evoke in human minds. “The assumption that events bespeak their character by merely happening has made for many strange reasonings in the history of jurisprudence. Events have meaning, it is true, but the meaning is always potential, or rather there are many meanings relative to many purposes. A situation is potentially meaningful in many directions, and which meaning is relevant is in part dependent upon a human judgment.”⁷⁹ Advocacy thus consists as much—perhaps more—of persuading the judge to take a desired view of the facts as it is of the application of law to those facts. “To formulate the ‘facts’ in one way and not in the other is to get one kind of decision and not another.”⁸⁰ The point, for present purposes, is that constitutional adjudication depends as much on “what are the facts?” as on “what is the law?” and far more than on “what are the neutral principles relevant to the decision?” Thus it can be said that judicial impartiality or neutrality, save again on the most elementary level, falls on two counts. Choices must be made between competing values; and choices must be made as to the interpretation to be placed on a set of “facts.” Facts do not speak for themselves, and cannot be used by themselves for the establishment of value-judgments. As Reinhold Niebuhr puts it: “Every judgment of fact is a judgment of value.”⁸¹ And as Alfred North Whitehead has told us “Every proposition proposing a fact must, in its complete analysis, propose the general character of the universe required for that fact. There are no self-sustained facts, floating in non-entity.”⁸² Further: “The notion of mere fact is the triumph of the abstractive intellect. It has entered into the explicit thought of no baby and of no animals. . . . A single fact in isolation is the primary myth required for finite thought . . . for thought unable to embrace totality. This mythological character arises because there is no such fact. Connectedness is of the essence of things of all types. Abstraction from connectedness involves the omission of an essential factor in the fact considered. No fact is merely itself.”⁸³

The point emphasized here is that there are no facts apart from a theory, and that, accordingly, a person's view of the facts is unavoidably colored by the

⁷⁸ See Krutch, *We Need More Than More Facts*, *The New Leader*, Sept. 27, 1954, p. 15; Krutch, *Value-Judgments Cannot Be Based on Facts Alone—And That's A Fact*, *The New Leader*, October 18, 1954, p. 15. Compare EASTON, *THE POLITICAL SYSTEM* 224 (1953): “[N]o factual proposition uttered by a human being can be devoid of all relevance to moral preconceptions.”

⁷⁹ GARLAN, *LEGAL REALISM AND JUSTICE* 31 (1941). See Isaacs, *The Law and the Facts*, 22 *COLUM. L. REV.* 1 (1922).

⁸⁰ GARLAN, *LEGAL REALISM AND JUSTICE* 38 (1941).

⁸¹ Niebuhr, *The Dilemma of Modern Man*, *THE NATION*, Feb. 22, 1947.

⁸² WHITEHEAD, *PROCESS AND REALITY* 17 (1929).

⁸³ WHITEHEAD, *MODES OF THOUGHT* 12-13 (1938).

nature of that theory. Neutrality, thus, is unattainable in the constitutional adjudicative process, both on the level of (legal) principle and on the level of the facts of the dispute before the Court.

If that be true of the process of constitutional adjudication, then it is odd to find Professor Pollak maintaining that if the Court decisions in recent race cases "are not supportable on the basis of neutral constitutional principles, they deserve to be jettisoned."⁸⁴ Under the analysis suggested by the present writers, such a view would result in the rejection of all constitutional decisions. However, perhaps Pollak's concept of neutrality differs from that developed here and is more a statement of the ideal of the dispassionate rule of law in social affairs than a description of the judicial decision-making process. Thus he believes that Professor Wechsler is really calling for 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."⁸⁵ Obviously this cannot state the actuality. As demonstrated above, ample evidence exists to indicate that the judicial method cannot be "disinterested." To call for it to be "reasoned" means little, for "reason" is a tool, not an end: the results of a process of "reasoning" depend entirely upon what premises (*i.e.*, values) are used in that process, just as the end product of Univac depends upon what is fed into it.⁸⁶ And it is highly unlikely that any method of judicial opinion-writing can plainly and fully enunciate "the *real* bases of decision." Surely enough psychological testimony is available to establish the fact that the "*real* bases of decision," in whatever context, are more unconscious than known to the decision-maker.⁸⁷ Surely it is manifestly impossible for a judge to tell us entirely what *really* motivated him.⁸⁸ Surely we have been able by now to pierce the facade of mechanical jurisprudence and to realize that the *real* bases of decision depend upon the total heredity and environment of the decision-maker.⁸⁹ Try as he might, the judge is not going to be able to do it, in any complete sense. What he can do, and what we suggest below that he consciously attempt to do, is to set out in explicit form his value preferences as he understands them.

⁸⁴ POLLAK 31.

⁸⁵ POLLAK 32.

⁸⁶ See, e.g., Bridgman, *op. cit. supra* note 20; Polanyi, *op. cit. supra* note 22.

⁸⁷ For example, it has been said that important managerial decisions in business are made "subconsciously." McDonald, *How Businessmen Make Decisions*, Fortune, Aug. 1955, p. 132.

⁸⁸ Neither Cardozo nor Holmes nor Frankfurter, among the more literate of the judges, can describe in more than partially helpful generalities what the process is. See especially CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167-177 (1921) (on "subconscious forces").

⁸⁹ Compare the conclusion of some political scientists regarding foreign policy decisions: "In conclusion, we might summarize our comments on the nature of choice as follows: information is selectively perceived and evaluated in terms of the decision-maker's frame of reference. Choices are made on the basis of preferences which are in part situationally and in part biographically determined." SNYDER, BRUCK & SAPIN, *DECISION-MAKING AS AN APPROACH TO THE STUDY OF INTERNATIONAL POLITICS* 120 (1954).

It is with this background in mind that a recent statement by Mr. Justice Frankfurter of the constitutional adjudicative process is of interest:

We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. . . . To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance toward views not shared. . . . These are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power.⁹⁰

What the Justice appears to be calling for here is not something called "neutrality" or even "objectivity," although he uses the latter word. Rather he seems to be saying that a judge should make conscious effort to evaluate all of the considerations present in a constitutional dispute, to comprehend "the full range of . . . constitutional issues" in that dispute. If so, then there can be little quarrel with the proposition. With such a concept of neutrality no one can really disagree. But that involves what is at best a superficial or elementary sort of neutrality. Neither the Justice nor the professors have come to grips with the fundamentals of the constitutional adjudicative process.

IV. TOWARDS A PURPOSIVE JURISPRUDENCE

If, then, true neutrality in constitutional adjudication is a bootless quest, the important question which must be faced becomes: What *should* motivate judges faced with constitutional issues? A judge may try to be detached and objective, self-disciplined and humble, but he must adhere to *some* standard. Certainly it is not something called "the intention of the framers," a filio-pietistic notion that can have little place in the adjudicative process of the latter half of the twentieth century—if, indeed, it ever did. A nation wholly different from that existing in 1787, facing problems obviously not within the contemplation of the Founding Fathers, can scarcely be governed—except in broadest generality—by the concepts and solutions of yesteryear. It is, of course, only those constitutional provisions of inherent ambiguity that pose problems of interpretation. Where the intention of the framers is clear—as, for example, on the number of Senators or in the establishment of two houses of Congress, or for the provision for a President and Vice-President—no interpretation is necessary.

⁹⁰ *Rochin v. California*, 342 U.S. 165, 170-172 (1952). In his essay on Marshall, *op. cit. supra* note 60, at 21, Frankfurter says: "It is important . . . to appreciate the qualifications requisite for those who exercise this extraordinary authority, demanding as it does a breadth of outlook and an invincible disinterestedness rooted in temperament and confirmed by discipline. Of course, individual judgment and feeling cannot be wholly shut out of the judicial process. But if they dominate, the judicial process becomes a dangerous sham. The conception by a judge of the scope and limits of his function may exert an intellectual and moral force as much as responsiveness to a particular audience or congenial environment."

This is the sort of statement that *sounds* good on a first and rapid reading, but one which will not stand any sort of rigorous analysis. Mr. Justice Frankfurter's statement of the ideal, at the very least, fails to come to grips with the attainable. Compare a prior statement, possibly inconsistent, in FRANKFURTER, *LAW AND POLITICS* 13 (1939).

And it is not something called "reason," whatever that might mean to Professor Hart, through "the maturing of collective thought" which will develop "impersonal and durable principles of constitutional law."⁹¹ No one, to be sure, can disagree with that sort of exhortation; it is to be equated with patriotism and motherhood and the "American way." But *what* principles? *Neutral* principles? There are no such things. *Impersonal* principles? Ditto. *Durable* principles? Some examples, please. Neither Hart, Wechsler nor Pollak has tackled the important (and difficult) problems of this era—those that can be summed up in these questions: What *is* the role of the United States Supreme Court in an era of positive government? What principles *should* guide the Justices in their difficult task of continuously updating the American Constitution? What the three commentators have done is, at best, to set out a partial restatement of the (unattainable) ideal of the Anglo-American system of jurisprudence, and, at worst, to ignore the questions relevant to the modern age.

The suggestion we make is for a *Teleological jurisprudence*, one *purposive in nature* rather than "impersonal" or "neutral." Only a brief statement of this proposal can be made here, since space limitations permit no more than the tracing of its main contours; a comprehensive development is planned by one of the present authors as a separate article.⁹²

A basic difference between the society and government of today and those existing in the latter part of the 18th century is the entirely different posture that government takes with regard to social affairs. The United States is now well into the age of positive government, one in which it is widely agreed that government has affirmative jobs to perform. A consensus exists among the American people that social affairs are of a nature that, for many reasons, the intervention of the State is both necessary and desirable. Whether we call this a welfare State or a social service State, the central notion is clear: Only a dwindling minority of Americans espouse views of laissez-faire. At the same time, it has been proved necessary to reassign the respective roles of the governmental departments. Thus we find the growth in importance of the executive and the administrative branch of government, with a concomitant diminution of importance in both the legislature and the judiciary. These complementary developments present us with a point of departure for a discussion of the role of the Supreme Court in present day America.⁹³

No further exposition is necessary of the obvious fact of the change in the nature of government to one positive in thrust (as opposed to the negative nature of laissez-faire government) and affirmative in responsibility. A few state-

⁹¹ HART 99. Further elaboration of Professor Hart's views may be found in *Comment to Breitel, The Courts and Lawmaking*, in *LEGAL INSTITUTIONS TODAY AND TOMORROW* 40-48 (Paulsen ed. 1959), and in *Comment to Snee, Leviathan at the Bar of Justice*, in *GOVERNMENT UNDER LAW* 139-145 (Sutherland ed. 1956).

⁹² Miller.

⁹³ For some elaboration of the statements made in this portion of the text, see Miller, *The Constitutional Law of the "Security State"*, 10 *STAN. L. REV.* 620 (1958).

ments may, however, be set out to indicate the functional realignment of the jobs of government. With the growth of administration to the point where it has with considerable validity been called a fourth branch of government, there has come a blurring of the sharp lines of demarcation of the traditional trichotomous division of government. The jobs done administratively now include all of those historically accomplished by the legislature, the judiciary, and the executive. The growth in scope and importance of administration is part of the overall aggrandizement in relative power of the executive branch of government. As Corwin has noted, the history of the presidency is one of steadily increasing power.⁹⁴ The analogue of this development is the downgrading in relative importance and power of both the legislature and the courts. The most that the legislature does today is to formulate broad policy guide lines for the conduct of our government. Its power of control over the details of government has been ceded to the administrators. Furthermore, it can be said that even in the formulation of policy, the Congress really is of lesser importance than the President and his advisers. It is, in fact, not too much to say that the Congress and the Chief Executive have swapped roles, so to speak: Now it is the President who proposes and Congress which vetoes, rather than the other way around.⁹⁵

The executive in this scheme of affairs is of course the leader, not only of the legislative programs but also of the broad administration of policies formally announced by Congress. His own law-making power, often exercised without specific grants of power from Congress, enables him further to take over the ostensible role of Congress. For the most part, it is the executive branch, including the administrative agencies, which, in the resolution of the myriad of claims by individuals on the government and the requirements that government imposes upon individuals, effects the nexus between the broad policy guide lines set out by Congress and the complex facts of everyday life in an industrialized and urbanized society. As we are being told with increasing frequency by qualified observers, more and more the administrator is replacing the judge in this fundamental task.⁹⁶ Historically, the judge did this job, and in fact legislated as he did so. The development of the common law was the result. Today, the courts have lost power in the same way as has the Congress. While still of great importance, relative to administration they simply are not so influential as once they were.⁹⁷ The job of judges has become one of deciding

⁹⁴ CORWIN, *THE PRESIDENT: OFFICE AND POWERS* ch. 1 (4th ed. 1957).

⁹⁵ The point was made by a perceptive journalist, DOUGLASS CATER, *THE FOURTH BRANCH OF GOVERNMENT* (1959). See Senator Clifford P. Case of New Jersey's *Comment to Newman, A Legal Look at Congress and the State Legislatures*, in *LEGAL INSTITUTIONS TODAY AND TOMORROW* 92-99 (Paulsen ed. 1959).

⁹⁶ See, e.g., the remarks of Justice William O. Douglas, *Legal Institutions in America*, *Id.* at 274-299: "Today the administrative agency is supreme in state and federal governments." *Id.* at 274.

⁹⁷ See the interesting essay by one of the better known federal judges, Wyzanski, *History and Law*, 26 U. CHI. L. REV. 237 (1959), particularly at 240-42.

the pathological case—the case that has not been satisfactorily resolved by one of the other branches of government, Congress, the executive, or the administrative. With regard to constitutional issues, without making reference to many questions of statutory interpretation which obviously also result in important examples of policy-making by the courts, the federal judiciary speaks in instances where there is a clash of values that cannot be resolved politically. These values usually revolve around a failure on the part of government to satisfy an individual that a governmental demand is a reasonable one. The Court's role in this type of situation, which is its most important function, is that of articulating a broad norm, one which fits the facts of the case before it and also transcends that particular dispute.⁹⁸ In this process, it is acting as a national conscience for the American people, more than as an arbitrator of the insignificant disputes of insignificant people.⁹⁹ Through the medium of the law case, a process of normation¹⁰⁰ by adjudication takes place. A standard is erected toward which men and governments can aspire.

Professor Lon Fuller has demarcated two basic forms of social ordering; in the absence of one or the other of these, nothing resembling a society is possible: "*organization by common aims and organization by reciprocity.*"¹⁰¹ The adjudicative process has traditionally seemed to work most efficiently in cases involving reciprocity. In a contractual relationship, for instance, a thing of value, material or otherwise, is granted by one party to another in return for some thing of presumptively equal value. We say "presumptively" because in an earlier era of negative government, buttressed in economic theory by the tenets of doctrinaire economic liberalism, legally equal values were in fact not always economically equal values. Reference is made to the Court's sustained use of the fiction of "liberty of contract" to thwart state or federal attempts to establish minimum wages, maximum hours, and acceptable working conditions in the reciprocal business relations of management and labor.

The demise of the "liberty of contract" doctrine, and therewith the transition to the positive, service, welfare State, left the way clearly open for the adjudica-

⁹⁸ One of the bases for considerable current criticism of the Supreme Court, both on and off that bench, is that it undertakes to decide too many cases, many of which are thought by the critics to be unimportant. The academic critics are epitomized by Professor Hart, who espouses the views of his former colleague, Mr. Justice Frankfurter. A biting critique of the Hart-Frankfurter position is set out in Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960).

⁹⁹ See, e.g., Ribble, *Policy Making Powers of the United States Supreme Court and the Position of the Individual*, 14 WASH. & LEE L. REV. 167, 184-5 (1957). See the statement by Mr. Justice Harlan that it is the policy of the Court to choose its cases "in the interest of the law, its appropriate exposition and enforcement, not in the mere interest of the litigants." Harlan, *Managing the Dikes*, 13 RECORD 541 (1958).

¹⁰⁰ The term is that of Karl Llewellyn. See Llewellyn, *The Normative, The Legal, and the Law Jobs: The Problem of Juristic Method*, 49 YALE L. J. 1355 (1940).

¹⁰¹ Fuller, *The Forms and Limits of Adjudication*, Remarks before the Jurisprudence Round Table at the Annual Meeting of the Association of American Law Schools, December 29, 1958. This paper, in revised form, will be incorporated in a book to be entitled *The Principles of Social Order*, which will be published by Professor Fuller in the near future.

tive process to be employed to abet that other form of other ordering: organization by common aims. As yet, adjudication has adjusted itself less efficiently to this new form. One reason is that "organization by common aims" implies a national consensus, which on most controversial issues is not yet determined by the American people and is also undetermined by one spokesman of that consensus, the Supreme Court. Another and probably more significant reason is that "organization by common aims" involves "polycentric" questions, *i.e.*, questions not easily settled by the adjudicative process because of their unavoidable intersection with problems not primarily "legal" and "constitutional."¹⁰² On the other hand, "organization by common aims" as a motive for social ordering, for social cooperation, has seemed in this century and in this country to be the only viable means of effectuating doctrines of social justice, a feature of the "national consensus" to which the American people now appear committed. Yet "common aims," suggesting common agreement, touch precisely those "polycentric" questions with which heretofore the Supreme Court has been deemed ill-equipped to deal.

The position taken by Hart and Wechsler is based on a view of life and the social process in which litigants (and others) are in agreement on the basic essentials—the goal values—and all that remains is the settlement of preferred ways to reach those ends. Put another way, their position is bottomed on a theory of a fundamental harmony of interests of all members of the American community. But that is precisely what may *not* be present in most important constitutional litigation, such as racial relations, where disagreement is over ends or goals and not the means or tactics to attain them; the administration of the criminal law, where an anti-social being is jousting with something called society; and in many of the civil liberty cases, where again the disagreement is over fundamentals. To posit a society with a harmony of interests is to rearticulate a fundamental tenet of the American democracy; to speak otherwise is to question, at least in part, one of the underpinnings of the constitutional order. Nevertheless that, in essence, is what is present here, and serves to explain, at least partially, the counting of votes—as Hart says—of "one up (or down) for civil rights" and so on. To put it in other terms, it is the difference between a Hobbesian view of the social process and that of, say, Burke, Locke or Rousseau.

The essential thing to recognize about the social process is that it is not governed by something called "reason," as Hart intimates, but is a set of interlocking and interacting power relationships; it is not ruled in accordance with "neutral principles" or as a result of common adherence to what is desirable.¹⁰³ "While philosophic saints in their ivory towers construct ideal societies,

¹⁰² Fuller borrows the term "polycentric" from POLANYI, *THE LOGIC OF LIBERTY* (1951).

¹⁰³ The social process of course includes the judicial process, particularly as it relates to the resolution of constitutional questions. Constitutional law, accordingly, is much more than "lawyers' law," and can even be considered of such importance that it should not be left to the lawyers—at least not wholly so.

'burly sinners rule the world.'"¹⁰⁴ To some extent, thus, civil rights determination in the judicial process is a resultant of an evaluation of power relationships in the social process; and civil liberties receive protection when it is convenient for society to protect them or when the issue with which the liberty is concerned is one in which the major social groups are in basic agreement. Compare, in this regard, the position of Mr. Justice Douglas, who looks upon the first amendment as the enunciation of absolute principle, with the interest-balancing position of, say, Mr. Justice Frankfurter, who concedes the necessity of value-choice in adjudication. Who, then, is the "activist"; who the exponent of self-restraint? The answer, of course, is that both—plus their colleagues—are activists in the sense that conscious use of decisional power makes it inevitable. Both Douglas and Frankfurter see the Court as a power organ in a social power process, the former desiring to use it affirmatively, the latter more willing to rely on the end-products as they come tumbling out of the social decision-making spigot, so long as those results do not unduly upset him.¹⁰⁵ Thus Douglas can, at least in part, be said to hold to a Hobbesian view of the judicial process, with Frankfurter being more a follower in the Burkean or Lockean tradition.¹⁰⁶ The comparison is not exact, but does serve to describe two diverging views of the role of the Court.

In many aspects of the American social scene the commitment of the people is less to the democratic ideal than it is to the furtherance of their own parochial interests. While it can be said that a spirit of cooperation, not competition, prevails in most of the nation,¹⁰⁷ in some respects something less than even "antagonistic cooperation" is the rule. It is in these sharp cleavages that the Court reflects, in its cliques and its decisions, the warring factions of the American people. Negro-white relations and the criminal law have been cited; they are joined in large extent by labor-management relations and other im-

¹⁰⁴ PATTERSON, *JURISPRUDENCE* 558 (1953).

¹⁰⁵ Compare Mr. Justice Frankfurter's opinion in *Rochin v. California*, 342 U.S. 165 (1952) (forcible use of stomach pump by police officers is conduct "that shocks the conscience . . . [and is] too close to the rack and screw . . .") and in *Louisiana v. Resweber*, 329 U.S. 459 (1947) (execution of felon by electrocution after first attempt failed because of power trouble does not offend "a principle of justice 'rooted in the traditions and conscience of our people'"). How these opinions by Mr. Justice Frankfurter can be reconciled, in so far as judicial neutrality is concerned, is a mystery. Even more mysterious is Frankfurter's assertion in the *Resweber* case that he saw his duty as that of enforcing "that consensus of society's opinion which, for purposes of due process, is the standard enjoined by the Constitution." Such a view of the constitutional adjudicative process is not substantiated by history or practice. See, for an instructive analysis of due process, Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 *YALE L. J.* 319 (1957).

¹⁰⁶ Consult STANLIS, *EDMUND BURKE AND THE NATURAL LAW* (1958); CONE, *BURKE AND THE NATURE OF POLITICS: THE AGE OF THE AMERICAN REVOLUTION* (1957); CANAVAN, *THE POLITICAL REASON OF EDMUND BURKE* (1960). See PATTERSON, *JURISPRUDENCE* § 4.16 (1953), for a comparison with John Locke.

¹⁰⁷ See, e.g., MONTAGU, *THE NEXT DEVELOPMENT IN MAN* (1952). Cf. SIMON, *PHILOSOPHY OF DEMOCRATIC GOVERNMENT* 123 (1951): "[In a democratic state] deliberation is about means and presupposes that the problem of ends has been settled."

portant social disputes. In some of the fundamental issues growing out of these relationships can be found differences, not in details or in tactics, but in end-values or purposes. And while it can be said that a political counterpart of Adam Smith's invisible hand *may* operate, so as eventually to get the "common good" furthered (a doubtful proposition, in any event), still what might be called "the individual good" often must suffer in the process. When those "individuals" so suffering are sufficiently numerous and can exercise a considerable power leverage, then their *political* battles, in the American system, often tend, as we have been told by Tocqueville and Dicey, to become *judicial* in nature. The *judicial* area is, thus, a *political* battleground—either because, as in the case of the Negro, the legislature is foreclosed to him, or because, as in labor relations, the legislature delegates its responsibility—and there should be little wonder that the results are hailed as victories for one side or another, both by laymen and lawyers. Reason, Hart to the contrary, in these instances, if not in others, is emphatically not "the life of the law"; rather, it is the language of political battle. And the Court is a power organ, which aids in the shaping of community values, whether avowedly so as in the hands of a Douglas or whether abashedly so when Frankfurter seeks to convince us that he is an apostle of "self-restraint."¹⁰⁸ Whatever its decision—even a denial of certiorari or taking refuge within the doughy contours of "political questions"—the Court is institutionally a part of a government with affirmative orientation: In a welfare state, it is also concerned with "welfare." The only question is not whether it should be so but whether it should be *outwardly* so, and whether it should try to be so systematically, rather than in a helter-skelter manner.

The role, then, of the Supreme Court in an age of positive government must be that of an active participant in government, assisting in furthering the democratic ideal. Acting at least in part as a "national conscience," the Court should help articulate in broad principle the goals of American society.¹⁰⁹ The process is not a novel one; it has characterized the activities of the Supreme Court in the past, and the suggestion here is that it become outwardly so. Historically, the Court has espoused such goals as the free market, political democracy, and fairness in governmental activities affecting individuals. Today there is an equal need for more conscious normation on the part of the members of the Court.

¹⁰⁸ Something that neither Frankfurter nor his followers have answered is what happened to his vaunted sense of self-restraint in the recent race cases, involving certainly the most polycentric of social questions. Why didn't the Justice dissent or at least utter one of his well-known concurring opinions?

¹⁰⁹ The Court as a "national conscience" is discussed by Bryce, by Curtis, and by Ribble: BRYCE, *THE AMERICAN COMMONWEALTH* 273 (1913), and the recent analysis by Howell, *James Bryce's "The American Commonwealth,"* 9 J. PUB. L. 191 (1960); CURTIS, *LIONS UNDER THE THRONE* (1947) and his essay in *SUPREME COURT AND SUPREME LAW* 170-198 (Cahn ed. 1953); and for Ribble see his article cited in note 99, *supra*. See also Rostow, *The Supreme Court and the People's Will*, 33 NOTRE DAME LAW, 573 (1958).

In this process it is the *effects* of a given decision that become important. But is it here that the judges of today, as well as those of yesterday, operate in areas of personal ignorance. We lack a sociology of judicial decision-making, and do not really know, save in an impressionistic, helter-skelter manner, just what the impact on the value position of Americans is of a decision of the United States Supreme Court.¹¹⁰ The need is thus apparent for a greater use of the data of the social sciences by the judiciary in reaching their decisions. The judge as policy-maker and norm-articulator must manipulate more than the legal doctrine.

It is in this connection that P. W. Bridgman's concept of operational analysis becomes of importance: *thought in terms of consequences*. As Bridgman put it:

In general, an operational analysis appears as a particular case of an analysis in terms of activities—doings or happenings. In my own case, pursuit of operational analysis has resulted in the conviction, a conviction which has increased with the practice, that it is better to analyze in terms of doings or happenings than in terms of objects or static abstractions. Many professional philosophers will doubtless object that this begs the whole question, for it assumes that an analysis in terms of doings or happenings is possible. Whether this objection is valid in any ultimate sense we leave unexplored, at least for the present, but I believe it possible to analyze at a level where the immediate emphasis is on doings or happenings. . . .

Analyzing the world in terms of doings or happenings, as contrasted with analyzing in terms of things or static elements, amounts to doing something new and unusual.¹¹¹

It may be doubted that this latter sentence is true so far as what judges have actually done is concerned. In the annals of American constitutional adjudication, those men we call the great judges have habitually analyzed and thought in terms of consequences. Although their decisions are often couched in terms of adherence to "the law," nevertheless to some degree they have been engaging in operational thinking. In the main, we are suggesting in this paper that operational thinking become the outward rule, rather than the hidden actuality.

Hence we suggest that judicial decisions should be gauged by their results

¹¹⁰ The point is well made in FRANKFURTER, *SOME OBSERVATIONS ON SUPREME COURT LITIGATION AND LEGAL EDUCATION* 17 (1954): "Take a problem that has been confronting the Supreme Court, Sherman Law regulation of the movie industry. A number of decisions have been rendered finding violations under the Sherman Law. Does anybody know, when we have a case, as we had one the other day, where we can go to find light on what the practical consequences of these decisions have been? . . . I do not know to what extent these things can be ascertained. I do know that, to the extent that they may be relevant in deciding cases, they ought not to be left to the blind guessing of myself and others only a little less uninformed than I am."

Compare CARDOZO, *THE GROWTH OF THE LAW* 116-17 (1924): "Some of the errors of courts have their origin in imperfect knowledge of the economic and social consequences of a decision, or of the economic and social needs to which a decision will respond. In the complexities of modern life there is a constantly increasing need for resort by the judges to some fact-finding agency which will substitute exact knowledge of factual conditions for conjecture and impression."

¹¹¹ BRIDGMAN, *op. cit.* *supra* note 20, at 3.

and not by either their coincidence with a set of allegedly consistent doctrinal principles or by an impossible reference to neutrality of principle. The effects, that is to say, of a decision should be weighed and the consequences assessed in terms of their social adequacy. Alternatives of choice are to be considered, not so much in terms of who the litigants are or what the issue is, but rather in terms of the realization or non-realization of stated societal values. What those values might be, we do not now set forth. Rather we contend that judges have always done this, in greater or lesser degree, overtly or covertly, consciously or unconsciously; and that now it should become a matter of conscious choice. The reports are replete with statements indicating that judges think in terms of effects, as well as of such other matters as precedent. The proposal here is that this should become recognized, on and off the bench, as the hallmark of the constitutional adjudicative process. Disputes are and should avowedly be settled in terms of the external consequences of their application—with those consequences spelled out in some degree of particularity. In making this suggestion, we call for a return to a Marshallian view of the Court.

At least two attempts—completely dissimilar in approach—have seriously been made to postulate a set of teleological criteria for the judiciary. These propose the affirmative utilization of the judicial process for definite, designated ends. The two proposals are those broached by M. S. McDougal, who often in collaboration with Harold D. Lasswell has published a series of essays calling for a “policy-oriented” law, the latest of which was directed toward the need for such an international law; and by Alexander M. Pekelis, whose article calling for a “jurisprudence of welfare” has lain neglected for over fifteen years.

McDougal's position is summed up in the concept of what he calls “human dignity”:

By an international law of human dignity I mean the processes of authoritative decision of a world public order in which values are shaped and shared more by persuasion than coercion, and which seeks to promote the greatest production and widest possible sharing, without discriminations irrelevant to merit, of all values among all human beings.¹¹²

While McDougal has at no time published a detailed exposition of his ideas, still it is apparent that he considers the judicial process to be one of “authoritative decision” which should be concerned with furthering the law of human dignity. For “outcomes” and “effects” are important aspects of the power process, and a “law of human dignity will insist upon the most flexible interpretation of . . . inherited doctrines for promoting the application of authority to particular events in ways that enhance the overriding values of a world public order of freedom, security, and abundance, as such values are at stake in differing types of particular events and contexts.”¹¹³ The point emphasized

¹¹² McDougal, *supra* note 10, at 107.

¹¹³ *Id.* at 130.

here is not an evaluation of the merits of the McDougal "law of human dignity," but that it is a serious attempt to project a set of criteria by which an affirmatively-minded judiciary may think in terms of consequences and evaluate their decisions teleologically.

As with McDougal, so with Pekelis. In a single terse essay¹¹⁴ he picks up the thread of judicial freedom and judicial creativeness—which had been brandished by so many legal realists, who, perhaps overwhelmed by their audacity, failed to follow the implications of their finding—and asks "judicial freedom for what?" The problem is no longer that of description but instead it is that of "the shaping of legal reality" following a "quest for extra-legal guidance." Such guidance has been found in economics (as in *Wickard v. Filburn*)¹¹⁵ and in political science (as in *Schneiderman v. United States*).¹¹⁶ Even in the private law categories, Pekelis tells us, it is clear that "the crucial issues . . . cannot be solved by legal syllogisms only, or without making a more or less conscious choice between alternative social policies." He then makes his plea for a *jurisprudence of welfare*, based on "that minimum knowledge of social science which would enable [judges] to exercise a common-sense control. . . ." For "unless we are resigned to a government by technicians, and ready to submit to a totemistic symbolism evolved by the social sciences, we must be ready to learn their language. . . ." Judges (and lawyers) must be able to use social-science material in making their decisions. Although welfare is "an ambiguous concept," "it assumes as its end the ethical and political ideals professed by our society and attempts to find in the arsenals of judicial doctrine and social science the means for their realization." Welfare jurisprudence is the rejection of "an issueless life and an issueless jurisprudence," and is more of a mode of inquiry than an answer to the problems of our time. It is "a call for the growth of systematic participation of the judiciary—burdened with responsibility and stripped of its pontifical robes—in the travail of society."¹¹⁷

Both of these formulations are attempts to build on the shambles of classical jurisprudence left after the attack of the legal realists had crumbled the edifice of the "phonograph" theory of justice. The authors of them call not for neutrality but for the open taking of sides by the judiciary so as to further the ideals of American democracy. Forward looking, they reject, expressly or implicitly, the notion that neutrality can be of any real help in the judicial, and social, process. The call for "systematic participation . . . in the travail of society" is fundamentally at odds with the published views of the three commentators whose papers are under discussion. McDougal and Pekelis seek to replace the haphazard system now in operation with one dominated by conscious design.

A judicial process in terms of consequences is both unavoidable in the

¹¹⁴ PEKELIS, LAW AND SOCIAL ACTION 1-41 (1950).

¹¹⁵ 317 U.S. 111 (1942).

¹¹⁶ 320 U.S. 118 (1943).

¹¹⁷ PEKELIS, *op. cit. supra* note 114, at 5, 6, 9, 14, 31, 39, 40.

American legal system and to be desired. Thus the job of the American lawyer is to help build such an affirmative jurisprudence. This does not mean that the judge should sit like a kadi under a tree, dispensing justice by whim or caprice. Rather it means that the judge is to be engaged in "operational analysis"—in purposive directional thought—which is both a recognition of the creative nature of his job and a consideration of the forces that limit that creativity.

A teleologically-oriented jurisprudence is not, it should be stressed, a device to provide the answers to a given set of circumstances. Rather, it is a method—a mode of inquiry, a way to approach constitutional questions. It is opposed to a mechanistic view of the social and the judicial processes. It seeks to provide purposive direction to the flow of social events. By asking the welfare or the human dignity question, the judge must think in terms of consequences and will help in providing some guiding lights for the attainment of the democratic ideal.

In such a purposive posture, the data heretofore considered useful in judicial decision-making will perforce have to be supplemented with relevant facts and principles from the social sciences. To the legal doctrine must be added what is known in the pertinent social science disciplines. If, for example, a judge is to make a decision on the economic question of the nature of the American market economy, as is necessary in antitrust cases, he will probably have either to emulate Judge Wyzanski in the *Shoe Machinery* case¹¹⁸ and appoint an economist as one of his "law" clerks or find some other means of determining what is useful and necessary to know about that case.

Finally, judicial decision-making in terms of consequences emphatically does not mean that the judiciary is a "tool of the State." If a judge acts in conscious affirmation of a set of values, it is just as likely that he will oppose the position of the State as to uphold it. Saying that in an age of positive government, all organs of government must be avowedly purposive in their actions, is not to postulate a subservient judiciary.¹¹⁹ Just as in the days of the "nightwatchman State," the judiciary can be independent, even while admitting its deep and continuing involvement in societal affairs.

V. CONCLUSION

All nations face the same basic problems: external security and internal order. Both of these are interdependent. But all governments do not resolve these problems in the same way. In the American constitutional order, the values of personal freedom and individual liberty are given as much importance as anywhere else in the world and more importance than in most of the world. In the attainment of these goals, the judiciary has as important a role to play as any other organ of government. Perhaps it is even more important than the

¹¹⁸ Discussed in Freund, *The Supreme Court and American Economic Policy*, THE JURIDICAL REVIEW 142, 159-162 (1959). The case is *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). See KAYSER, *UNITED STATES v. UNITED SHOE MACHINERY CORPORATION: AN ECONOMIC ANALYSIS OF AN ANTI-TRUST CASE* (1956).

¹¹⁹ See FRIEDMANN, *LAW IN A CHANGING SOCIETY* 59-62 (1959).

legislature or the executive. For while it is true of course, as we are often told by Mr. Justice Frankfurter, that the other branches of government also have the capacity to govern, it is the courts that can best protect the rights of minorities which tend to become submerged in the political processes of government. The other branches of government, precisely because they are more political and thus more susceptible to the prevailing winds, may and do find it difficult at times to withstand the pressure of majority opinion. A majority, as De Tocqueville and John Stuart Mill have indicated, can be despotic. It is, accordingly, the quintessence of democracy for an appointive judiciary to further the ends of the integrity of the individual.

One final word: "Reason," Professor Hart to the contrary notwithstanding, is not "the life of the law." A part of the law, to be sure. But the life? No. As used by Hart, "reason" is an ambiguous term. If he is referring to logical derivations from abstract general principles, then he is not describing the judicial process. If, however, he is referring to a process of disciplined observation, coupled with a recognition that choices must be made among alternatives and a cognizance of the consequences of the decision, then Reason is certainly of great importance. It is certainly not a "life principle," whatever that might mean. But Professor Hart, and Professors Wechsler and Pollak, do state an ideal, one which Chief Justice John Marshall once stated as follows:

Courts are mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.¹²⁰

In the course of a slashing critique of what he calls Professor Hart's "theology," Thurman Arnold, a central figure in the legal realist movement of the 1930's, says that the ideal is of "tremendous importance."¹²¹ For without a continuing pursuit "of the shining but never completely attainable ideal of the rule of law above men, evolved solely from Reason," says Arnold, "we would not have a civilized government. If that ideal be an illusion, to dispel it would cause men to lose themselves in an even greater illusion, the illusion that personal power can be benevolently exercised. Unattainable ideals have far more influence in molding human institutions toward what we want them to be than any practical plan for the distribution of goods and services by executive fiat."¹²²

¹²⁰ *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 866 (1824). For Cardozo's comment on this statement, see CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 169-170 (1921). See also BLACK, *THE PEOPLE AND THE COURT* (1960).

¹²¹ Arnold, *supra* note 98.

¹²² *Id.* at 1311. For a discussion of "reason" and its role in human thought, see Alexander, *THE WESTERN MIND IN TRANSITION* (1960): "Like Kierkegaard, Nietzsche was motivated by the conviction that abstract reason cannot solve the basic problems of human existence. 'Reason,' Nietzsche wrote in his *Thoughts Out of Season*, 'is only an instrument and Descartes, who

What this seems to mean is that sophisticated people¹²³ should recognize the personal power of federal judges but that the creative role of the judge should not be divulged, else the nation will suddenly succumb to totalitarianism. As such, it has a familiar ring: it is the same argument used against the legal realists of two or three decades ago.¹²⁴ It has no more validity today than it had then. Morris Cohen put the matter succinctly many years ago:

When I first published the foregoing views [on judicial legislation] in 1914, the deans of some of our law schools wrote me that while the contention that judges do have a share in making the law is unanswerable, it is still advisable to keep the fiction of the phonograph theory to prevent the law from becoming more fluid than it already is. But I have an abiding conviction that to recognize the truth and adjust oneself to it is in the end the easiest and most advisable course. The phonograph theory has bred the mistaken view that the law is a closed, independent system having nothing to do with economic, political, social, or philosophical science. If, however, we recognize that courts are constantly remaking the law, then it becomes of the utmost social importance that the law should be made in accordance with the best available information, which it is the object of science to supply.¹²⁵

Legal fictions permeate law and the legal process. They are useful to the extent that they serve desirable ends. The "shining . . . ideal of the rule of law above men, evolved solely from Reason" is partially fictional in nature. It is a useful fiction. But the alternative is not despotism: the range of social choice is far greater than Thurman Arnold's over simplified "either-or" dichotomy. A recognition of what Holmes called "the secret root from which the law draws all the juices of life," by which he meant "considerations of what is expedient for the community concerned,"¹²⁶ provides a more viable point of departure for a jurisprudence of the age of the positive State.¹²⁷

recognized only reason as the supreme authority, was superficial.' He succinctly said that the true statement should read *vivo, ergo cogito* and not the Cartesian *cogito, ergo sum*. Reason is in the service of life, of the will to live. . . . The common element in these two so opposite philosophies is their denial that scientific abstractions can solve the actual concrete problems of human existence. Both represent a reaction against the belief of three centuries that the eventual salvation of mankind lies in science." *Id.* at 196.

¹²³ It is not explained why no danger exists if only Arnold and other sophisticates see the illusory nature of the ideal, but that it is dangerous for people generally to become aware of it. Isn't there an equally "shining" ideal that members of a democratic society have the capacity to make up their own minds and to guard against self-deception? Arnold is engaging in the even greater illusion that deception of the "masses" is proper in a democracy. *Quaere* also just what relevance Arnold's remarks about "executive fiat" have in the circumstances? His juxtaposition of the two pole positions involves the use of a resounding *non sequitur*.

¹²⁴ See, e.g., Wade, *The Concept of Legal Certainty*, 4 MODERN L. REV. 183 (1941).

¹²⁵ COHEN, LAW AND THE SOCIAL ORDER 380-81 (1933) (a collection of previously published essays).

¹²⁶ HOLMES, THE COMMON LAW 35 (1881).

¹²⁷ Can it not be said that the Supreme Court may legitimately serve as part of an "aristocracy of talent," in Carlyle's phrase, in helping build that jurisprudence during the ensuing decades? (The term comes from CARLYLE, PAST AND PRESENT 29 (Everyman's ed. 1941).)