II. THE DEBATE OVER NEUTRAL PRINCIPLES

A. *The Genesis of the Neutral Principles Debate*

Brown v. Board of Education, [29] decided on May 17, 1954, may fairly be regarded as the first significant act of the Warren Court.[30] It played to immediate and widespread applause. Most of the country hailed *Brown* for its egalitarian result, and commentary at the time regularly noted racial segregation's incongruity with the broader promise of democracy.[31] Many saw the decision as particularly useful for removing a blot on the United States's ability to combat the communist threat.

Not all reviews of *Brown* were positive, however; the decision was met with catcalls and threats of defiance as well. Some of the criticisms academics advanced in later years about *Brown* and the Warren Court bore a remarkable similarity to segregationist complaints at the time of the decision itself. Many of those attacking

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29. 347 U.S. 483 (1954).

30. See Alexander M. Bickel, *The Supreme Court and the Idea of Progress* 4·8 (Harper & Row, 1970) (arguing that *Brown* represented the first sharp break with the Vinson Court).

31. Michael Klarman has argued persuasively that *Brown's* countermajoritarian nature is greatly exaggerated-an assessment with which I agree. Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions,* 82 Va. L. Rev. 1, 19-21 (1996).

Brown made claims that the decision represented naked power politics by the Supreme Court, which had abandoned proper constitutional forms. "The South," proclaimed Senator James Eastland of Mississippi, "will [neither] abide by nor obey this legislative decision by a political court."[33] A Manifesto of Ninety-Six Members of Congress accused the Court of substituting its "personal, political and social ideas for the established law of the land" and decried the decision as "naked power" and "naked judicial power."[34] Although the ugly vehemence of these remarks is troubling, the juxtaposition of "naked power" with judicial propriety mirrors the neutral principles debate of both judicial generations.

Complaints that the Supreme Court had abandoned its judicial role to engage in power politics were not unique to the time immediately following *Brown;* they would plague the Warren Court throughout its tenure. In 1958, the Conference of Chief Justices, in a sharply critical report commenting on many of the Supreme Court's decisions not dealing with race, accused the Court of exercising "almost unlimited policy-making powers."[35] Speaking in the midst of a heated congressional and national furor over whether to strip the Court of jurisdiction in cases involving communists or otherwise to modify Court decisions, Senator Jenner of Illinois suggested that judicial review was being used "as a device for conforming the law to what the individual members of the Court, or a majority of them, think the law should be. In the latter case, judicial review is being used to promote a judicial oligarchy, and is bringing us far closer to a government of men and not of laws."[36] In 1965, following the turmoil that arose after the school prayer[37] and reapportionment[38] decisions, a publication for

33. William S. White, *Ruling to Figure in '54 Campaign: Decision Tied to Eisenhower-Russell Leads Southerners in Criticism of Court,* N.Y. Times 1 (May 18, 1954).

34. *Text of 96 Congressmen's Declaration on Integration,* N.Y. Times 19 (Mar. 12, 1956). *See* also Southern Manifesto, 102 Cong. Rec. 4460 (1956).

One federal judge even called the Supreme Court a "hierarchy of despotic judges" and accused it of discriminating against white citizens. *U.S. Judge in South Assails High Court,* N.Y. Times 6 (July 26, 1957) (comment of George Bell Timmerman, Sr., Federal District Judge of South Carolina). Apparently anticipating Wechsler's argument, Senator Sam Ervin of North Carolina said the Court's segregation decisions violated "the freedom to select one's associates. Whenever Americans are at liberty to choose their own associates, they virtually always select within their own race." Sam J. Ervin, Jr., *The Case for Segregation,* Look 32 (Apr. 3, 1956).

35. *What 36 State Chief Justices Said About the Supreme Court,* U.S. News & World Report 92 (Oct. 3, 1958). See also *Conference of Chief Justices, Report of Committee on Federal-State Relationships as Affected by Judicial Decisions* (August, 1958), printod in 104 Cong. Rec. A7782 (1958).

36. 104 Cong. Rec. 18,641 (Aug. 20, 1958).

37. *School District of Abington Township v. Schempp,* 374 U.S. 203 (1963); *Engel v. Vitale,* 370 U.S. 421 (1962).

students called Senior Scholastic published an article entitled *The Supreme Court . . . Guardian or Dictator of the Nation's Laws?*[39] Although the foaming cries of rabid segregationists might have been dismissed easily, by the time the furor was over the Court could count among its critics many members of the American Bar Association, many members of Congress, and many state Supreme Court Chief Justices.[40]

In light of the identity of the Court's critics and the tenor of their criticism, academic critics stayed mute for some time after *Brown*, and when critical, they approached the task with delicacy. Erwin Griswold, Dean of the Harvard Law School, explained: "With such a hue and cry being raised, one should be very careful that he does not join it, and that he does not create the impression that he is joining it."[41] In a later article, he elaborated, "[a]nything [a critic] may write is susceptible to misuse by such irresponsible critics of the Court and its work."[42] Phillip Kurland, a Professor of Law at the University of Chicago, rose to defend the work of the state Supreme Court Chief Justices whose report he had helped draft. He worried that the report "gave aid and comfort to the enemy. . . . It was the warm greetings of brotherhood from the Southern demagogues and the paeans of praise from the American witch-hunting fraternity that did the harm."[43] He might have added that releasing the report amidst the Little Rock controversy that resulted in *Cooper v. Aaron*[44] had not helped.

If the ice was to be broken in polite circles, no one was better suited to do so than Learned Hand, "the most revered of living American judges."[45] Eighty-seven years old in February of 1958, he "was called"[46] to the Harvard Law School to give the prestigious Holmes Lectures, an event whose attendance rivaled a major theater

38. See, for example, *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

39. *The Supreme Court . . . Guardian or Dictator of the Nation's Laws?*, Senior Scholastic 6 (Mar. 4, 1965).

40. See notes 33-36 and accompanying text.

41. Erwin N. Griswold, *Morrison Lectures*, 43 Mass. L. Q. 98, 101 (1958).

42. Erwin N. Griswold, *The Supreme Court, 1959 Term-Foreword: Of Time and Attitudes-Professor Hart and Judge Arnold*, 74 Harv. L. Rev. 81, 82 (1960).

43. Philip B. Kurland, *The Supreme Court and Its Judicial Critics*, 6 Utah L. Rev. 457, 459 (1959).

44. 358 U.S. 1 (1958).

45. Gerald Gunther, *Learned Hand: The Man and the Judge* 653 (Knopf, 1994).

46. J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 Harv. L. Rev. 769, 769 (1971).

opening. Judge Hand's appearance came amidst fury at some of the Supreme Court's decisions in cases involving communists. Southern segregationists had stood alone since *Brown,* but with recent civil liberties decisions limiting state and federal witch-hunting activities, the segregationists had finally found an issue calculated to attract broader national condemnation of the Supreme Court.[47] Learned Hand, as it turned out, was sharply critical of the Supreme Court's activism, a fact that turned the heads of the Court's admirers. "Warren Court admirers could dismiss the most vocal critics of the Court as extremists; yet here was the nation's most highly regarded judge, renowned as the most articulate advocate of liberty, apparently joining the Court's enemies."[48]

Context helps to illuminate how this revered judge of generally liberal ideals came to be criticizing the Warren Court. Learned Hand was an old-guard progressive. He had fought the battle in favor of progressive legislation against the Old Court,[49] a battle that was not won until the defeat of that Court amidst the furor over President Franklin Roosevelt's Court-packing plan.[50] Learned Hand and other progressives had attacked the Old Court repeatedly for using the Constitution, particularly the Due Process Clause, to strike progressive legislation.[51] Given his part, Learned Hand could not reconcile criticizing courts for invalidating economic legislation, while approving their using those same clauses to strike laws in the name of civil or personal rights.[52] Any such interference with the operations of legitimate democratic government constituted the Supreme Court, in Learned Hand's view, as a "third legislative chamber."[53]

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47. See J. Patrick White, *The Warren Court Under Attack: The Role of the Judiciary in a Democratic Society,* 19 Md. L. Rev. 181, 189 (1958) Southern Congressmen, having failed in their initial effort to mobilize anti-Court sentiment . . • were quick to perceive that their hasic purpose of discrediting the Supreme Court would be served whether the issue was undue concern for civil liberties or softness to communism or states' rights.").

48. Gunther, *Learned Hand* at 655 (cited in note 45).

49. See Learned Hand, *Due Process of Law and the Eight-Hour Day,* 21 Harv. L. Rev. 495 (1908). On Hand's involvement in Progressive Era politics, see, for example, Gunther, *Learned Hand* at 202-69 (cited in note 45).

50. See Gunther, *Learned Hand* at 459-60 (cited in note 45). The question of whether Justice Roberts's famous switch was in response to FDR's Court-packing plan is contested, but I stand with those who think that widespread popular attacks on the Court apparently influenced the Supreme Court's general turnaround. See Laura Kalman, *The Strange Career of Legal Liberalism* 349 n.70 (Yale U., 1996).

51. See Thomas Reed Powell, *The Judiciality of Minimum-Wage Legislation,* 37 Harv. L. Rev. 545 (1924); T.W. Brown, *Due Process of Law,* 32 Am. L. Rev. 14, 20-21 (1898).

52. Learned Hand, *The Bill of Rights* 46 (Harvard U., 1958).

53. Id. at 42. Judge Hand expressed his disapproval of such a system in no uncertain terms. "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." Id. at 73.

Although Learned Hand's main point of criticism was the exercise of activist judicial review in general, he also took *Brown* to task.[54] Learned Hand's original inclination had probably been to support *Brown,* but his correspondence with Supreme Court Justice Felix Frankfurter suggests that heavy lobbying by Justice Frankfurter about the decision's rationale ultimately led Learned Hand to attack *Brown.*[55] In the end, Learned Hand concluded that like other judicial decisions he had criticized, *Brown* was nothing but an illegitimate *"coup de main."*[56]

After Learned Hand threw down the gauntlet, the way was clear for further academic criticism of the Supreme Court and of *Brown.* Herbert Wechsler, the Harlan Fiske Stone Professor of Law at Columbia University,[57] accepted the challenge in his own Holmes Lectures a year later. Unlike Learned Hand, Professor Wechsler was prepared to accept a role for judicial review. This, Wechsler felt, followed from Article III and from the decision in *Marbury v. Madison:*[58] the Court could not shirk its duty to decide constitutional questions thrust upon it.[59] That duty, however, only raised the question of what standard the Court was to apply, a question Wechsler was forced to answer although Learned Hand had not.

It is here that Professor Wechsler developed his famous argument for "neutral principles." In order to separate court processes from "the ad hoc in politics," Wechsler said, the judicial process must be "genuinely principled, resting with every respect to every step that is involved in reaching judgment on analysis and reasons quite

54. Id. at 55.

55. Gunther, *Learned Hand* 665·66 (cited in note 45). According to Learned Hand's biographer Gerald Gunther, Hand was sympathetic to *Brown.* Although skeptical of the *Brown* Court's rationale, which seemed to be limited to the special rule of education, Learned Hand felt he could have supported the decision on the ground that "racial equality was a value that must prevail against any conflicting interest." Id. at 666. But Justice Frankfurter could not accept this rationale, reluctant as he was to be boxed into striking down stato anti-miscegenation laws on the very same ground, a result he did not believe the country would tolerato. Id. at 666·67.

56. See Hand, *The Bill of Rights* at 55 (cited in note 52). On Learned Hand's struggle with the *Brown* decision, see Horwitz, *The Transformation of American Law* at 259 (cited in note 18); Gunther, *Learned Hand* at 671 (cited in note 45); Kalman, *The Strange Career of Legal Liberalism* at 33-34 (cited in note 50).

57. Professor Wechsler's professional chair was more than a little ironic in light of the tension over the rationale in *Brown.* After Professor Wechsler's speech, the neutral principle advanced most often to justify *Brown* was a rationale based essentially on Justice Stone's famous footnote four in his decision in *Carolene Products. United States v. Carolene Products, Co.,* 304 U.S. 144, 152 n.4. (1938). See notes 71-85 and accompanying text.

58. 5 U.S. (1 Cranch) 137 (1803).

59. Wechsler, 73 Harv. L. Rev. at 3-10 (cited in note 18).

transcending the immediate result that is achieved."[60] "[M]ust they not," Wechsler asked, "decide on grounds of adequate neutrality and generality, tested not only by the instant of application but by others that the principles imply?"[61] "[I]s not the relative compulsion of the language of the Constitution, of history and precedent-where they do not combine to make an answer clear-itself a matter to be judged, so far as possible, by neutral principles-by standards that transcend the case at hand?"[62] Wechsler's concern was to distinguish a court of law from "a naked power organ."[63]

. . . Professor Wechsler, as will be clear from his position on *Brown,* insisted only that the principle in a case-the rule of a case-not differ depending upon the identity or interest of the plaintiff. According to Professor Wechsler, it was essential that a court employ a rule of decision that treated alike the claims of a "labor union or a taxpayer, a Negro or a segregationist, a corporation or a Communist."[64] . . .

From the general statement about neutral principles, Professor Wechsler turned to troubling cases, the most vexing of which was *Brown.*[67] Professor Wechsler professed to agree personally with the result in *Brown,*[68] but he simply could not explain it by the standard of neutrality he had imposed. As Wechsler saw it, the decision was

60. Id. at 15.
61. Id.
62. Id.at17.
63. Id. at 19.
64. Id. at 12.
67. "I would surely be engaged in playing Hamlet without Hamlet if I did not try to state the problems that appear to me to be involved." Wechsler, 73 Harv. L. Rev. at 31 (cited in noto 18).
68. Id.

not about race, but about the right of association.[69] Here, however, neutral principles escaped him:

> Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail? I should like to think that there is, but I confess that I have not written the opinion.[70]