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Book Review. Wechsler, H., Principles, Politics, and Fundamental Law

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This collection of essays on American constitutional law brings together several leading contributions to the field by a distinguished contemporary practitioner and student of the subject. Despite the diversity of their topics, their content is interrelated. The method of constitutional adjudication which the author advocates in the first paper, "Toward Neutral Principles of Constitutional Law"—delivered in April 1959 as the Oliver Wendell Holmes Lecture at the Harvard Law School—finds illustration in the third essay, "Mr. Justice Stone and the Constitution." The second essay, dealing with "The Political Safeguards of Federalism," traces the effects on the political complexion of Congress and the role of the President as national leader, which result from the established methods of choosing the two Houses and the electoral college, and which in all probability are more important than the decisions of the Supreme Court in determining the balance of authority between the nation and the states. The fourth and final essay, on "The Issues of the Nuremberg Trial," returns to the theme of judicial method and considers the extension of that method at Nuremberg to determining, on an international basis, individual guilt of war crimes and crimes against the peace.

Professor Wechsler's discussion of controversial issues is temperate and clear. His respect for viewpoints different from his own is genuine, even while he remains firm in expressing the conclusions which all will recognize as the product of extensive knowledge and keen insight. The subjects with which he has chosen to deal possess a continuing importance. The essay on federalism explores both the legal and the political aspects of the selection of the President and Congress, and of the resulting play of forces. Madison foresaw that "'a local spirit will infallibly prevail much more in the members of Congress, than a national spirit will prevail in the legislatures of the particular States'" (p. 55). One consequence is the frequent concern of Congress to preserve state law when federal law might be substituted, in the face of the growing centralization which economic change has fostered. In a land where conditions continue to vary widely, this consequence is, on the whole, a good thing. Another consequence is that national leadership perforce devolves largely upon the President; but his strength may be insufficient to prevail over local sentiment in Congress, as the continuing paralysis of legislation to cope with persistent racial discrimination abundantly illustrates. The effects of equality of large- and small-state representation in the Senate are intensified by the gerrymandering of congressional districts within the states, which produces a disproportionate representa-

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tion of nonurban areas in the House of Representatives, and by the strength in the House and in the electoral college of southern states with relatively small participation in elections. Professor Wechsler opposes the plan for proportional division of electoral votes within the states according to the size of the vote for each candidate in a presidential election; for under it, in the existing political situation, the votes of the underrepresented states of the North would be rather evenly divided, while those of the overrepresented South would remain more unified, rendering the latter an enlarged influence in the Democratic Party and a more attractive bait for Republican campaign efforts. And if such a plan were adopted while each state retained two electoral votes based on its representation in the Senate, any relatively unified small state would possess a similar disproportionate influence. The author's conclusion on this highly important issue seems sound.

Professor Wechsler makes no exaggerated claim in his concluding essay that the Nuremberg trial, with which he was connected, applied a full-scale rule of law. "Those who choose to do so may view the Nuremberg proceeding as 'political' rather than 'legal'—a program calling for the judicial application of principles of liability politically defined" (p. 154). For him, however, the genuine effort at impartiality that was made, the defined basis of judgment in the charter of the Tribunal, and the procedural protections that were given to the accused, established a difference in kind from raw military or political vengeance. The greatest weakness in the scheme lay in the immunity from answerability for their own offenses which the victors enjoyed, and the consequent absence of equality of victors and vanquished before the law. Despite this shortcoming and the inherent weakness of trial by judges coming from the victorious nations, the imperfect expedient of Nuremberg implied "the assumption of an irrevocable obligation—to build a world of just law that shall apply to all, with institutions strong enough to carry it into effect." If this obligation is carried out, "Nuremberg will stand as a cornerstone in the house of peace." If it is not, "we shall hear from the German ruins an attack on the Nuremberg judgment as the second 'diktat' of Versailles; and, notwithstanding the goodness of our intentions, we may have no sufficient answer" (p. 157).

Professor Wechsler's essay on "Neutral Principles of Constitutional Law" will doubtless attract greater immediate interest than the others in this volume, as it did after its previous publication. In his Introduction to the book, Professor Wechsler calls attention to the writings of certain previous critics and invites the reader "to pursue the question further and to reach an independent judgment" (p. xv). There cannot be disagreement with the ideal set forth here, that the decision of constitutional questions by the Supreme Court ought to be on the basis of principles which transcend a particular case, are not tailored to achieve a desired result in the case, and are explicitly enunciated by the Court. The use of the word "neutral" arouses a certain resistance, however, and

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the omission from consideration of important factors in constitutional adjudication gives ground for doubt that should be stated.

A deficiency in the English language, rather than Professor Wechsler's choice of terms, produces the difficulty with the word "neutral" which he acknowledges in his Introduction. Principles which are noble affirmations of some of the basic values of our culture, such as the constitutional principles in the first and fourteenth amendments, cannot be "neutral" in content. Professor Wechsler does not mean that they can, or that the Court should be indifferent to the interests before it. What he requires of the Court is, rather, that it adhere to principles which have not been devised to determine a particular issue for its own sake alone, but which will truly embrace other issues involving the same essential values. It was, he maintains, not enough to justify the outlawry of racial segregation in public schools by enunciating grounds applicable only to Negroes in schools, when white persons also were involved; nor can these grounds afford a basis for a constitutional requirement of desegregation outside of schools, as the Court has attempted, per curiam, to have them do. Greater and more accurate generalization should be the aim; but principles that are merely "general," as all principles are, without the requisite aptness, would not suffice. They must ascertainably transcend the particular issue in a specific direction; but the overtones of the word "transcendent" rule it out as a suitable adjective. Professor Wechsler, therefore, chooses to stand by the word he originally selected, even though, to some, it may convey meanings he did not intend.

The Court, then, in deciding constitutional cases that break new ground is to utter sound and accurate generalizations, whether "neutral" or other. Surely it should if it can; and often it has in the past, as the essay on Mr. Justice Stone demonstrates. But what if the right decision is clear when the right generalization, short of the constitutional provision itself, is not? Surely the decision should be made, rather than a wrong one; and the Court should be chastised only if it utters a harmful generalization, as distinguished from an inadequate one, or if it fails to make use of available resources for formulating better principles. It is hard to discern that the Court has been guilty of either fault in the situations Professor Wechsler reviews. Although the author makes intriguing suggestions of sounder generalizations which might perhaps be developed, he does not develop them. It was, of course, not his task to do so, and an attempt to perform it would in the nature of things have been superficial. More needs to be said, however, about the performance of the Court.

In its constitutional adjudication especially, the Court must adjust inherited principles to new needs, discerning consistency between the two and weeding out inconsistency. When it did so with respect to the commerce and due process clauses in the stressful period that culminated during the service of Harlan Fiske Stone on the bench, it had at its

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3 E.g., New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54, affirming per curiam 252 F.2d 122 (5th Cir. 1958).
command a half-century of critical thought and writing by lawyers, economists, and philosophers, as well as prophetic judges, directed to many of the very issues before it. It and the lawyers who appeared before the Court drew upon these resources. For whatever reasons, no similar body of learning exists with respect to the racial problems and some of the other problems that have arisen recently. In *Brown v. Board of Educ.*, the Court turned to the information supplied by sociologists and psychologists, because, although this information was fragmentary, it was the best available. The failure to achieve a better synthesis and a more adequate level of generalization lay more largely with legal scholars and social scientists, or perhaps simply with the times, than with the Court.

To fulfill the purposes of the Constitution, the Court today is compelled to enter territory which is much less clearly plotted than before. When it perforce relies partly on instinct to find its way, it does not repudiate the light of reason which the clouds obscure. We of this generation are not privileged to know whether or when the clouds will lift and permit a course to be charted more largely with the tools of intellect; but in the meanwhile those who proceed forward with deliberate courage, including by a fortunate dispensation the Supreme Court in the matters mentioned here, merit the recognition which, in time, usually goes to worthy pioneers. The Justices "live greatly in the law" by applying their highest powers to some of the crucial problems of our time. The author has done no less, despite the modesty of his aspiration simply to make the attempt and, if need be, to fail in it (p. 48).

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When I was a boy I had a book that I treasured particularly. It bore the title *Beasts and Men* 3 and was the autobiography of Carl Hagenbeck, known as the father of the modern zoo and celebrated pioneer in the training of mixed animal groups. In his life story the author dwelt at length upon the difficulties of making heterogenous animals perform as a unit. For reasons shrouded by the mysteries of the human brain, this tale came vividly to my memory when I sat down to read and appraise Kaplan and Katzenbach's *Political Foundations of International Law*. Here two younger scholars from slightly antagonistic disciplines—an unruly teacher of international law, and a game-theory-struck expert on international politics—have hitched up to replow and recultivate a ground that had become barren and exhausted. Neither mem-

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3 HAGENBECK, BEASTS AND MEN (Elliot & Thacker abr. transl. 1909).