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CONCERNING THE RESPONSIBILITY AND CRAFTSMANSHIP OF
THE JUDGE: A REVIEW OF JULIUS STONE'S *LEGAL SYSTEM
AND LAWYERS' REASONING*, IN THE LIGHT OF RECENT
CRITICISM OF THE SUPREME COURT

"Use every man after his desert, and who shall scape whipping? Use them after your own honour and dignity: . . ." Hamlet, Act 2, Sc. 2.

J. D. HYMAN*

I. STONE'S FRESH LOOK AT LAWYERS' REASONING

ALMOST 20 years ago Julius Stone's monumental book *The Province and Function of Law*, modestly subtitled *A Study in Jurisprudence*, was hailed throughout the English-speaking world as a major contribution to the subject.¹ Criticisms of detail there were. But the book was generally accepted as, in Professor Patterson's words, the "most comprehensive and thorough survey of the important theories of and about law" thus far to appear in English. As Professor Stone reminds us in the preface to the new volume, the earlier one was divided into three sections entitled *Law and Logic*, *Law and Justice*, and *Law and Society*. He continues:

the increasing acceptance since that time of some such division of the tasks of jurisprudence, and the vast proliferation of scholarship in each of these three areas, has convinced us that the time has come when each area requires a substantial separate volume to be devoted to it.²

The present volume is an expansion of the *Law and Logic* section of the earlier one.³

While most of the material of the older volume is contained in the new one, note has been taken of some criticisms, and the "vast proliferation" of relevant scholarship has been most impressively captured. So authoritative a study of lawyers' reasonings is particularly welcome at the present time when popular attacks on the results of decisions of the Supreme Court of the United States are almost matched in intensity and vehemence by academic criticisms of the quality of those decisions. Pondering those criticisms, I have come to wonder whether we are not exacerbating very real problems by the lack of a coherent, articulated standard for measuring judicial performance. Stone's book should stimulate the effort to achieve one.

The Logical Framework of a Legal System

After a general introduction in Chapter I, Stone devotes three chapters to the explication, respectively, of the efforts of Austin, Kelsen and Hohfeld to

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1. Patterson, 47 Colum. L. Rev. 330 (1947); Cowan, 95 U. Pa. L. Rev. 692 (1947); Wright, 7 U. Toronto L.J. 227 (1947); Campbell, 63 L.Q. Rev. 519 (1947).

2. Stone, p. 1. Subsequent page references without further identification refer to Stone.

3. Additional volumes expanding the other two sections of the earlier book will soon appear under the titles *Human Law and Human Justice*, and *Social Dimensions of Law and Justice*.

formulate general statements about the logical structure of legal systems. Chapter 5, Conceptual Boundaries and Structure of Legal Orders, first deals at length with the problem of defining law. While Stone does not undertake to formulate a firm definition (an omission from the earlier book felt by Professor Patterson to be a deficiency⁴) he does include a presentation of seven steps which he believes to be involved in a definition of law, as lawyers are concerned with it, in the light of juristic thought from Austin to the present.⁵ It is characteristic of the lack of dogmatism which pervades Stone's approach to the problems of jurisprudence, and of his continuous sense of the complexity of law and its manifestations, that he concludes the discussion of the definition of law with the observation that the inclusion of a definition "(even with words of caution) would tempt too many readers to take any definition offered as a short cut or even substitute for the exposition to which the whole volume is devoted, and to which the best the 'definition' can only be a kind of index. As regards the 'definition' of law in general, it is this, rather than the danger of having to eat one's words, which is the gravest sense in which *omnis definitio periculosa est.*"⁶

The second section of Chapter 5, the Structure of a Legal Order, includes a careful analysis of the logical component in the formal structure of a legal order. Stone finds deficiencies in regarding the individual legal norm either as exclusively imperative in character or as an "ought" statement. He suggests that the norm unit must be recognized as being either ordaining in form (imposing an obligation to do or not to do something) or as licensing the doing or not doing. At this point he examines the newly developing branch of logic which uses so-called deontic modalities as possibly having value for jurisprudential analysis, and conversely as being able to benefit from a study of legal modes of thought. In particular he notes that logicians have neglected the situation which may be called absence of law, or legal neutrality, as distinguished from that which involves licensing norms.⁷ This distinction is used by him to differentiate between a closed and an open legal order, the former being a system, like ours, in which judges are obliged to decide every case within their jurisdiction which comes before them, and the latter, arguably, characterizing the international legal order.⁸ Stone then explores the possible utility of deontic logic in the analysis of legal systems. Briefly, the deontic logicians have concluded that the structure of a truth-directed system of propositions connected by the familiar logical relationships of necessity, possibility, contingency, and impossibility is similar to that of a deontic (or ought-directed) system of modalities concerning acts. This similarity makes possible the use, in the latter, of the traditional logical concepts of negation, conjunction, disjunction, implication, equivalence, tautology and contradiction.⁹ Stone then works out a set of formal

4. Patterson, *supra* note 1, at 332.

5. P. 179-83.

6. P. 185.

7. P. 187.

8. P. 190. Stone refers to Lauterpacht's arguments to the contrary: note 127.

9. P. 193.

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propositions, for a closed legal order, which appears to comprehend all the relationships in terms of obligatory, prohibitory, and permissive modes.¹⁰ The addition of another modality permits the set's extension to open legal orders.¹¹ I am not equipped to predict the ultimate value of this method of analysis for law. But it does suggest the possibility of using a formal structure for the purpose of studying the interaction of basic legal relationships and thus minimizing errors of analysis and communication which accompany more rhetorical forms of exposition. This discussion is a good example of Stone's broad acquaintance with developments in current thought and his ability to find tools which may assist jurisprudential analysis.

In this conceptual discussion of legal norms, Stone gives a clear indication of his basic conviction about the limited role logical concepts and processes play in the functioning of a legal order. This he holds to be so even with respect to norms introduced into the legal order by the legislative authority. He asserts that "while by background and training the law-interpreting and law-applying officials usually respect such logical concepts and processes [in using legislative norms], they are neither legally nor psychologically compelled to do so. And in cases where strong reasons of policy are present, even the strongest implications and incompatibilities may find themselves defied."¹² As will be seen, however, this position by no means puts Stone in the category of the wholly capricious, like Juvenal's outrageous housewife, who has become a symbol of the outrageous judge.¹³ At this point Stone makes the helpful observation, to which I will return, that "the relation of superiority-inferiority between norms is a way of expressing the relative value-intensity of norms within the scale of validity of the given legal order . . ."¹⁴ Another clarifying distinction which Stone draws in this introductory analysis is that between juridical concepts (those embodied in the workings of the law) and jurisprudential concepts (those framed by legal scholars for the better understanding of the law's functioning).¹⁵

Fallacies in the Typical Logical Forms of Judicial Reasoning

With Chapter 6, *Logic and Growth in Law*, Stone enters upon the major development of the theme of this volume. He starts by posing the radical question involved in our newly found, or newly re-discovered, awareness of the freedom which judges enjoy: ". . .[C]an we ask judges to be aware of the indeterminacy and other problematics of the notion of the *ratio decidendi*, and yet simultaneously to continue their remarkable past achievements?"¹⁶ It was a question which disturbed Learned Hand when in 1922 he reviewed Cardozo's

10. P. 196.

11. P. 197.

12. P. 202.

13. Kurland, *The Supreme Court 1963 Term, Foreword*, 78 Harv. L. Rev. 143 (1964).

14. P. 202.

15. P. 205.

16. P. 210.

*The Nature of the Judicial Process.*¹⁷ To Stone part of the answer lies in re-framing theories of precedent: "Precedents should be seen as illustrating 'a probably just result in another context for comparison with the present', so that their use thus remains 'a rational means toward judgment', rather than as containing legal propositions of general force independent of their former context, to be used as premises from which to deduce future legal rules."¹⁸ He adds that "the unity within a society of its legal order must finally be found in the less tangible matters . . . ; in the traditional techniques and received ideals of lawyers as a class, and the general solidarity-tendencies of the 'legal' [orders] as in effect a kind of 'culture' within society . . ." There must also be considered "the integrity, insight and wisdom of lawyers, and . . . their knowledge of the world as men . . . [T]he readiness of the lawyers of an age and of the wide society of which they are a part, to come to accept some kind of minimal version of justice between man and man." He also emphasizes in words particularly apposite to our current controversies, the demonstrated capacity of Englishmen to keep modifying moral and political traditions without disastrously shattering consensus. Ideas of this character constantly enter the legal order, "whether covertly through judicial assumptions, or overtly through the open doors of legal standards of 'good faith', 'reasonableness', 'public policy' and the like." He refers to the observation of the English philosopher John Wisdom that effective legal arguments are often "not so much deductions as appeals to convictions on which men have come to recognise that they can safely rest."¹⁹

Before examining the problem in greater detail in the context of the common law system, Stone reviews the problems of growth as they appeared in the experience of the codified law in France and of the received Roman Law of post-medieval England.²⁰ He concludes the chapter with quotations from English and American judges either explicitly acknowledging, or ignoring, by asserting one aspect or the other, the contradiction between the law's growth and its dependence upon logically controlling decisional authority.²¹ There are included some startling recent observations of English judges decrying the role of logic and insisting upon the determinative role of common sense, outlook and impression.²²

More detailed analysis begins with Chapter 7, entitled *Categories of Illusory Reference in the Growth of Common Law*. It might be subtitled: *Logical Fallacies of Judicial Reasoning which Obscure the Development of Change in*

17. 35 Harv. L. Rev. 479 (1922); *Jurisprudence in Action*, 235, 237-38 (1953). If, he said, ours is a period of change in the law, "the development will be self-conscious as never before. How Demos will accept it is another matter . . . Will he awake in a rage when they [the judges] admit that they are not all 'mind,' but entertain a 'will' as well? . . . However, after making all allowances, there will be excellent people who cannot help feeling that the voice of this book is in a way the voice of heresy. . . . They will be troubled at learning all this; and they will be right to be troubled."

18. P. 210.

19. P. 211.

20. Pp. 212-29.

21. Pp. 229-34.

22. P. 230.

Rules of Law. Stone makes it clear that he is not discussing primarily the field marked by the occasional cases which demand a judicial choice free of logical compulsion, but rather "with the much wider one [field] in which decisions and commentation on them still take the form of logical derivation and logical testing."²³ "[I]t is proposed to show that each such illusory category identified, since it does not yield any one necessary answer by the syllogism, both invites and compels the court to an answer based on evaluation, conscious or unconscious, of the social situation confronting it."²⁴ The first such category is called that of "meaningless reference": "the supposed principle by reference to which a case is decided has no possible meaning which can base the decision, . . . even though the court purports to derive its decision therefrom."²⁵ The major example which he gives is the rule fixing the burden of proof. It is usually assigned by determining whether the factual element involved is in terms excluded from the applicable rule as defined, or whether the factual element is not referred to in the rule as declared but is made the subject of an exception. Logically there is no difference "between a quality of a class as contained in the definition of the class, and a quality of a class as contained in an exception to this class."²⁶ Where the legal proposition is stated in an authoritative form, as in a statute, this difference, although not logically significant, may provide the basis for a usable legal distinction. This basis of significance is absent where case doctrine applies and an authoritative form of words is lacking. In the *Constantine* case, for example,²⁷ the question was whether, when the purpose of a contract has been frustrated, the defendant who pleads frustration has the burden of proving that his fault had not induced the frustration; or whether the plaintiff, in resisting the plea of frustration, must establish that the defendant's fault had induced the frustration.²⁸ In declaring that the legal category is meaningless, Stone does not mean that the decision is meaningless or even unsound. His point is, rather, that the legal category from which the courts purport to deduce their decision is meaningless in this context, since it does not logically compel the decision.²⁹

The next category which Stone classifies as meaningless in this sense, is that of "concealed multiple reference." As he describes this approach, "a single legal term or phrase comes to be used to indicate the legal consequences flowing from differing factual situations." The phrase takes on a life of its own as a legal concept, but different sets of facts are recognized as bringing the concept into play. And different results may follow depending on whether one or the other set of facts is used to determine whether or not the concept comes into

23. P. 240.

24. P. 241.

25. *Ibid.*

26. P. 242.

27. *Imperial Smelting Corp. v. Joseph Constantine Steamship Line, Ltd.* [1940] 1 K.B. 812; [1940] 2 K.B. 430 (C.A.); [1942] A.C. 154.

28. Pp. 244-45.

29. P. 246.

play. Complications arise as different verbal formulations are developed to state the concept, depending upon the different fact situations. A concealed multiplicity of reference thus develops, as in the problem of the "passing" of "the property in goods."³⁰ Another example is found in the doctrine of *res gestae*, which he describes as "the lurking place of a motley crowd of distinct conceptions operating in the cases in mutual conflict and reciprocating chaos," involving "at least seven distinct categories each with its own rules."³¹

Next are described "Legal Categories of Competing Reference," the fallacy of logical form in which "two or more legal categories, or their respective logical consequences, each prescribing a different way, overlap in their application to a particular situation."³² One example given is *Haseldine v. Daw*,³³ where different results followed depending upon whether the controller of a lift is assimilated to the occupier of realty or to a common carrier. Another is *Hynes v. New York Central Railroad*,³⁴ discussed by Cardozo in *The Nature of the Judicial Process*. Frequently both categories, being abstractions from solutions for earlier fact situations, fit, although neither exactly. If they yield different results, a choice which is essentially innovatory must be made between them.³⁵

Other forms of statement of legal concepts which carry ambiguities precluding logically compelled results are described as the single legal category with competing versions of reference; the legal category of concealed circular reference, like duty in negligence; circular reference, like implied conditions in contracts and the whole domain of quasi-contract; and, finally, the legal category of indeterminate reference, as embodied in legal standards.³⁶

There follows an extensive re-examination of the proposition that the core notion in a system of precedent, the *ratio decidendi* of a case, is itself a legal category of indeterminate or concealed multiple reference. Stone's principal point here is that there cannot, logically or practically, be one and only one *ratio decidendi* of a case. As one who, like thousands of other law students, was confronted in his legal training with the famous essay of Professor Goodhart³⁷ and struggled blindly to reconcile its thesis, presented as authoritative, with what seemed to be the way in which precedent actually functioned, I find pleasure in a discussion which persuasively puts that proposition firmly to rest.³⁸

Chapter 7 concludes with a presentation of the consequences of the examination just summarized, into the limited role of rigorous logical reasoning in the judicial process. It may be objected that everything said thus far, is merely a wordy repetition of Holmes' succinct assertion, perhaps best known in its formulation in *The Path of The Law*: "Behind the logical form lies a judgment

30. *Ibid.*

31. P. 247.

32. P. 248.

33. [1941] 1 All E.R. 525, *rev'd*, [1941] 2 K.B. 343 (C.A.).

34. 231 N.Y. 229, 131 N.E. 898 (1921).

35. Pp. 249-50.

36. Pp. 252-67.

37. *Determining the Ratio Decidendi of a Case*, 40 Yale L.J. 161 (1930).

38. Pp. 267-80.

as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding."³⁹

Whether or not upon exhaustive analysis, each of Stone's categories would be found to be completely sustained by the case materials and to be independent of the others cannot be determined here. What is most worthy of note, I suggest, is that this discussion by Stone represents a significant effort to reduce to manageable form the fundamental characteristics of the distinctive devices by which our legal system has preserved an appearance of formal logical procedures despite the quite minor role which formal logic plays in the actual process of reaching decisions.

Steps Toward Clarification of the Process of Judicial Reasoning

From this review and analysis, Stone proceeds with a significant attempt to grapple with the important question which follows: what, then, are the constraints upon the judge whose freedom has been so vigorously insisted upon? Stone disclaims any espousal of:

judicial arbitrariness in decision, or even judicial "legislative power" in the sense in which we attribute this to the legislature. The effect of the exercise of the judicial duty to choose within the leeways left by *stare decisis* is, of course, to produce new law, and control and guide its growth; in this sense it may be called "creative" or even "legislative". But unlike that of the parliamentary legislator, the judicial choice is usually between alternative decisions and modes of reaching them presented to the judge by the authoritative materials of the law.⁴⁰

Stone significantly adds a qualification which is frequently overlooked by many who acknowledge verbally that judges must create: "Yet we must be careful not to assume . . . that the area of movement is unimportant, or (still less) that its size is somehow always diminishing by the accumulation of past decisions." He continues:

For the universe of problems raised for judicial choices at the growing points of law is an expanding universe. The area brought under control by the accumulation of past judicial choices is, of course, large; but that does not prevent the area newly presented for still further choices by the changing social, economic and technological conditions from being also considerable. And it has always to be remembered that many occasions for choice arise by the mere fact that no generation looks out on the world from quite the same vantage point as its predecessor, nor for that matter with the same eyes. A different vantage point, and different eyes, often reveal the need for choice-making where formerly no alternative, and perhaps not even any problem, were perceived at all.^{40a}

39. The Holmes Reader, 59, 69 (Marke ed. 1955).

40. P. 281.

40a. *Ibid.*

He sums up his point: "No 'ineluctable logic', but a composite of the relations seen between legal propositions, of observation of facts and consequences, and of value-judgments about the acceptability of these consequences, is what finally comes to bear upon the alternatives with which 'the rule of *stare decisis*' confronts the courts, and especially appellate courts."⁴¹ He adverts, too, to the appeal of logic as providing "symmetry, consistency and automatism," warning that "the ideal of law as 'a work of art' often leads us, especially in a transition period like the present, to neglect the fuller ideal of the law as a just arbiter between living men involved in the conflicts of a real society."⁴²

Chapter 7 closes with a brief discussion of the scope of judicial creativeness in the interpretation of statutes, of some of the effects of judicial unawareness of the leeways within the system of precedent and the judicial duty of choice, and of the logical structure of the illusory categories. The first deals with the situation as it exists in England, and is admittedly far from complete. The second makes the point that judges are often impelled to disregard the leeways of choice, by "conservatism of policy, of emotion, of convenience, or of intellect."⁴³ The third attempts to identify the formal logical errors in each of the illusory categories.

In Chapter 8, Stone enters more specifically upon his inquiry into the kinds of reason and reasoning appropriate for a conscious use of the freedom of judicial choice, leaving for another volume the criteria of justice which may underlie the exercise of that freedom.⁴⁴

As I have been sketching Stone's book, this last chapter becomes a climax: and, in view of the very modest steps toward a solution, it might appear as anticlimax. Perhaps it would have been fairer to him to dwell more on the notably solid job he has done restating and re-appraising the important contributions of Austin, Kelsen and Hohfeld. Yet I feel that as the book is organized and as I have attempted to summarize its development, it not only leads us into one of the most important and pressing problems of twentieth century jurisprudence, but also offers us some useful guide lines for further exploration. Stone gives a summary of the work of some contemporary philosophers who are seeking to devise structures for rational thought in those areas where formal logic cannot do the whole job or even a major part of it.

To a considerable extent what Stone reports is a re-discovery of ancient rhetoric, as formalized by Aristotle and Cicero among others. One characteristic is that starting points for an argument are to be found, not in a single authoritative major premise, but in a group of propositions or principles each of which is rendered acceptable within the given society by the consensus of thoughtful persons in that society. Another characteristic is that the argument does not

41. P. 284.

42. Pp. 285-86. Mishkin & Morris, *On Law in Courts 177-79* (1965) probe additional reasons for the use of logical form in judicial opinions.

43. P. 292.

44. P. 301.

proceed in a single line of development but along parallel lines; in the analogy of the English philosopher, John Wisdom, the argument develops not like the links of a chain but like the legs of a chair.⁴⁵ Similarly, he borrows the metaphor of the Belgian philosopher Chaim Perelman, likening this form of reasoning to "a piece of cloth, the total strength of which will always be vastly superior to that of any single thread which enters into its warp and woof."⁴⁶ Less figuratively, Professor Wisdom's position is stated to be that: "Since the premises offered are severally inconclusive, decision . . . became a process of weighing the accumulation of severally inconclusive items on each side, a choice between conflicting 'probabilities'."⁴⁷ It is surprising that Stone makes no reference to the work of the famous mathematician, George Polya, whose *Patterns of Probable Inference*, published in 1954, was an illuminating attempt to apply the forms of mathematical logic to situations where rigorous and demonstrative reasoning was not validly applicable.⁴⁸

Stone refers at some length to the treatise by Professors Perelman and Olbrechts-Tyteca on "the new rhetorics." Like Polya, they apparently develop a standard of rigor for rhetorical arguments which depends upon the degree to which they approach formal reasoning, including the use of the theory of probabilities to ascertain when such approximations are worthy of credence.⁴⁹ The net result of rhetorical reasoning is persuasiveness rather than logical compulsion. Persuasiveness is not wholly subjective, in the sense of measuring whether the arguments in fact persuade, but rather whether they are worthy of persuading, in terms of their impact upon "a man capable of disciplined, reasoned, unbiased thinking."⁵⁰ Stone does not offer this particular version of the new rhetorics as a *vade mecum* or a perfect formula for measuring the quality of legal argumentation. He suggests merely that "some features of the appellate judicial process which resist rationalisation in terms of deduction from pre-existing legal propositions, fall more easily into place in terms of the notions with which rhetorics work."⁵¹ It may help us to "extend the frontier of reason into territory which (with all but the best judges) has usually been left to the sway of either intuitive choice or spuriously compulsive logic."⁵²

45. P. 327.

46. *Ibid.*

47. *Ibid.*

48. See Hyman & Newhouse, *Standards for Preferred Freedoms: Beyond the First*, 60 Nw. U.L. Rev. 1, 6-7 (1965).

49. P. 329.

50. P. 331. Cf. Garver, *On the Rationality of Persuading*, 69 Mind 170-71 (N.S. April 1960): "We call persuasion *rational* when it is the case both (a) that reasons, facts, or arguments are the agent of persuasion . . . and (b) that these reasons, arguments, etc., are to the point. . . . We may recognise individual cases on each side of the line, but we cannot say out of hand that a person who has been persuaded has changed his mind either rationally or irrationally." "We can say that persuasion has been rational whenever it is the case that there is some decision procedure applicable to the question under consideration—that is, when men have agreed (as they have in science) upon a set of standards or criteria which determine either if a proposal is to be accepted or if it is to be rejected."

51. P. 333.

52. P. 335.

II. JUDICIAL REASONING AND THE SUPREME COURT

Elements in Current Criticisms of the Court

In this last chapter, Stone takes note of the current scholarly controversy in the United States about the work of the Supreme Court. In Professor Herbert Wechsler's call for neutral principles of constitutional adjudication, and Professor Henry Hart's call for the use of "reasoned principles" to build a general body of law based upon a "coherent and intelligible fabric of principle,"⁵³ Stone finds a retrogressive demand for a kind of logical formalism which is not appropriate to the performance of the judicial function as it has been and is being conducted in our system. It does seem odd to one acquainted with the materials on *The Legal Process*⁵⁴ prepared by Professors Hart and Sacks, to accuse the former of aligning himself with a misleading formalism in judicial decision making; for Professor Hart has vehemently insisted upon a rigorous judicial role in reshaping the common law and in applying statutory law. Indeed Stone recognizes that Hart "does not regard the 'reasoned elaboration' which he enjoins on judges as a substitute for judicial concern with policy."⁵⁵ And most of the critics of the Court are sophisticated students of the judicial process generally and quite ready to accept at least the Holmesian version of the creative, policy-making element which is a necessary part of it.

This situation has all the features of a paradox for me. Surveying the literature of the current debate I would hazard a guess that the criticism has three strands which are generally not distinguished; one is sharp disagreement with the Court's policy choices or the wisdom of asserting them judicially; a second is the insistence upon an acuteness and delicacy of legal analysis, and a precision in stating grounds of decision which may be beyond both the capacity of most judges and the requirements of judicial decision-making; the third is a complaint that the reasoning of the Court frequently departs even from reasonable standards of rhetorical argument; or, in Stone's words, not "every argument which does not qualify as 'logical' qualifies as rhetorics (or 'quasi-logical')." Rhetorical conclusions must still be logically *possible*, and their persuasiveness must not depend on logical traps."⁵⁶ Of course these second and third aspects represent a difference of degree; but it is one which seems to me to be crucial.

As a starting point for the examination of the hypothesis, I turn to Professor Philip B. Kurland's ten point indictment of the work of the Court, framed in the words of its own members, mostly in dissenting opinions.⁵⁷ One preliminary observation is in order regarding the plausible strengthening of the indictment by the use of the very words of dissenting members of the Court.

53. P. 317. Hart, *Legal Institutions Today and Tomorrow* 42 (Paulsen ed. 1959).

54. Hart & Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (tentative ed. 1958).

55. P. 318.

56. P. 330.

57. Kurland, *The Court of the Union, or Julius Caesar Revised*, 39 *Notre Dame Law* 636 (1964).

Unlike the critics, the Justices are faced with the painful responsibility for decisions. And despite Thurman Arnold's cavalier dismissal of the utility of collegial discussion,⁵⁸ it remains a fact that at the least an effort must be made to achieve a consensus of five or more on the result and hopefully on an opinion. The vehemence of dissenting language may at times reflect the frustration of intense effort to persuade colleagues in conference. And to find doom in the triumph of a position thought to be seriously and importantly in error and vigorously fought against is a tradition as old as dissenting opinions.

The thrust of Kurland's indictment is indicated in the opening statement of the issue: whether "Caesar has been unduly ambitious and grasping of power,"⁵⁹ and in the closing admonition to the Court to "fling away ambition."⁶⁰

First count: "[T]he Court has unreasonably infringed on the authority committed by the Constitution to other branches of the Government."⁶¹ This charge plainly involves a dispute about policy ("unreasonably"), mingled with an issue as to which constitutional principles define the scope of the Court's authority and responsibility to override other branches.

Second count: "The Supreme Court has severely and unnecessarily limited the power of the states to enforce their criminal laws."⁶² Again we are in the realm of policy, as the adverbs indicate.

Third count: "The Court has revived the evils of 'substantive due process'"⁶³ Probably this count, like the first, reflects a blend of two factors: the normative one of how far the Court should go, and the articulation of the "correct" constitutional principle for the delimitation of the reach of the due process clause.

Fourth count: "The Court has usurped the powers of the national legislature in rewriting statutes to express its own policy rather than executing the decisions made by the branch of government charged with that responsibility."⁶⁴ This would seem to be a debate about the wisdom of the exercise of an acknowledged power and duty of the Court, like all courts, to implement statutes in the direction of imaginatively fulfilling legislative purpose: for it may be doubted that American legal scholars favor a retreat to the rigid approach to interpretation which the English courts have been struggling with.⁶⁵

Fifth count: "The Court writes or rewrites law for the purpose of conferring benefits on Negroes that it would not afford to others."⁶⁶ This is a challenge to quality or honesty of craftsmanship: inadequate regard to *stare decisis* in statutory interpretation, and a manifestation of the tendency, which does appear

58. Arnold, *Professor Hart's Theology*, 73 Harv. L. Rev. 1298, 1313 (1960).

59. Kurland, *supra* note 57, at 636.

60. *Id.* at 643.

61. *Id.* at 638.

62. *Ibid.*

63. *Ibid.*

64. *Id.* at 639.

65. Cf. Bickel & Wellington, *Legislative Purpose and the Judicial Process*, 71 Harv. L. Rev. 1, 14-17, 39 (1957).

66. Kurland, *supra* note 57, at 639.

occasionally, and which Stone joins most legal scholars in condemning, for judges to "act on the view . . . that justice can be done *ad hoc* in each case" ⁶⁷

Sixth count: "The Court disregards precedents at will without offering adequate reasons for change."⁶⁸ Again an issue of bad judicial craftsmanship and possibly *ad hoc* attempts to reach what seems to be a just result in a single case considered in isolation.

Seventh count: "The Court uses its judgments not only to resolve the case before it but to prepare advisory opinions or, what is worse, advisory opinions that do not advise."⁶⁹ This count is objectionable for duplicity. The first part raises some interesting questions about the articulation of the grounds of decision. On the one hand, the demand is, as we have seen, for the pronouncement of principles which will ineluctably decide future cases within the same field of gravity. On the other hand, there is the need to avoid going further than the disposition of the case requires. This would seem to be partly a question of craftsmanship, partly a question of what is meant by an adequately reasoned statement of the ground of decision. The latter part of the count goes solely to craftsmanship.

Eighth count: ". . . [T]he Court seeks out constitutional problems when it could very well rest judgment on less lofty grounds."⁷⁰ A problem of craftsmanship is involved here, related to the one involved in the seventh count.

Ninth count: "The Court has unduly circumscribed the Congressional power of investigation."⁷¹ The use of the adverb suggests primarily a policy disagreement, with perhaps inadequate attention to the proper formulation of the grounds of decision.

Tenth count: ". . . [T]he Due Process Clause of the Fourteenth Amendment as applied by the Court consists only of the 'evanescent standards' of each judge's notions of 'natural law.' "⁷² This count involves the proper articulation of grounds of decision.

The indictment thus summarized is not a complete catalog of recent criticisms of the Court;⁷³ it is limited by the ready availability of dissenting opinions for their statement. Yet it may be presumed that Kurland felt them to disclose the nature of the problem reasonably well, or he would not have used the device. As I understand them, four (the fifth, sixth, seventh and eighth) involve alleged deficiencies in applying, or disregard of the demands of judicial

67. P. 319.

68. Kurland, *supra* note 57, at 640.

69. *Ibid.*

70. *Ibid.*

71. *Ibid.*

72. *Id.* at 641.

73. See, *inter alia*, Kurland, *supra* note 13, at 143-76 *passim*; Pollak, *The Supreme Court 1962 Term, Foreword*, 77 Harv. L. Rev. 62, 65-70 (1963); McCloskey, *The Supreme Court 1961 Term, Foreword*, 76 Harv. L. Rev. 54 (1962); Brown, *The School-Prayer Cases*, (1963) *The Supreme Court Review* 1; Neal, *Baker v. Carr*, (1962) *The Supreme Court Review* 252; Paulsen, *The Sit-In Cases of 1964*, (1964) *The Supreme Court Review* 137.

craftsmanship which informed consensus would regard as appropriate. Two others (the third and tenth) go to the adequacy of statement of the principles upon which decisions are grounded. The remaining four (first, second, fourth and ninth) involve conflicts of evaluation, of policy, of the proper role of the Court in the governmental structure, of political wisdom in the exercise of power. To some degree they may involve the second ground of criticism—insufficiently precise articulation of standards of decision. Yet, while conflicts of evaluation must be debated in terms of the constitutional structure and particular constitutional provisions, they cannot be answered solely in those terms, any more than the question of the validity of judicial review can be answered by ineluctable logical reasoning from specific unambiguous terms of the constitution. In the interests of clarity alone, it is important to consider these issues separately, even though they may frequently be interrelated. For it is a different thing to tell a Justice that you think his policy judgment about the Court's role is unwise or even dangerous to the welfare of Court and Country than to tell him either that he does not understand what kind of articulation of principle is necessary for a valid constitutional decision or that he is incapable of achieving it. The distinction is particularly important if, as I believe, improper standards are being demanded in the course of an attack which is also sharply opposed to the wisdom of the basic policy choice being made.

Disagreement about Evaluation of Interests

Much of the policy conflict, I suggest, turns upon what Stone characterizes as the "relative value-intensity of norms within the scale of validity of the given legal order . . ."⁷⁴ Two examples may serve to illustrate this point. Mr. Justice Black's indictment of the uncertainties of due process under the settled mode of interpretation is accompanied by a passionate conviction that the first amendment should be given an absolute application. It may be, as Professor Alexander Bickel says, that such a position is intellectually vulnerable because it cannot account at all for qualifications which must be made and it therefore obscures the process of decision-making.⁷⁵ Nevertheless the insistence upon this principle illuminates the fact that for Mr. Justice Black a maximum value-intensity attaches to freedom of speech and association. This value is within the constitutional scale of validity. One may, if one wishes, quarrel with the weight he assigns to it on grounds of policy or wisdom; one may claim, with Bickel, that he fails to acknowledge those conflicting principles to which he gives de-

74. P. 202. The selection and ranking of value postulates by judges in connection with the act of judging should not be wholly personal to them and eccentric to the society from which they hold their power of decision-making. It must be rationally justifiable within the frame of reference of that society. But such justification is, I believe, significantly different from the "reasoned elaboration" for which those ranked postulates are the starting points in the handling of authoritative legal material to reach and state the grounds for the decision. Moreover, I believe that the subjective element is necessarily greater in the development of the value postulates than in the latter process. All of this I find implicit in the quotation from Stone in the text.

75. Bickel, *The Least Dangerous Branch* 96-97 (1962).

cisional weight; one may not, I submit, assert that he is a bad judicial craftsman because of the weighting. Similarly, the same Justice's position in Federal Employer's Liability Act cases reflects a strong conviction about the scope which should be allowed to juries. But given that value-commitment, the development in the FELA cases seems to me to be defensible as a matter of legal craftsmanship.⁷⁶

At this moment in history, we are confronted with transitional reformulations of basic constitutional values, notably in the due process and equal protection clauses of the fourteenth amendment. Some parts of the Bill of Rights can be regarded "as statements of a finite rule of law, its limits fixed by the consensus of a century long past." Notwithstanding, the nation has accepted the proposition that, as constitutional postulates, they should be "read as an affirmation of the special values they embody," leaving "room for adaptation and adjustment if and when competing values, also having constitutional dimension, enter on the scene."⁷⁷ The due process and equal protection clauses have no such fixed referent as a point of departure. They opened the walls of our federal structure to forces of the most vaguely defined scope and power, using concepts that were imperfectly formulated and reflected a conglomeration of the highest idealism and the most practical political considerations and compromises. In the name of federalism they were both given, almost from the outset, a very restricted scope.⁷⁸ The development of the due process clause is a study in irony: only in recent years has it become a force in the conduct of criminal proceedings in the states. And only recently has the equal protection clause, like a sleeping volcano, begun to erupt.

I suggest that behind both revolutions there is a common pressure that far transcends any accident of wilfulness on the part of the present members of the Supreme Court. The common pressure arises from the accelerating development of a national and international situation which has forced us to confront the chasm which separates some harsh actualities of our life from some of our most deeply regarded ideals. One of the ideals was that every man was entitled to equal justice before the law. The actuality is that under our adversary system a man cannot get legal justice without competent legal representation. Since 1932, on a case by case basis, the Court has been intervening in dramatic and glaring instances of injustice arising from lack of counsel. The fair trial rule protected us for almost two decades from having to face the issue in its totality. Gideon's trumpet proved the equal of Joshua's: the walls tumbled down and the problem was fully exposed.⁷⁹

76. See Hyman & Newhouse, *supra* note 48 at 11-15; Arnold, *supra* note 58, at 1301-04.

77. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 19 (1959); Selected Essays on Constitutional Law 463, 475 (Assn. of Amer. Law Schools, 1963), hereinafter cited as Selected Essays.

78. See Hyman, *Segregation and the Fourteenth Amendment*, 4 Vand. L. Rev. 555-57 (1951).

79. See Kamisar, Book Review—Gideon's Trumpet by Anthony Lewis, 78 Harv. L. Rev. 478-90 *passim* (1964). As has been said above, the Court's choice of doctrine and techniques for developing doctrine, may at times, or often, be subject to criticism. See,

Another of the ideals was that ours is a land of equality of opportunity in which each man's progress is limited solely by his capacity and drive. The actuality is that minority groups are trapped in an almost inescapable maze of custom, social practice and law which only the extraordinarily lucky or gifted and energetic could traverse. The appearance of Myrdal's *An American Dilemma* in 1944 documented the size of the gap. To compare the mild character and reception of the 1947 Report of the President's Committee on Civil Rights, *To Secure these Rights*, with the tone and impact of the more recent reports of the United States Commission on Civil Rights, is to see how revolutionary was the change in the climate of opinion. Under such conditions, important parts of the value structure grounded in the Constitution have inevitably come under radical reappraisal. That the eruption was triggered by decisions of the Court thrust the Court into the forefront of the working out of the problem. The meaning of the fourteenth amendment is being re-written under conditions of the utmost urgency and under the strain of the deepest emotional involvements. The constitutional issues are as deep as those which confronted the Marshall Court in respect to the judicial power, the scope of the powers of the national government, and the role of the states. Questions have to be asked and answered that far transcend those of judicial technique, although the latter are deeply involved.

The foregoing assertion may be illustrated in Wechsler's treatment of the *School Segregation Cases*. He sees the constitutional issue not in terms of "discrimination at all" but in terms of "the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved." His reaction is shaped by a feeling that there is a valid point to the underlying sociological assumption of *Plessy v. Ferguson* that "enforced separation stamps the colored race with a badge of inferiority" solely because its members choose "to put that construction upon it."⁸⁰ I believe Wechsler to be grievously and demonstrably wrong in his underlying assumption.⁸¹ But the point is that the difference in conviction as to the impact of discrimination profoundly affects the value-set with which one approaches the problem of explaining the legal grounding of that decision: why should the equal protection clause be thought to speak urgently to a situation in which no discrimination is found?

for one persuasive example, Enker and Elsen, *Counsel for the Suspect*, 49 Minn. L. Rev. 47, 48-49 (1964). It may be noted that the problem exposed as a result of the trumpet blast is not confined to criminal cases. Cf. *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964); *The Availability of Counsel and Group Legal Services: A Symposium*, 12 U.C.L.A. L. Rev. 279-463 (1965); Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 Yale L.J. 1317 (1964).

80. Wechsler, *Selected Essays* 485. This was reinforced by a very personal conviction that he suffered as much as a Negro associate when, involved together in litigation before the Supreme Court, they had to leave the Supreme Court building in order to lunch together.

81. See Black, *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421 (1960), *Selected Essays* 844; Pollak, *Racial Discrimination and Judicial Integrity*, 108 U. Pa. L. Rev. 1 (1959), *Selected Essays* 819; Myrdal, *An American Dilemma* 606-18 (1944).

To state it positively, if one is convinced that the non-legal assumption which underlies the *Plessy* decision is totally wrong, and that segregation of the Negro in the United States has been both a symbol and an instrument of discrimination and oppression, then the equal protection clause may reasonably be thought to prohibit action required or systematically supported by the state which manifests those purposes. To be sure, courts are not to probe the motives of legislators. But there are accepted techniques for objectifying that problem, notably the application of presumptions of improper purpose in the use of certain bases for classification which experience shows to have been widely used in order to impose discriminatory burdens. Such presumptions may be overcome by an objectively convincing showing that other legitimate purposes are being achieved. As Professor Louis Pollak has shown⁸² this analysis has footing in earlier Supreme Court decisions. Perhaps the Court is censurable for not having spelled out its argument more fully. The present point is that Wechsler's denial of any principled basis for the *School Segregation Cases* is tenable only in the light of his evaluation of a proposition which is essentially one of fact, whether it be called sociological or psychological.

Another example of the overlapping of criticisms of lack of principled grounds for decision and criticisms of evaluation may be found in a recent address of Mr. Justice Harlan.⁸³ He said: "It does not derogate from steadfastness to the concept of developing constitutionalism in the field of civil rights—even as we must solve by orderly constitutional processes alone the great question of racial equality before the law—to insist upon *principled* constitutionalism which does not proceed by eroding the true fundamentals of Federalism and the Separation of Powers." Obviously there is room for difference of opinion as to the "true fundamentals" of these great principles. And the subordination of a claim of federalism to a claim of civil rights in a particular case may be challenged as unwise on the ground that the former principle is being eroded. But I respectfully suggest that it only confuses an inevitably difficult problem to call such a determination unprincipled for that reason.

Criticism of Articulation of Grounds of Decision

Once we identify as well as we can the differences in weight given to the principles which clash in a given decisional situation, we move to the next problem, which is the quality of the Court's reasoning from the given starting points. At the outset it is necessary to reiterate a proposition which Stone establishes and which will probably not be disputed: that no rhetorical or plausible argument, as distinguished from a formal or demonstrative one, can be perfect in the sense of inescapably compelling the conclusion from sufficient premises. Our problem, then, is essentially one of deciding, not merely whether

82. Pollak, *supra* note 81; Selected Essays 839-40.

83. Address at the Dedication of the Bill of Rights Room, U.S. Subtreasury Building, New York City, August 9, 1964; reprinted By Virginia Commission on Constitutional Government.

a court's reasoning is imperfect, but whether it is so imperfect that it lacks the power to persuade a reasoning person of the soundness of the decision. The point at which one makes this transition depends upon one's view as to the appropriate logical rigor for judicial reasoning. To Bickel and Gunther this appears to approach, if it does not fully reach, the inescapable compulsion of demonstrative reasoning. The Court "must act rigorously on principle."⁸⁴ The "Court does not involve itself in compromises and expedient actions."⁸⁵ Judges must avoid the "forbidden territory" of "judicial impressionism."⁸⁶ Principles of constitutional limitation "must not become cloaks for predilectional judgments."⁸⁷ In the aggregate, these observations lead at least to the threshold of a demand for principles which, when logically applied, will ineluctably decide cases.

A rereading of Wechsler's very subtle, deeply felt, and painstakingly thought out essay, has left me in some doubt if he goes as far as his commentators. He does say that "surely the main qualities of law [are] its generality and its neutrality."⁸⁸ He also says that "the main 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."⁸⁹ If these were the "main" constituents of the judicial process, we would have had no common law after the twelfth century and no twentieth century American constitutional law. And this position seems to be pushed even further when he says: "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."⁹⁰ Unless "adequacy" is carefully defined, this statement approaches the most extreme kind of nineteenth century formalism in law. Elsewhere in his essay, however, Wechsler finds openings for growth which a literal reading of these passages would make impossible. As already noted, he approves the treatment of constitutional provisions not as "statements of a finite rule of law, its limits fixed by the consensus of a century long past" but "as an affirmation of the special values they embody," leaving "room for adaptation and adjustment."⁹¹ And the passages quoted above are followed shortly by one from Mr. Justice Frankfurter which calls upon judges "to find the path *through* precedent, *through* policy,

84. Gunther, *The Subtle Vices of the "Passive Virtues,"* 64 Colum. L. Rev. 1, 3 (1964), quoting Bickel, *supra* note 75, at 69. This and the succeeding brief quotations, torn from context, do not do justice to the care and subtlety of Bickel's analysis, particularly with regard to the rational basis for judicial review (Ch. 1) and the attempt to formulate standards for the exercise of the power (Ch. 2). But the massing of brief quotations by Gunther underscores what I believe to be the ultimate thrust of Bickel's position and of Wechsler's.

85. *Id.* at 5, quoting Bickel at 95.

86. *Id.* at 6, quoting Bickel at 55.

87. *Id.* at 6.

88. Wechsler, *Selected Essays* 473.

89. *Id.* at 472.

90. *Id.* at 475.

91. *Ibid.*

through history, to the best judgment that fallible creatures can reach"⁹² The Court, and its critics, Wechsler insists, must reach their conclusions on criteria "that can be framed and tested as an exercise of reason and not merely as an act of willfulness or will."⁹³ Perhaps wrongly, I read "not merely" here as placing the two phrases in complementary, not contradictory posture, and therefore not out of harmony with the two quotations immediately preceding.

The critics, then, appear to be making two major points. The first is that courts are not free, as legislators are, to pick their results case by case as they may happen to favor one result or another from day to day without regard to what they did yesterday; that they are obligated to give a "reasonable explanation" for their initial value choices and their conclusions in terms of relevant materials which are authoritative for judges. A corollary of this is that courts should not apply a principle authoritative for a given class of situations to one case and not to another merely because of different personal feelings toward those who would benefit from its application in the two cases.⁹⁴ The second point is that the grounds for a decision must be such as to preclude a departure from this norm of impartiality; that is, the principle must logically compel the proper decision of subsequent cases in the same class. Does this overstate the conclusion of the critics as to how "adequate" a statement of reasons must be in order to sustain a judicial determination, particularly one that some other organ of government has transgressed the Constitution? Criticisms of specific decisions tend, I believe, to support this characterization.⁹⁵

In order to illustrate his thesis, Wechsler concentrates on *Shelley v. Kraemer* and the *School Segregation Cases*. With respect to the first, he concludes that it is an *ad hoc* determination of a narrow problem, yielding no neutral principle.⁹⁶ He puts the question in this way:

Assuming that the Constitution speaks to state discrimination on the ground of race but not to such discrimination by an individual even in the use or distribution of his property, although his freedom may no doubt be limited by common law or statute, why is the enforce-

92. *Id.* at 473 (emphasis added).

93. *Id.* at 470.

94. *Id.* at 472.

95. There are some ironies in the whole situation which reinforce doubts about the reasonableness of the standards insisted upon. Thus, Wechsler's statement of the guiding principle has required extended, highly refined commentary in order to communicate the precise meaning of such essentially metaphorical terms as "neutral" and "impersonal" principles. Gunther, while praising Bickel's complete understanding of neutral principles, censures him sharply for failing to achieve them in his own attempt to construct a principle by which the Court may avoid or postpone decisions. Gunther, *supra* note 84, at 10. Dean Erwin Griswold, praising Hart and defending his position against Arnold's answer, finds ineffective the "detailed demonstration of the validity of criticisms he made about the Court," because it is "too labored, too argumentative, and too painstakingly anxious to cover every point. . . ." Griswold, *The Supreme Court 1959 Term, Foreword*, 74 Harv. L. Rev. 81, 83 (1960). Much of the recent criticism of the Court reminds one of T. S. Eliot's criticism in its earlier phase. *Hamlet* was solemnly pronounced "most certainly an artistic failure." "Both workmanship and thought are in an unstable condition." The standard there was the "objective correlative." *Hamlet and His Problems*, in *The Sacred Wood* 98-99 (1928).

96. Wechsler, *Selected Essays* 482-86.

RESPONSIBILITY AND CRAFTSMANSHIP OF JUDGE

ment of the private covenant a state discrimination rather than a legal recognition of the freedom of the individual?^{96a}

A substantial number of legal scholars have found a principle upon which the decision may rest, a principle of the meaning of the state action concept of the fourteenth amendment first announced some thirty years ago by Professor Robert Hale.⁹⁷ The principle, briefly stated, answers Wechsler's question by saying "It is both;" it asserts that because the fourteenth amendment prohibits a state from denying the equal protection of the law to any person, it prohibits the state from lending its aid for the purpose of supporting a practice by a private individual which could not constitutionally be imposed by the state. In order that the domain of private action may not be unduly circumscribed, the theory further provides that the operation of the principle stops when the interest of the actor significantly outweighs the interest of the person acted against. There may be many objections raised to this theory; but I submit that it cannot be said to be lacking in the kind of rationality appropriate to judicial decision-making.

Since the Court has not committed itself to so sweeping a doctrine, or even to the more limited ground suggested by Professor Pollak,⁹⁸ it may be contended that as far as the Court is concerned, the decision remains wholly *ad hoc*. Yet it does not have the taint of the particular kind of *ad hoc* determination most vigorously assailed by the critics: different results on facts which are the same with respect to all or most factors conceived to be legally relevant; different only with respect to factors not conceived to be legally relevant. It is *ad hoc* rather in the sense that a unique combination of factors was felt to invoke as controlling the force of a particular principle. This I take to be the meaning of Hart's statement that on occasion "the instinct of courts" may be "sounder than their articulated rationalization."⁹⁹ And Dean Pound has reminded us that typically the process of articulation may take time: "Out of the struggle to decide the particular case justly and yet according to law, while at the same time furnishing, or contributing to furnish, a guide for judicial decision hereafter, there comes in time a logically sound and practically workable principle derived from judicial experience of many cases."¹⁰⁰ It may be, in short, the kind of *ad hoc* determination which accompanies the first stirrings of a

96a. *Id.* at 482.

97. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 Colum. L. Rev. 149 (1935); Hale, *Rights under the Fourteenth and Fifteenth Amendments against Injuries Inflicted by Private Individuals*, 6 Law. Guild Rev. 627 (1946); Countryman, *The Constitution and Job Discrimination*, 39 Wash. L. Rev. 74 (1964); Haber, *Notes on the Limits of Shelley v. Kraemer*, 18 Rutgers L. Rev. 811 (1964); Gellhorn, *American Rights*, 174-95 (1960); Henkin, *Shelley v. Kraemer; Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473 (1962); Horowitz, *The Misleading Search for "State Action" under the Fourteenth Amendment*, 30 So. Cal. L. Rev. 208 (1957); Williams, *The Twilight of State Action*, 41 Texas L. Rev. 347 (1963).

98. Pollak, *supra* note 81; Selected Essays 819, 822-41.

99. Hart & Sacks, *supra* note 54, at 236.

100. Pound, *The Formative Era of American Law* 123 (1938).

viable new principle. Were the pressures behind the decision in *Shelley* sheer wilfulness or a sound sense of the thrust of the equal protection clause?

The Court had previously declared that zoning ordinances enforcing housing segregation were unconstitutional.¹⁰¹ Restrictive covenants had long been used on an extensive scale to achieve substantially the same result: the zoning of neighborhoods on racial lines. The petitioner came to court with more than a generalized constitutional principle behind him; he came asking how it could be that the Constitution permitted the state to achieve this result in one way but not in another. Similar problems have been recognized to arise in the two cases most frequently considered in connection with *Shelley*, *Marsh v. Alabama*¹⁰² and *Smith v. Allwright*.¹⁰³ The former held constitutional limitations on free speech applicable to the control of the use of streets in a company-owned town which had all of the characteristics of an ordinary incorporated municipality. The latter, in Wechsler's words, held "that the constitutional guarantee against deprivation of the franchise on the ground of race or color has become a prohibition of party organization upon racial lines, at least where the party has achieved political hegemony."¹⁰⁴ There is a common factor in all these cases: the degree to which, and the scale upon which, coordinated private action achieved control over the affairs of a community on matters usually subject to control by formal political process.¹⁰⁵ There are not many similar instances; others may arise which will illuminate the common factors. In the meantime, Professor Thomas Lewis has argued persuasively that they properly rest upon the traditionally legal technique of the development of law by analogy.¹⁰⁶

Whether or not these analyses, or Pollak's, be accepted as wholly satisfactory, I submit that the cases, if not fully articulating a clear ground of decision, reflect the generating force of broader principles that are relevant. It should give us more than brief pause to note that the opinion in *Shelley* was for a unanimous Court.¹⁰⁷ To challenge all of these decisions as wholly lacking in principle is to impose a demand which is not really for principles as distinguished from wilfulness, but rather one which requires grounds of decision in new controversies to be so perfect and complete in analysis and statement that they can be applied logically, with no admixture of policy, to dispose of any subsequent case which involves similar elements.

For another example of the kind of standard being demanded of the

101. *Buchanan v. Warley*, 245 U.S. 60 (1917).

102. 326 U.S. 501 (1946).

103. 321 U.S. 649 (1944).

104. Wechsler, *Selected Essays* 482.

105. *Cf.* Brown, Book Review, 62 *Colum. L. Rev.* 386, 391 (1962) acknowledging at least a possibility that *Shelley* might have a principled basis in "the continuing operation of restrictive covenants as bodies of imposed, if highly localized, law . . ."

106. Lewis, *The Role of Law in Regulating Discrimination in Places of Public Accommodation*, 13 *Buffalo L. Rev.* 402, 413-28 (1964).

107. There were three dissents in *Marsh*, and Mr. Justice Frankfurter concurred only in the result in that case and in *Smith*.

Court, let us look at Bickel's excoriation of the Court's decision in *Shelton v. Tucker*.¹⁰⁸ The example is particularly useful since the writer of the opinion for the Court, Mr. Justice Stewart, is not generally thought to be particularly given to predilectional decision-making. Bickel declared: ". . . [I]t is evident on the face of the opinion that the Court was unable to evolve a principle on which to dispose of this case"; that the decision is a revision of "a mere judgment of expediency"; it is merely to disagree with the legislature on the thoroughness with which the fitness of Mr. Shelton should be inquired into"¹⁰⁹ The case involved a challenge, on constitutional grounds, to a statute adopted in 1958 at an Extraordinary Session of the Arkansas General Assembly which required every teacher in an Arkansas school or university to file an affidavit each year listing every organization to which he belonged or to which he made any contribution during the preceding five years. No Arkansas teachers have tenure; they all are hired on a year to year basis, and they may be denied renewal of their appointments at the discretion of the appointing body. Teachers who fail to file the required affidavit may not be appointed or paid. The filing of a false affidavit is denounced as perjury, punishable by a fine of \$500 to \$1000 plus the loss of the teaching license.

A public school teacher challenged the constitutionality of the statute in a federal district court proceeding; a college teacher, in the state courts. The Supreme Court, five to four, sustained the attack on first amendment grounds. Mr. Justice Stewart begins with the assertion that the case involves two basic postulates. "First. There can be no doubt of the right of a State to investigate the competence and fitness" of teachers in its schools. The Federal Constitution does not require "that a teacher's classroom conduct be the sole basis for determining his fitness." Hence "there can be no question of the relevance of a State's inquiry into the fitness and competency of its teachers."¹¹⁰ "Second. It is not disputed that to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society."¹¹¹ The opinion then states the question to be decided: "is not whether the State of Arkansas can ask certain of its teachers about all their organizational relationships. It is not whether the State can ask all of its teachers about certain of their associational ties. It is not whether teachers can be asked how many organizations they belong to, or how much time they spend in organizational activity. The question is whether the State can ask every one of its teachers to disclose every single organization with which he has been associated over a five-year period."¹¹² The conclusion is: "The statute's comprehensive interference with associational freedom goes far beyond what

108. 364 U.S. 479 (1960).

109. Bickel, *supra* note 75, at 54.

110. 364 U.S. 479, 485 (1960).

111. *Id.* at 485-86.

112. *Id.* at 487-88.

might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers."¹¹³

To me this means that the repressive effects of comprehensive disclosure are very severe and that no adequate justification for such comprehensive disclosure as a necessary measure to aid in determining qualifications has been shown. This sounds like another application of the now familiar principle that when substantial impairment of first amendment freedoms is threatened by state action a compelling justification for the particular impairment must be forthcoming.¹¹⁴ Is this such a leap as to negate the rationality of the conclusion in terms of the premises? Bickel says it is. He argues that "the Court implicitly rested on the premise of previous decisions that the state's interest in the fitness of its employees generally outweighs the desirability of sustaining an atmosphere of freedom of private association."¹¹⁵ I find no basis in the prior cases for an inference that in most circumstances ("generally") any kind of inquiry into fitness of employees will outweigh the interests in the employees' associational freedom no matter how seriously it is threatened. However, having found inadequate what he interprets as the Court's major argument, Bickel seeks other grounds for striking down the statute. He then refers to the portion of the opinion, quoted above, declaring that all teachers could be asked about some associations and some teachers could be asked about all associations. His argument continues: if the Court meant that some associations could not be inquired about, it failed to specify which. Yet, it did imply that some could not be asked about. But if some could not be asked about, then the Court was contradicting its previous assertion that some teachers might be asked about all of their associations. I find no contradiction here. In the light of the overriding premise of the requirement to show a compelling need, the Court's statement means to me that there might conceivably be circumstances under which a need for knowing about membership in particular associations could be demonstrated because of the nature of the organization. And, conversely, that in the case of particular teachers there might be a possibility of showing need to inquire into all of their associations, because of some facts making that need evident with respect to the particular teachers. The Court was not out of hand excluding such possibilities. But it was asserting that a general inquiry into all the organizational ties of all teachers had not been shown to be justified. Bickel concludes this crucial phase of his critique by saying: ". . . it could scarcely be that Arkansas had a permissible interest in finding out how many organizations its teachers belonged to and how much time they spent in organizational activity but might not verify that information by inquiring into the names of the organizations that a teacher had joined."¹¹⁶ I do not under-

113. *Id.* at 490.

114. See Freund, *The Supreme Court and Civil Liberties*, 4 Vand. L. Rev. 533, 550 (1951); Freund, *The Supreme Court of the United States*, Ch. III (1961); Hyman, *Judicial Standards for the Protection of Basic Freedoms*, 1 Buffalo L. Rev. 221 (1952).

115. Bickel, *supra* note 75, at 52.

116. *Ibid.*

stand why it could not be. So generalized an inquiry carries at most a slight threat to freedom of association. It will, of course, produce only general information about the associational interests of teachers as a class. Validation of such information would hardly seem to be significant enough to justify the very serious threat involved in the identification of every association of every teacher. Furthermore, it is scarcely credible that school boards would undertake to test the accuracy of the reporting by actually investigating every organization and finding out how much time each reporting teacher devoted to it. To suggest, as Mr. Justice Frankfurter did in dissent¹¹⁷ that a teacher may have so many commitments that he lacks time for his work, does not appear to meet the Court's position. In the first place, the sheer number of organizations which one joins or supports financially provides only the slightest basis, if any, for an inference that the joiner is giving any time to any of them. Secondly, the organizational involvements of a teacher, or any employee, are only one of an infinite variety of interests which might divert his time and attention from his work. In short, I am unable to see how so uncertain and speculative an inquiry could possibly be thought to justify what the Court assumed, and rightly, to be so grave a threat to organizational freedom.

Bickel lists a number of "principles" which he believes might have been invoked to support the decision. All of them are very specific; for example, that the state might not require the disclosure of certain classes of organizational affiliations because of their special privacy.¹¹⁸ Is Bickel really asserting that the ground for decision is tantamount to no ground because it is not specific enough? Does the obligation to give reasoned grounds for decision require that the grounds always be in the form of rules? Excessive pursuit of "rigorous" principles seems to lead to this.

A like attitude seems to be implicit in Professor Alison Dunham's attack on the ". . . crazy guilt pattern of Supreme Court doctrine on the law of expropriation . . ." ¹¹⁹ The root of the criticism is that the "tendency in the opinions [is] to substitute a vague ethical standard for any objective standard";¹²⁰ to treat just compensation as an ethical judgment as compared with market value "which tends toward an objective standard devoid of such judgment in each individual case." "The most that the Court has been able to develop as guiding principles are indications of some of the factors it considers relevant. The weight to be assigned to these factors in any given case has not

117. 364 U.S. 479, 495 (1960).

118. Bickel, *supra* note 75, at 54. It is not always easy to draw the line between treating a specifically identified object differently because it represents a unique combination of factors relevant to the legal inquiry, and treating it differently because of some attribute not legitimately related to the legal inquiry. The present constitutional status of the Communist Party illustrates this. See, e.g., *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1961); *Garner v. Board of Public Works*, 341 U.S. 716, 720 (1951). It is therefore not beyond reason that under some circumstances the NAACP might validly receive special treatment from the Court.

119. Dunham, *Griggs v. Allegheny County in Perspective*, (1962) *Supreme Court Review* 63.

120. *Id.* at 73.

yet been disclosed."¹²¹ The tendency toward this form of articulation of standards for judgment in lieu of delusively objective rules appears to be pervasive in modern law.¹²² Is not Dunham asking for a return to rules which will provide a substitute for judgment?

Review of these instances of criticism of the Court supports the implication of the terms in which the critics frame their changes. In order to escape from impressionism and predilections, one needs rules which logically compel results when they are applied to new cases. The examples reveal not so much an absence of principle supporting the decisions as a lack of articulation of the principles with enough specificity to preclude the exercise of judgment in its subsequent application. Stone has a pertinent warning: "For the implied claims that a clear dividing line can be drawn between good and bad reasoned elaboration re-bury essential problems which it has taken nearly a century to uncover."¹²³ Current controversy about the Supreme Court does, to be sure, involve the old problems on a new level. The critics do purport to allow for judicial creativity; but they insist that a basis for decision is legitimate only if it both meets the impossible ideal of being perfectly logical and totally exhaustive in analysis, and also is stated in so precise a form that it impersonally decides all future cases coming within its field of gravity.

About eighteen years ago Stone's mentor, Dean Roscoe Pound said:

In a developed legal system, when a court decides a case it seeks first to attain justice in that particular cause and second to attain it in accordance with law; on grounds and by a process prescribed in or provided by law.¹²⁴

Stone's book re-documents this proposition generally for Anglo-American judges. Arriving at a just result in the case before the court and in like cases will continue to be, as it has been, a major pressure upon judges, but only to the extent possible within what Llewellyn called the leeways of the authoritative materials which they must use.¹²⁵ This pressure will prevail over the new demand for a logically complete articulation of the principle supporting the decision, as it has prevailed over the old demand for a logically compelled foundation for the major premise of the decision.

A Unique Standard for Supreme Court Justices?

It may be suggested that what has been said is all right for ordinary judges in ordinary cases, but not adequate for Supreme Court Justices when they exercise the extraordinary power of judicial review. Reasoning which is accepted

121. *Id.* at 81.

122. See Hyman & Newhouse, *supra* note 48, at 30-41. It is interesting to observe that the work of Professor Brainerd Currie in the Conflict of Laws, which has earned him the Triennial Coif Award for outstanding legal scholarship, has been characterized as favoring a system to effectuate relevant governmental policies "on what appears to be an *ad hoc* basis." Hill, *Governmental Interest and the Conflict of Laws*, 27 U. Chi. L. Rev. 463 (1960).

123. P. 317.

124. Pound, *supra* note 100, at 118.

125. Llewellyn, *The Common Law Tradition*, 219-22 (1960).

as adequate when courts are deciding where the right lies as between two private parties, may become inadequate when they are passing upon the action of a coordinate organ of government. Bickel and Wellington, in another context, have proposed the distinction. To this assertion: "There are few occasions when the candid and deliberate confrontation of the truly decisive issue is not the most desirable course for the Court to take," they append this footnote: "We would not venture such a statement if 'courts' rather than 'this Court' were in question . . . Fictions can be useful and a traditional approach may serve to contain the unsophisticated or the willful decision-maker."¹²⁶

This proposal stirs some uneasiness. Is it really to be expected that one small group of judges, drawn from many segments of the profession, can take on wholly new and different modes of functioning? Even more important is the fact that the critics have utterly failed to demonstrate that the performance of the Supreme Court which they condemn represents a fall from some state of grace previously achieved by the Court. Examples of past performance which would illustrate the ideal of neutral principles in Supreme Court adjudication are simply not proffered. Wechsler, in looking to the past, suggests that the Court's crisis in the 1930's was the result of lack of neutral principles for its decisions invalidating legislation under the due process clause.¹²⁷ But was it not rather the pushing of a principle—freedom of business enterprise from regulatory legislation—too far? Regulations interfering with business were struck down unless they were found to be essential for the achievement of some social goal felt to be of overriding importance. It was a case of pushing too hard principles to which the community was no longer prepared to give the highest priority. The difficulty seems to have been one of conflict in values rather than poor judicial technique. But even if Wechsler's interpretation be accepted, it merely reinforces the point that the alleged sins of the present day are not novelties.

Looking further, even a casual survey of the work of the Court raises serious doubt that there has been so grievous a falling off. The decisions of the Marshall Court have been transmitted to us in a magnificent rhetoric which clothed the work of a Justice who can hardly be classified among the less strong-willed occupants of the Supreme Court bench. Perhaps we should avert our gaze from that period on the ground that in those days the foundations had to be laid (would it be fair to rejoin that new foundations have to be laid in these days?). On many of the great issues since then, the Court has floundered and stumbled in the search for an authoritative basis for just results. One respected casebook on Constitutional Law makes this comment on the struggle of the Court to articulate a principle for determining when the silent commerce clause spoke to invalidate and when it spoke to sanction state regulation of local matters which were linked with interstate commerce:

126. Bickel & Wellington, *supra* note 65, at 39.

127. Wechsler, *Selected Essays* 478.

[T]he Court faced a perplexing dilemma in dealing with state legislation. On the one hand was the interest in preserving the established network of local controls On the other hand lay the interest in freeing interstate commerce from burdensome or hostile state regulation. The terse language of the commerce clause was hardly adequate to deal with this problem; the same must be said of the intellectual resources of most members of the court.¹²⁸

The editors also suggested that a way through the dilemma was worked out by Mr. Justice Curtis in *Cooley v. Board of Wardens*.¹²⁹ The distinction there drawn between those "subjects" of the commerce power which "are in their nature national, or admit only of one uniform system, or plan of regulation," and other subjects, did provide a working principle for the Court as I understand principles of decision. But I cannot see how it could possibly pass the new test for qualification as a neutral principle. Within the doctrine, factors might be identified which would bear upon its applicability or not. As Chief Justice Vinson said of the clear and present danger test: "It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words."¹³⁰ I would agree and add: more we cannot expect from principles of decision in those areas which do not lend themselves to rules, or in which we have not yet been able to formulate rules. One wonders, incidentally, how the clear and present danger test would fare under the new standard. It has hardly proved precise enough to dispose of cases impersonally. Yet one doubts that the critics would call the efforts of Mr. Justices Brandeis and Holmes wholly lacking in principle.

Other examples can be readily found. Professor Edward L. Barrett, Jr. fourteen years ago opened a penetrating discussion with these words:

The problem of determining the permissible extent of state taxation of interstate commerce is as old as the Constitution. From Chief Justice Marshall's dissertation upon the subject in 1827 in *Brown v. Maryland* to the present, thousands of pages of words upon the subject have found their way into the Supreme Court reports. Despite this judicial outpouring, however, the Supreme Court of the United States has yet to evolve a satisfactory theory upon which to decide cases in this field.¹³¹

128. Barrett, Bruton, & Honnold, *Constitutional Law, Cases and Materials* 165 (2d ed. 1963).

129. 53 U.S. (12 How.) 299 (1851). The length of the struggle over this doctrinal area is well explored in Dowling, *Interstate Commerce and State Power—Revised Version*, 27 Va. L. Rev. 1 (1940), Selected Essays 280. At the conclusion of this article, Professor Dowling, who described his proposed formulation of the doctrine as one involving a balancing of interests, emphasized the "responsibility which its adoption by the Court would impose upon the Bar." While recent discussion about the Court has occasionally adverted to this basic problem, cf. Dixon, *Book Review*, 16 J. Legal Ed. 473 (1964), I am not aware of any extended consideration of it.

130. *Dennis v. United States*, 341 U.S. 494, 510 (1951). See Dowling, *supra* note 129, Selected Essays 293-94 for a tentative listing of the factors which would be relevant to the balancing standard applied to the commerce clause situation.

131. Barrett, *State Taxation of Interstate Commerce*, 4 Vand. L. Rev. 496 (1951), Selected Essays 324.

RESPONSIBILITY AND CRAFTSMANSHIP OF JUDGE

The principles which clash when states reach into the pockets of business which spreads across state lines are important, although they stir less emotion in the nation as a whole than the other issues which we have been discussing. And the Justices may be thought to be less vulnerable to personal predilections in dealing with them. Does not the protracted struggle to formulate durable and precise grounds of decision in this less charged area suggest that the gropings stem in large measure from the inherent difficulties of the task?

Against this background of history, the demand now being made of the Supreme Court that it perform on a level never attained by any other court appears quite unreasonable. And measured against the examination of the logical character of the judicial process presented in Stone's book, it is seen to be equally so. The Court does and will make judgments of policy the wisdom of which may be questionable. It will commit errors of reasoning and craftsmanship in working out its results. Let us challenge them both. The latter task we will, I believe, be able to perform more effectively if we pursue the lines of inquiry opened by Julius Stone's latest book. But let us not castigate the Court for failure to meet an impossible standard.¹³²

132. Scholarly criticism is, I believe, essential to the most effective functioning of our legal system. To the extent that such criticism indiscriminately mixes policy disagreements and critiques of serious failures of craftsmanship with each other and with condescending irritation at lapses from an impossible standard, its usefulness is likely to be impaired. It may only encourage Cromwellian, self-righteous pugnacity which brushes aside all criticisms lest principles be compromised by yielding to some. Such reactions are not inconsistent with devotion to the highest principle and awareness of the weight of uncommon responsibility.