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THE SUPREME COURT AND CONSTITUTIONAL ADJUDICATION: OF POLITICS AND NEUTRAL PRINCIPLES

Martin Shapiro

Introduction.

For the last several years a great debate has raged over "neutral principles," "standards," and "objectivity" in constitutional law.\(^1\) The debate has been confined largely to the law reviews and the conventional vocabulary of law. The nature of the judicial process, the nature of law, judicial realism, natural law, and statutory interpretation have been the subjects of discussion. Excessive preoccupation with these traditional categories is unfortunate, however, because it obscures several features of the discussion which are of primary importance. It will be the contention of this article that no matter what the vocabulary of debate, the real issues are those concerning the politics of the Supreme Court, not the nature of law and legal reasoning.

Political Jurisprudence.

This tendency of the debaters to talk in legal terms, as one lawyer to another,\(^2\) while their intellectual impetus is actually political, is

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2 Curiously enough, this is true even of Professor Wright's contribution which

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illustrated by the origins of the dispute itself. Aside from occasional angry and gratuitous growls at social scientists, there is little indication from their own writings that the defenders of constitutional neutrality are reacting primarily to developments in political science rather than legal theory and practice. Yet as soon as the literature cited in footnote 1 is placed in the overall context of recent developments in the study of the Supreme Court, it becomes strikingly clear that the standards controversy is an integral part of a broader examination of the political role of the Supreme Court.

In the periods immediately preceding and following Professor Wechsler's catalytic Holmes Lectures, a new approach to the Supreme Court, which might be called political jurisprudence, was appearing. Beginning with The Federalist papers, the Court always had been considered in some sense political. The new approach emphasized the political nature of the Court, but that was not the crux of the matter. The main thrust was that the Supreme Court was a governmental body—not a totally isolated and peculiar subject of study—but one government agency among many, subject to the same modes of analysis as the others.

The executive branch not only executes, but judges and legislates. Congress participates in the administrative as well as the legislative process. The Supreme Court similarly legislates and administers, as well as judges. Just as a great deal of the activity of Congress and the executive branch can be analyzed in terms of interest groups and their access to and accommodation through governmental decision makers, so the Court's decisions can be analyzed and rationalized in terms of the group nature of politics. In American politics the particular decisions of any given governmental agency are never final. They are simply integers in a constantly changing policy equation.
produced by the interaction of many decisions by many agencies. Therefore, the Court's decisions must be considered within the framework of inter-agency relations and the constant shifts in those relations. Since each branch of government has a hand in making policy, the courts are to be treated as part and parcel of the policy making process. The Court votes as does the Congress and the electorate. Voting analysis techniques developed for Congress may, therefore, be applicable to the Court. The Court is a small group of individuals making political decisions. Therefore, the techniques developed by political sociologists for analyzing small group behavior should be applicable to the Court.

The Supreme Court is indisputably a part of American government, and, if for no other reason, it has to exercise political functions. For the followers of this new approach, mostly political scientists, the problem was largely methodological: were the techniques and modes of analysis developed for other political and governmental bodies sufficiently generic to be applicable to the Supreme Court as well? But aside from such methodological concerns, the substantive result of this new approach has been to create or reinforce a vision of the Court as one political actor among many, rather than a unique and isolated, or perhaps insulated, institution.

Political scientists have concerned themselves less with the practical impact of this vision than with its accuracy and usefulness in understanding the operations of government as a whole. Lawyers have been more concerned with the practical effect. There are two reasons for this difference in attitude. First, the political scientist rarely has had any startling success at seeing his ideas shape the destinies of the institutions he studies. He does not yet worry much about the results of his teachings because he has seen so few. But the lawyer, and particularly the law teacher, knows that what he teaches concerning the nature of law and courts today will determine the at-

titudes and actions of the next generation at the bench and bar. He must worry about not only whether what he is saying is true, but how what he is saying affects the position of the courts and his profession. Furthermore, the political scientist feels no vested interest in the institution he studies; the student of the Interstate Commerce Commission does not care particularly whether it lives or dies. The lawyer, on the other hand, has a personal and professional loyalty to courts, a loyalty considerably reinforced by material considerations. Taken at its most cynical or most exalted level, the lawyer's interest in maintaining the health and prestige of the Supreme Court and other courts is a deep and abiding one.

The second reason why the political scientist has not been particularly conscious of dangers in his new approach to the Supreme Court is that he is not aware that he has proposed anything particularly startling or subversive. He says that the Supreme Court is one political agency among many: the President, Congress, the House Rules Committee, the Federal Power Commission, the Bureau of the Budget. But this does not rob the Court of any of its peculiar characteristics. Just as no one is claiming that the President does the same job, needs the same qualities, or has the same weaknesses as the House Rules Committee, no one is denying the Court's institutional uniqueness merely by considering it in connection with other agencies of government. If the political scientist calls the judge, as well as the President, the congressman, the bureaucrat, and the party functionary, a politician, he does not mean—or at least he does not intend to be taken as meaning—that the judge is or should be the same kind of man as the congressman, any more than he means that the Secretary of State ought to think like a ward heeler.

However, from the lawyer's point of view, it must often seem that an increasingly dominant school of thought has been branding the Court as "just one of those outfits in Washington" and the Justices as just a bunch of politicians. What seem to be emphasized are not the impartial, disinterested, law-applying functions of a court which are traditionally and rather vaguely subsumed under the labels "law" and "justice," but the activist, law-making, policy-making, personal preference, and public pressure-oriented functions which the term "politics" suggests. To those particularly concerned with the health of courts, it would seem a black day indeed when this political vision of the Supreme Court became the popularly accepted one. It is this feeling which has given rise to the recent search for neutral principles and constitutional standards.
The call for neutral principles in its mildest form is a plea for reasoned elaboration rather than *ipse dixit* in Supreme Court opinions. There has been particular objection to handling important questions through *per curiam* decisions which simply state the Court's result with no explanation of how or why it arrived at that result except the Delphic citation of a precedent or two. Nor have the commentators been pleased with full opinions which fail to canvass all the relevant issues and rebut the objections of opponents. Too often the majority and dissent have engaged in separate monologues rather than a dialogue. This failure to meet, let alone agree, on the issues indicates that the Justices have not been sufficiently exploiting their opportunities for consultation. Proper consultation would allow them to compose rather than publicize many of their differences and arrive at the reasoned solutions which the give and take of their collective wisdom could provide. Thus, it is argued, both the majority and dissent often have missed or mishandled the crucial legal issues.

So far so good. Everyone is against sin and for a good argument. Not even the most rigorous legal realist prefers a badly written, illogical, incomplete opinion to a clear and learned discourse. But the proponents of "standards" do not mean by "reason" simply the rationalization of the Court's decisions in terms of the logic and rhetoric of the law. For them, reasoned elaboration refers not only to the style and shape of the decision, but, more importantly, to the mode of arriving at it. The Supreme Court must reach its decisions by a process of reasoned conclusion from general principles.

The call for general principles, in its mildest form, is a plea to the Court to decide cases on something less eccentric than personal sympathies for the parties to the particular litigation. Again there can be little objection. Not even Justice Frankfurter's famous khadi

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14 Wechsler, supra note 1, at 11, 15; Brown, supra note 1, at 82; Hart, supra note 1, at 98; Henkin, supra note 1, at 654.
15 Wechsler, supra note 1, at 19, 23; Bickel & Wellington, supra note 1, at 3.
16 Wechsler, supra note 1, at 19; Brown, supra note 1, at 82; Bickel & Wellington, supra note 1, at 3; Hart, supra note 1, at 124.
17 Griswold, supra note 1, at 85; Hart, supra note 1, at 95.
18 Wechsler, supra note 1, at 26-34; Bickel & Wellington, supra note 1, at 3-6; Hart, supra note 1, at 100, 121.
19 Wechsler, supra note 1, at 14-15; Griswold, supra note 1, at 92.
20 Wechsler, supra note 1, at 15-19; Griswold, supra note 1, at 92.
21 Wechsler, supra note 1, at 11-13, 19; Griswold, supra note 1, at 91; Henkin, supra note 1, at 653.
dispensing justice under a tree would be performing satisfactorily if he always decided for the pretty blond and against the wizened crone. However, this approach soon blossoms into a broad attack on result-oriented jurisprudence, not only in the sense of what happens to the particular litigants, but in terms of general social, political, and economic results. The judge should not be swayed by what the consequences of his decision will be. He must content himself with the reasonable application of general principles to particular fact situations. This is not to say that the judge may not look beyond the case before him. Indeed the insistence that the judge must take the long view is the hallmark of the proponents of standards. But the long view he is to take is not of the practical consequences of his decision but of the long-run viability of the standard he enunciates. In other words, his chief concern should not be whether a given decision will for the next twenty years facilitate or hinder the rise of the Negro to a position of equality; rather, it should be whether the standard of equality which he enunciates today will in the next twenty years maintain him in the path of logic and consistency or lead him into the temptation of irrationality. Is the standard he enunciates today sufficiently general and rational to be applicable to the cases which come before him tomorrow?

22 Wechsler, supra note 1, at 11-12; Griswold, supra note 1, at 91.
23 Wechsler, supra note 1, at 15.
24 Wechsler, supra note 3, at xiii-xiv.
25 See, Henkin, supra note 1, at 653. Wechsler subsequently has written the following:

I surely cannot have afforded any basis for the view that I posed an antithesis between "making an enduring contribution to the quality of our society" and resting on "neutral principles." By no possible reading did I say that the Supreme Court "should have cast out of its reckoning the likelihood that a decision one way rather than another would effect 'an enduring contribution to the quality of our society.' What I did say is that it is not enough that a decision makes such a contribution unless it also rests on neutral principles, i.e., was not merely an ad hoc disposition of its immediate problems unrationaled by a generalization susceptible of application across the board.

Quoted in Pollak, Constitutional Adjudication: Relative or Absolute Neutrality, 11 J. Pub. L. 48, 60-61 (1962). But as Professor Pollak says immediately following the quotation:

[Wechsler] apparently would permit his model judge to consider the "contribution to the quality of our society" which might ensue from one or another constitutional choice. But his judge's estimate of the likely impact on American life of a proposed constitutional decision remains a thing apart from the competing constitutional principles whose neutral accommodation yields one or another constitutional result.

Ibid.

I myself cannot see how Professor Wechsler can have his cake and eat it too. If the "enduring contribution" happens to correspond with the neutral solution, then no problem exists. But what if the two are in conflict? Everything Wechsler has written suggests that it must be the enduring contribution which gives way. Thus the decision always will fall where the neutral principle leads it, and the enduring contribution will be at best a fortuitous dividend and at worst a sacrificial lamb to jurisprudential sanctity.
It is here that the notion of neutral principles enters. The judge must be neutral in the sense of bringing to his task of adjudication no predisposition toward any given social or political result except a predisposition toward reason and consistency. He must deal impartially with the conflicting social interests represented by the litigants before him. It has even been argued that the Justices' sole task is to keep the grounds clear for the struggle between interests (business and labor, white and black, for example) and simply record the results reached on the economic and political battlefronts. The ideal seems to be a disinterested non-partisan apolitical judiciary, one which brings no political or economic preferences or values to the bench.

If the judge is not to decide cases on the basis of choice between social interests—or, put another way, between political policies—how is he to decide them? By standards of course; but these standards are not to be generalizations of the judge's own values or policy preferences. What, then, should the standards be and what their sources? These questions constitute the crux of the entire discussion. The plea for neutral principles is not a new tendency in jurisprudential thought, but a very old one wrapped up in a newer vocabulary. For all the occasional bowing to the modern concepts of judge as law maker and human being, the proponents of standards have before them the old vision of the Court as law discoverer, not law maker. The neutral principles or standards are really the objective and eternal rules embedded in a "Blackstonian" body of law and the Constitution, which the judge discovers and applies to the case before him. When the defenders of neutral principles speak of the judge as motivated by reason, not will, they visualize the common law judge who did not command (make law) but simply discovered by deductive and analogical reasoning which of the great verities of the common law controlled the particular set of facts before him. Since the common law itself was the embodiment of reason and was applied by a purely reasonable process, there was no need of, nor could there be any room for, judicial prejudice, fiat, or preference.

Karl Llewellyn in one of his last works offered a peculiar variation on this search for objective standards. Llewellyn, of course, had been one of the principal leaders of the legal realists who had done so much to destroy the judicial myth. He now tried to put it back

28 Wechsler, supra note 1, at 15; Griswold, supra note 1, at 93.
28 Wechsler, supra note 1, at 11.
together again. While admitting that judges make law in the sense of filling the gaps between statutes and precedents, he argued that their discretion is not principally a matter of preference or valuation. Instead the judge is limited and directed by the great traditions of the common law. His task, like that of the great common law judges, is to discover appropriate, natural rules . . . right law. This is a natural law which is real, not imaginary; it is not what reason can recognize in the nature of man and of the life conditions of the time and place; it is thus not eternal nor changeless nor everywhere the same, but is indwelling in the very circumstances of life. The highest task of law-giving consists in uncovering and implementing this immanent law.30

In short, appellate courts do not choose between alternative social policies; they discern the underlying, objective, correct legal principles which govern a given fact situation.

This search for legal standards which the Justices are to discover by the process of collective legal reasoning is little more than the lawyer’s nostalgia for the legal Court and legal modes of discourse which prevailed before the advent of the political Court and political modes of discourse. The constant references to what “first rate” lawyers, i.e., the experts in legal technology, think of the Court reflect this basic urge to lift the Justices out of the vulgarity of politics and public policy back up to their rightful place in the closed circle of those learned and immersed in the law. Curiously enough, even the style in which the debate is carried on indicates the nostalgia for law with a capital L. The proponents of reasoned standards write in measured and learned prose and use the concepts and conventions of the “first rate” lawyers and the law reviews. Their opponents tend to write either in straightforward English often bordering on journalese or in the new jargon of the social sciences as if to suggest that the Supreme Court is not just for lawyers’ lawyers but for anyone interested in politics.

It is for these reasons that the movement toward neutral principles or standards must be viewed as evoked by, and the principal intellectual opponent of, the new political jurisprudence. As shall be seen presently, the opposition is not absolute, but the basic message of the standard bearers is that the Supreme Court must be viewed

not as a "naked power organ" but as one of the "courts of law."\(^3^1\)

Naturally enough, the rebuttal to the neutral principles concept begins by reemphasizing the more recent thought about the nature of the judicial process which the proponents of standards have soft-pedaled. The critics repeatedly emphasize that cases which reach the Supreme Court are the "trouble" or "pathological" or "no-law" cases. It is precisely because no readily ascertainable legal rule satisfactorily disposes of the issue that appeal is had to the highest court. Frequently there is no law to be discovered and the Court must make its own law by balancing the interests of the competing parties.\(^3^2\)

Of course the proponents of standards admit that often courts must balance interests.\(^3^3\) They want the Court to act as an impartial or neutral balancer. The anti-neutrality commentators reply that choice between interests in a given case is impossible unless the judge has some scale of preferences or goals.\(^3^4\) The use of the term "balance" is deceptive because it pictures the judge as a laboratory balance standing rigidly between the two interests and bringing his arm down on the side of the more weighty. The laboratory scale is impartial because advance agreement has been reached both on a standard of measure, e.g., grams, and on the quality or characteristic, e.g., gravitational attraction, deemed decisive between the two contenders. If a choice is made between two apples by putting them on opposite sides of a balance, it has been decided in advance that weight, not volume or color or sweetness, is the preferred quality.

Social interests do not lend themselves to a single accepted standard of measure. They have several characteristics, some of which may be considered relevant, others not. It is difficult for the judge to be neutral because he has no relatively exact scale of measurement like grams or ounces with which to balance. Personal prejudices are likely to creep into inexact measurings. And in another sense it is impossible for the judge to be neutral; unless he has some preestablished hierarchy of values or social goals, some preestablished standards of relevance, how can he determine which characteristics of the interests before him to balance?

Because of the vagueness of social measurement, it must happen

\(^{3^1}\) Wechsler, supra note 1, at 12 (emphasis added); see also, Henkin, supra note 1, at 654.

\(^{3^2}\) Miller & Howell, supra note 1, at 686; Miller, supra note 1, at 146; Mueller & Schwartz, supra note 1, at 585; Wright, supra note 1, at 616-18; Clark, Federal Procedural Reform and States' Rights; to a More Perfect Union, 40 Texas L. Rev. 211, 227 (1961) following Braden, supra note 1.

\(^{3^3}\) Wechsler, supra note 1, at 15-16; Griswold, supra note 1, at 93.

\(^{3^4}\) Miller & Howell, supra note 1, at 691; Miller, supra note 1, at 147.
frequently that two social interests of roughly equal weight—in terms of the number of individuals involved, for example—come before the Court. These interests may be in conflict because the social goals they are attempting to achieve are in conflict. Then the Court must make a decision not only between parties but between goals as well. Judicial choice between social interests implies—indeed requires—social preferences. In the "no-law" case the judge is, therefore, inevitably legislating his preferences.35

Those who oppose "standards" argue that since valuation is inevitable, it would be better to recognize it and turn to a discussion of what values the Court ought to further rather than to ignore the problem by a flight into fictitious neutrality. Real neutrality might be possible for a judiciary which operated within and bowed to a society with a real harmony of interests and values, but the "trouble case" shows that such harmony does not always exist.36 A court which must decide between litigants must decide between the values they represent. Professors Miller and Howell, therefore, insist that the principal duty of the Supreme Court is to develop and freely acknowledge a system of values.37

Thurman Arnold has put this message of the anti-neutralists in its most extreme form.38 Against Professor Hart's plea for more collective judgment and compromise of differences by the Supreme Court, he argues that constitutional decisions hinge on the political and social preferences of the Justices. Since these preferences probably will be strongly held and relatively fixed, neither compromise nor further enlightenment is likely to arise from extended debate in the conference room.

Dean Griswold replies that Arnold is simply incorrect; when students of the law forgather, the product of their collective wisdom is sounder and more acceptable to each than their original notions.39 This is one of the several issues concerning which the scholarly contestants, like the judges about whom some of them complain, just do not meet on common ground. Dean Griswold asserts that a group of legal scholars can come up with correct collective solutions to legal problems. Judge Arnold insists that each member of a group of politicians goes his own way when it comes to making law. Both

35 See, Pollak, supra note 25, at 55-60.
36 Miller & Howell, supra note 1, at 689.
37 Id. at 678.
38 Arnold, supra note 1.
39 Griswold, supra note 1, at 85.
may be right. The issue again becomes whether the Supreme Court is a group of legal scholars or a group of politicians.

It is at this point that the rebuttal to the standards proponents enters and indeed becomes a principal example of political jurisprudence. Professors Miller and Howell note that the "pathological" case which typically reaches the Supreme Court is pathological precisely because no successful solution for it is provided by other government agencies. Professors Mueller and Schwartz note that in the difficult constitutional cases the Court can never be "neutral." The very taking of jurisdiction puts it in potential conflict with the legislature whose decision the Court is about to review. Thus the Court is put back within the context of inter-governmental relations.

The general armament of political jurisprudence is mustered by the anti-neutrals. Society is an interacting set of power relations. The courts deal with social problems. "The Judicial area is, thus, a political battleground. . . . The role, then, of the Supreme Court in an age of positive government must be that of an active participant in government. . . ." If the Court is a part of positive government, its actions must be judged, as are those of other governmental agencies, not on the basis of some internal or inherent rationality, but by their results. Thus Miller and Howell suggest a teleological jurisprudence concerned with the social consequences of judicial decisions. In short, by preferring the concept of a political court to that of the court of law, it is possible to justify that very result-oriented analysis of the Supreme Court which is so distasteful to the "first rate lawyer."

"Teleological" jurisprudence would seem to refer to broad, long range, social results. It does not suggest the bête noire of the believers in principled adjudication: decision according to the identity of the particular litigants. However, too much often is made of separating the particular litigants from the legal or valuational problems they represent. It is the town drunk not the town banker who will in case after case raise the issue of police brutality. The litigant attacking racially discriminatory practices will generally be a Negro and his courtroom opponent a white Protestant American. The separation of litigant from cause tends to be another flight to that fictional land where legal issues present themselves abstracted from social and political situations. If, indeed, the Court is one of several

40 Miller & Howell, supra note 1, at 686.
41 Mueller & Schwartz, supra note 1, at 585.
42 Miller & Howell, supra note 1, at 689.
43 Id. at 683-84.
agencies to which various groups go for help, there is no more reason for the Court to ignore the identity of the groups than other governmental agencies. A legislative committee, hearing rival bills on their merits, still wants to know which came from the Congress of Industrial Organizations and which from United States Steel. A teleological jurisprudence must take account of the effect on particular litigants as well as general social results. At the very least, the result to a particular litigant probably will be indicative of the general social results.

Thus, on the whole, the opponents of standards present a political, result-oriented, law-making court in opposition to the neutralists' apolitical, logic-oriented, law-discovering judiciary.

Neutralists, Anti-Neutralists, and the Political Supreme Court.

When all is said and done the two sides fail to convince each other or the reader because, curiously enough, the anti-standards commentators do not really see the Court in politics, and it is precisely the position of the Court in the political and institutional structure which is at the root of the neutralists' nostalgic yearning for a return to an older "legal" view. While the debate proceeds on the level of the nature of legal reasoning and how, if at all, "neutral" should be defined, the suppressed major problem—and unfortunately it is a problem rather than a premise—is how many and how bold decisions the Court should reach. The decisive issues are those related to the tag "judicial modesty." How strong is the Court? What are the sources of its power? To what extent can it challenge other agencies of government?

In all the excitement over the concept of neutral principles, it is frequently forgotten that Professor Wechsler delivered the lectures which introduced the concept as a reply to Learned Hand's eloquent plea for judicial abdication of most of the power of judicial review. The notion of neutral principles was designed to provide some basis for judicial activism in the face of a long-term, concerted effort by Judge Hand, Justice Frankfurter, and their allies to limit severely or even eliminate the Supreme Court's power to declare statutes unconstitutional.

Wechsler, Hart, et al. attempted to prepare defenses for the Court on two fronts. First of all, the Justices had been subject to attack

44 See, Wright, supra note 1; Henson, supra note 1; Wechsler, supra note 24.
by both the lower courts and the bar. The neutralists, acutely aware of the political fact that the Supreme Court's relations with lower courts—particularly state courts—are based not on command but influence, argued that carefully reasoned and consistent opinions were essential to healthy inter-court relations. That higher courts should give clear and consistent instructions may be looked upon as a moral imperative of justice. That is not the point here. The Supreme Court depends on the lower courts for the administration of its policies. While the Court's language is one of command, the state courts in particular have so many means of delay and avoidance at their disposal that the "mandates" of the Supreme Court are often little more than requests. Therefore, the Court's power is to an important degree determined by the amount of cooperation it can elicit from these lower courts. As in all inter-agency relations, the technically subordinate agencies are likely to be more cooperative when their "superiors" act to make their lives easier rather than more difficult. Lower courts do not like to be reversed. Their role is easiest when they know precisely how the issues before them are likely to be treated on appeal. It is for this reason that unclear opinions, *ipse dixit*, and a multiplicity of opinions make the lower courts unhappy. Therefore, neutral principles in the sense of standards which will be applied uniformly case after case, reasoned explanation as to just how the Supreme Court reached its decision, and a clearly enunciated majority view are, no matter what their abstract validity or philosophic feasibility, politically powerful weapons for the Supreme Court.

It may be that consistency is the virtue of small minds and that the lower court judges are wrong in demanding it, or, as Llewellyn has suggested, are often looking for the wrong kind. Nevertheless, so long as its institutional power rests on the largely voluntary cooperation of subordinates, the Court must please those subordinates no matter how jurisprudentially backward they may be. Although the language may be that of moral or legal imperatives, it is clearly this political fact that lies behind much of the pleading for standards. Whether or not internal consistency is logically or philosophically compatible with the new goal-oriented jurisprudence, it is *politically* compatible; indeed it is politically essential. The Supreme Court must have the support of the lower courts to reach

46 Hart, supra note 1, at 96-99.
47 Supra note 29, at 17-18.
its goals whatever they may be. If consistency is an effective tool for recruiting such support, then consistency there must be.

The lower court judges are not only subordinates to be wooed but, together with the bar, important opinion leaders. Americans are intrigued by expertise. If they want to know if a bridge is sound, they ask an engineer. If they want to know if a court is any good, they are likely to ask judges and lawyers—thus the concern of the proponents of standards with the increasing restlessness of the “first rate lawyers” toward recent Supreme Court pronouncements. All of the cutting things that Judge Arnold says about first rate lawyers as running dogs of the corporations, entranced by the formalistic stupidities of law, may be true. But they will not change the political fact that the Court is stronger for having these opinion leaders on its side.

This notion of the bench and bar as opinion leaders leads to the second front: the general public. The judicial myth of impartiality and non-discretionary application of “correct” legal maxims has lost much of its force in the United States. Since this myth is the principal support of judicial activity, Judge Hand counseled retreat from those areas, particularly decisions on the constitutionality of legislation, where the most damage was likely to be done to what remained of judicial prestige. Wrapping what little was left of his black robe of impersonality around him, the judge was to retire to those fields of law where his policy preferences were least likely to be evident.

If the judicial myth on which the power of the Court rests has diminished in appeal, there are two solutions. The one is, as Judge Hand suggested, to retreat in order to preserve what remains. The other is to hold one’s ground and attempt to repair the damage. This is in effect what the protagonists of standards seek to do. Neutral principles or standards demand that the judge avoid sympathy for particular citizens, social and political preferences, and any arbitrary and unreasoned position on legal issues. Cases are to be decided on the basis of consistently applied standards to be found within the law itself. Differences within the Court are to be ironed out in chambers, not proclaimed on decision days. In short, what is demanded is the traditional myth of the impersonal, non-political, law-finding judge whose decisions are the result of the inexorable logic of the law and not his own preferences and discretion.

48 Hand, supra note 45, at 71-72.
The objection of the standards enthusiasts to *ad hoc* or *ipse dixit* opinions without reasoned elaboration is that the Court's opponents may counter with opposite *ad hoc* opinions. And one *ad hoc* is as good as another. Underlying this position is the feeling that once the Court's opponent, particularly the lay opponent, is lured from simple statements of preference into the "artificial reason of the law," the black robes surely must win.

Professors Miller and Howell have denounced this attempt to rebuild the myth as a jurisprudence of non-disclosure or "squid" tactics—the attempt to avoid discovery by emitting clouds of black ink. But surely this is a strange attitude for those who purport to stress the political dimensions of the Court. The distinction between what the Court says to the public about what it is doing and what scholars say to one another about what it is doing must be held firmly in mind. The politician is not usually asked to speak the language of political science or condemned for not doing so. Suicide is no more moral in political than in personal life. It would be fantastic indeed if the Supreme Court in the name of sound scholarship were to publicly disavow the myth upon which its power rests.

In the long run, and as a matter of general education, it might be best if everyone were told the truth, the whole truth, and nothing but the truth, assuming for a moment that what the anti-standardists have to say is such a truth. But politics is the art of the possible and the here and now. In so far as the standardists' writings are to be taken as counsel to the Court on how its opinions should be written, they seem to constitute sound political advice. Even within the scholarly world the plea for standards cannot be dismissed as obscurantism. Analogies with the physical scientist's search for truth will not do. Atoms are not affected by what scholars write about them. Courts and judges are. If the myth of the Court is destroyed in the law schools, the Court loses power. Surely this is an important truth to be taught, perhaps a more important truth than that about the discretionary role of judges.

Other critics of Wechsler meet the real issues more squarely when they argue that the standards approach might lead to complete

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49 Wechsler, supra note 1, at 12-14; Hart, supra note 1, at 98-99.
50 Miller, supra note 1, at 150.
51 Professor Wright acknowledges this propagandistic value of "neutral" modes of judicial expression (and seems to favor this sort of neutrality), but feels that Wechsler must have meant much more and attacks him for not making clear what more he meant. Wright, supra note 1, at 617-18.
52 See, Miller & Howell, supra note 1, at 664-68. Rosow, supra note 1, at 140, n.37, 145.
If the Supreme Court can act only when it is able to formulate a standard which would yield defensible results in all future imaginable cases, it might be unable to act at all. Such standards are hard to find. Take as an example the seemingly clear standard that the state may not segregate persons on the basis of race. Does that mean that the state may not assign its Negro plain clothes detectives to all Negro neighborhoods and its white to white? There would seem to be few standards indeed which are always applicable, particularly when the trouble case—i.e., the case which typically reaches the Court—is likely to be trouble precisely because it presents a situation in which two principles collide.

If the Court must yield to legislative judgment in every area in which clear, consistent, neutral principles cannot be applied, then it may never be able to challenge the legislature. It is somewhat ominous that about the only neutral principles Wechsler can think of are those connected with the post-1937 abdication of the Supreme Court to Congress in the commerce field. However, the opponents of judicial passivity who cast a wary eye at neutral principles would profit by remembering an old proverb which is constantly being attributed to one wise race or another: "My enemies' enemies are my friends." It has been the most judicially modest judges who have rejected standards and formulas as mechanistic, who have stressed balancing and case by case adjudication, and who have been most unwilling to translate the mandates of the Constitution into general standards for adjudication.

The reason is simple. Standards or principles have a certain "damn the torpedoes" quality. The court that views itself as champion and defender of a constitutional principle is likely to go right out and strike down statutes which violate that principle. Or at least a court, having enunciated a standard which the legislature then proceeds to violate, will be under great pressure simply in terms of self-respect to put the legislature in its place. The unprincipled, unreasoned, ad hoc approach is convenient for judges who wish to talk their way out of conflicts with the legislature whenever they feel too weak for the battle. Standing on principle, in international, barroom, or legislative-judicial relations is likely to lead to a fight.

Standards, when they can be found, are weapons useful to the Court in preserving the judicial myth and urging the Justices to greater boldness. However, if Professor Wechsler means that the

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53 Mueller & Schwartz, supra note 1, at 585-86.
54 Id. at 582-83.
Court may act only when it can find standards, and if the standards for standards are placed so high that few or none can be found, then he has not discovered an alternative to Judge Hand's abdication. Instead he has simply found another road to judicial surrender.

The standards debate, then, cannot be reduced entirely to a clash between political and apolitical jurisprudence. It is true that those who attack the concept of neutral principles do so by stressing the political role of the Court. But they have been so fascinated by the Court as political actor that they have forgotten that it is also acted upon politically. The almost instinctive habit of viewing the Court as a thing apart reasserts itself in concern about what the Court can do to others but not for what others can do to it. Those who favor neutral principles have been worrying about what others can do to it. Thus in many ways they have been more politically perceptive than their opponents. Unfortunately their method of protecting the Court, if carried to its logical extreme, is a return to an "apoliticism" which is intellectually indefensible in the light of present knowledge. Moreover, such a concept is so out of kilter with the demands of the real world that a court attempting to live by it strictly would be doomed to impotence.

The ghost of the original judicial realism, with its motto, "actions speak louder than words," hangs over the whole debate. Actions may speak louder than words, but words do speak and in one sense the Supreme Court's only action is words. In so far as the search for standards is a search for politically effective words, it is a necessary one. Professor Wechsler fears what will happen if the Court is seen as a "naked power" group. Judge Arnold says that such legal theorists "design the clothes which conceal the person of the king and which give him his authority and public acceptance." Surely here is the common ground between the proponents and opponents of neutral principles; and it is a political ground. If the Court is to be successful as a political actor, it must have the authority and public acceptance which the principled, reasoned opinion brings.

Another potential common ground is in the area of valuation and interest balancing. The opponents of neutrality argue that the Court openly ought to pursue certain social values. Surely social values are those things which people value. If Americans want an impartial, non-partisan Court, then that is one of the values the Court might well pursue. When the Court balances interests, the

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55 See, Rostow, supra note 1, at 138.
56 Arnold, supra note 1, at 1310.
American interest in an impartial judiciary is one of the factors which must be weighed. In Professor Truman's terms, large numbers, perhaps most Americans, entertain certain expectations or values about the Court's neutrality—what has been referred to as the judicial myth. Political institutions survive and prosper to the extent that they satisfy widely held expectations about them. Here again the anti-neutralists somehow have abstracted the Court from the political process by imagining that it can sit back, choose long-range social goals or values, and pursue them. A political institution deals in values all right, but not only the long-range goals of society; it must deal with society's immediate values and expectations about the institution itself. It is in this sense, not in the sense of some Platonic form of law, that Wechsler, et al. are correct in arguing that the Court's standards must be drawn from inside—not outside—the law. In framing its opinions the Court must satisfy popular expectations about the legal process. Satisfying such expectations, however, is not a political body's end but its means. One seeks to satisfy expectations in order to build the prestige necessary to pursue policy goals successfully. A court devoted only to creating the judicial myth, and enhancing its prestige, simply would be strutting like a peacock. A court must use the garnered prestige to further whatever long-range goals it has chosen. The standardists have concentrated too much on problems of expectations, institutional survival values if you like, while the anti-standardists have been overly preoccupied with general social values. The two may be synthesized in that muddle of long- and short-term goals, values, and expectations called politics.

The proponents of neutral principles have mounted a major and sustained attack on political jurisprudence. But if the doctrines they espouse as abstract truths and moral imperatives are treated as maxims of prudence, and too often in academic debate good practical advice is transmuted into bad philosophic universals, then they are more than nostalgic retrogressions. If the Court may proceed only when it can find universally applicable standards drawn from the law itself, only when the Justices have purged themselves of policy preferences, and only when collective wisdom has reached a reasoned decision beyond the level of rationalization, then the standards protagonists have struck not only for an apolitical court but for a relic of ideas gone by. But if they mean that the Court should shape its opinions to recruit popular and professional support, compose its internal dif-

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57 Truman, supra note 4, at 498.
ferences where possible, and make the preservation of the judicial myth an important determinant of when and where to act, then they have offered cautions which the Court as a political body should heed.

The question then becomes one of political strategy. The availability of standards becomes one of the factors in the political equation. In those areas where standards are most readily available and reasonably defensible, the Court enjoys the greatest freedom to act. Where standards are more difficult to formulate, or where the Court is badly split over what standards to apply, the potential damage to the Court's prestige must be weighed against the results. Where the creation or selection of standards would bring the Court into open collision with a politically powerful opponent or force it to do a patent injustice, then standards may not be the order of the day.

**Conclusion.**

It would be presumptuous indeed to suggest that the debate over standards might well end at this point. But at least it might shift to a new level. Both sides have agreed that the word "neutral" is not sufficiently precise.\(^5\) Both have acknowledged that if principles do exist they are few and difficult to find.\(^5\) Both visualize the judge as a balancer of interests. Both would prefer carefully reasoned, fully articulated opinions to vague meanderings.\(^5\) Both have declared that the Supreme Court is in some sense political.\(^6\)

Both sides should now recognize that the nostalgic yearning of bench and bar for a pre-political jurisprudence, for what one of the contestants has called "the return to doctrine,"\(^6\) is an existential reality—a fact of American political life. The lawyers, both as practitioners and judges, are an important constituency of the Court and, as opinion leaders, an important factor in the Court's relations with its broader constituency, the American public. Proponents of the new or political jurisprudence must listen to their opponents—not to counter their apolitical arguments—but to take account of the political facts which those arguments represent. To put it bluntly, the real problem is how the Supreme Court can pursue its policy goals without violating those popular and professional expectations of "neutrality" which are an important factor in our legal tradition and a

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\(^5\) See, Wechsler, supra note 24.
\(^6\) See, Wright, supra note 1, at 617.
\(^6\) See, Wechsler, supra note 1, at 15.
\(^6\) Henkin, supra note 1, at 652-53.
principal source of the Supreme Court's prestige. It is in these terms, not in terms of the philosophic, jurisprudential, or historical correctness of the concept of neutral principles, that the debate should now proceed.