
“Neutral” Principles: Rethinking the Legal History of Civil Rights, 1934–1964

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I. INTRODUCTION

“[T]he question posed by state-enforced segregation is not one of discrimination at all.”¹ So proclaimed Columbia law professor Herbert Wechsler to a surprised audience at Harvard Law School in April 1959. Hardly a southern segregationist, Wechsler’s words suggested a shocking indifference to the plight of African Americans in the South, not to mention a puzzling rejection of the Supreme Court’s landmark decision in *Brown v. Board of Education*.² “I find it hard to think,” Wechsler exclaimed, “that [*Brown*] really turned upon the facts.”³ “Suppose,” he posited, “that more Negroes in a community preferred separation than opposed it?”⁴ What if, he pondered even more bizarrely, blacks were “hurt” by integration?⁵

Wechsler’s doubts about integration, and the fact that he chose to express them just as massive resistance to *Brown* was entering a decline, have puzzled scholars for almost five decades.⁶ Yet, they

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1. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) [hereinafter Wechsler, *Principles*].

2. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

3. Wechsler, *Principles*, *supra* note 1, at 33.

4. *Id.*

5. *Id.*

6. For scholars who reacted negatively to Wechsler’s *Neutral Principles*, see Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960) (defending the

formed the basis of one of the most important law review articles of the twentieth century.⁷ “*Toward Neutral Principles of Constitutional Law*,” an expanded version of Wechsler’s 1959 Harvard address, gained instant notoriety for blasting the Warren Court’s “*ad hoc*” jurisprudence, meanwhile establishing firm guidelines for how the Supreme Court should practice judicial review.⁸ Even in cases where petitioners may be sympathetic, argued Wechsler, the Court should rely on “neutral principles” that “transcended” immediate parties’ interests.⁹

While critics have derided Wechsler for endorsing a rigid reliance on “neutrality” at the expense of racial justice, a close look at historical events both preceding and following his 1959 speech suggests a remarkably different thesis: Wechsler advocated legal neutrality not to thwart racial justice, but to achieve it. As this article will illustrate, Wechsler called for a federal “reconstruction” of the South as early as 1934, long before the Warren Court decided *Brown*.¹⁰ Further, he endorsed federal anti-lynching legislation from 1934 to 1938, and

segregation opinions as accurate interpretations of the law and the facts); Ira Michael Heyman, *The Chief Justice, Racial Segregation, and the Friendly Critics*, 49 CAL. L. REV. 104 (1961) (stating that critics of the *Brown* opinion have read it incorrectly); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 265–68 (1992); Arthur S. Miller & Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960) (suggesting that searching for values which judicial process can further is preferable to attempting false neutrality); Richard Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223 (1981) (suggesting a move away from a “process-oriented” view of constitutional law); Gary Peller, *Neutral Principles in the 1950s*, 21 U. MICH. J. L. REFORM. 561 (1988) (exploring what makes the Wechsler article “hard to grasp” and describing the legal thought that was prevailing at the time the article was written); Louis H. Pollak, Jr., *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959) (suggesting that the decisions with which Wechsler takes issue may be defended with constitutionally neutral principles); Martin Shapiro, *The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 GEO. WASH. L. REV. 587 (1963) (arguing that the political role of the court may not be ignored); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) (concluding that both interpretivism and neutral principles theories of constitutional law can succeed only by abandoning their initial purpose). For the decline of massive resistance in 1959, see NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950S*, at 320–39 (2d ed. 1997).

7. Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503, 505 (1997); Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 982 (1978); Fred Shapiro, *The Most Cited Legal Scholars*, 29 J. LEGAL STUDIES 409, 424 (2000); Fred Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 760 (1996); Cass R. Sunstein, *Neutrality in Constitutional Law*, 92 COLUM. L. REV. 1, 3 (1992).

8. See sources cited *supra* note 7; Wechsler, *Principles*, *supra* note 1, at 15.

9. Wechsler, *Principles*, *supra* note 1, at 17, 19.

10. Herbert Wechsler, Book Review, 44 YALE L.J. 191, 193 (1934) [hereinafter Wechsler, *Review*].

personally salvaged the defense of black communist Angelo Herndon against charges of inciting insurrection in Georgia from 1935 to 1937.¹¹

During his engagement with Herndon's case, which went to the Supreme Court twice, Wechsler came to realize that couching claims in neutral terms might have strategic value for black clients. After suffering a procedural defeat before the Supreme Court in 1935, Wechsler downplayed Herndon's status as an African American male and emphasized the fact that he was a hero of labor, directly tapping into a surge in popular support for "labor's rights" following the 1936 presidential election.¹² At the same time, Wechsler re-characterized the normative basis of his client's appeal, arguing that instead of helping blacks mount a "revolution" in Georgia, he was in fact stabilizing majority rule, catering to conservative fears of radical politics in the 1930s.¹³ In both instances, Wechsler downplayed Herndon's race and emphasized aspects of his case likely to appeal to whites, whether they identified with the Right or the Left.

Neutrality, for Wechsler, was not simply a call for deciding cases in a particular manner that reinforced doctrinal consistency or upheld the "legal system's legitimacy."¹⁴ Neutrality also had strategic value. Cognizant of the depths of racism in the United States, Wechsler used facially neutral legal arguments again and again to advance black interests in a manner that eluded charges of favoritism and avoided political backlash. Often, this meant focusing on improving black access to the political process. Inspired by the mass politics of the International Labor Defense in the 1930s, Wechsler developed a strategic liberalism that used federal law to undermine insurrection statutes in 1937, weaken the white primary in 1941, and publicize black

11. *Id.*; Norman Silber & Geoffrey Miller, *Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 873 (1993) [hereinafter Wechsler, *Selections*].

12. Compare Brief for the Appellant, *Herndon v. Georgia*, 295 U.S. 441 (1935) (No. 665), with Brief for the Appellant, *Herndon v. Lowry*, 301 U.S. 242 (1937) (Nos. 474-475). Risa Goluboff discusses the rise of labor's rights in RISA GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 30 (2007).

13. Brief for the Appellant, *Herndon v. Georgia*, *supra* note 12. For the radicalization of American politics in the 1930s, see WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940*, at 183-84 (1963); ARTHUR M. SCHLESINGER, JR., *THE POLITICS OF UPHEAVAL: THE AGE OF ROOSEVELT, VOL. III* (1961).

14. Friedman, *supra* note 7, at 516; see also Sunstein, *supra* note 7; Greenawalt, *supra* note 7. This article does not maintain that Friedman, Greenawalt, and Sunstein are wrong to assert that Wechsler possessed an interest in doctrinal consistency and legal legitimacy. He did. What this article suggests is that when it came to the question of advancing minority rights, Wechsler also believed that neutrality had strategic value.

protest in 1964.¹⁵ While constitutional theorists like John Hart Ely criticized Wechsler's adherence to neutral principles on the grounds that they did "not by [themselves] tell us anything appropriate about their content," that was precisely why Wechsler endorsed them.¹⁶ In fact, in a manner that prefigured Ely's own endorsement of political process theory, Wechsler pursued process-based approaches to civil rights reform precisely because they appeared more neutral than claims cast in terms of morality, racial justice, or fundamental rights.¹⁷

Taking Herbert Wechsler's endorsement of neutral principles as a starting point, this article will examine Wechsler's engagement with the "long" civil rights movement, showing how lessons that he learned from communists in the 1930s influenced his approach to civil rights lawyering and legal process in the 1940s and beyond.¹⁸ It will build on Kenneth Mack's argument that rights-based liberalism was not the only approach to civil rights reform in the post-World War I era, nor was legal process as unresponsive to civil rights as scholars like Akhil Amar contend.¹⁹ In fact, while most scholars agree with Amar that legal process failed to come to "grips" with civil rights, Wechsler suggests the opposite is true.²⁰ As the Warren Court's activist approach in

15. One claim of this article is that Wechsler represents a holdover of what Kenneth W. Mack terms the "mass politics" and "Marxist politics" of the 1930s. See Kenneth W. Mack, *Law and Mass Politics in the Making of the Civil Rights Lawyer, 1931-1941*, 93 J. AM. HIST. 37, 38 (2006) [hereinafter Mack, *Politics*]; Kenneth W. Mack, *Rethinking Civil Rights Lawyering in the Era Before Brown*, 115 YALE L.J. 256, 306-07 (2005) [hereinafter Mack, *Rethinking*]. The three cases are *Herndon v. Lowry*, 301 U.S. 242 (1937); *United States v. Classic*, 313 U.S. 299 (1941); *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

16. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 55 (1980).

17. *Id.* at 43-54. That Ely did not see a link between *Neutral Principles* and his own process theory may have been due to the fact that Wechsler did not advertise the fact that there was a strategic component to his neutral principles argument. As this article will show, however, Wechsler prefigured Ely's focus on the "access" prong of political process theory. For more on the access versus prejudice prongs, see Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747 (1991) (defending Ely's reconciliation of judicial review and democracy).

18. I borrow the term "long civil rights movement" from Jacquelyn Dowd Hall's *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. OF AM. HIST. 5 (2005).

19. Though not a communist or grassroots organizer, Wechsler endorsed an approach to reform that cast law in a supporting role to social movements, something that Mack identifies alternately as "mass politics" or "Marxist politics." See Mack, *Politics*, *supra* note 15, at 302-09; Mack, *Rethinking*, *supra* note 15, at 1, 26.

20. For a sampling of prominent scholars who argue that legal process never fully came to terms with *Brown* or the civil rights movement, see Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 703 (1989) (reviewing PAUL M. BATOR, ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1988)); William N. Eskridge, Jr. & Philip P. Frickey, *Historical and Critical Introduction* to HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* cxiii (1994)

Brown faltered, Herbert Wechsler's strategic version of legal process came to the rescue, directly aiding the direct action campaigns in Mississippi and Alabama in 1964 and 1965. To explain how this happened, this article will proceed in four parts. Part II will show how Wechsler became interested in southern racism in the 1930s, argued for federal intervention in the South in 1934, and developed an appreciation for the strategic deployment of neutrality while working for the International Labor Defense (ILD) on two separate appeals for Angelo Herndon in 1935 and 1937. Part III will show how Wechsler continued to advance minority interests in the 1940s, by focusing on increasing minority rights or voting access. Part IV will discuss *Neutral Principles* and the events immediately leading up to Wechsler's critique of *Brown* in 1959, showing how the negative treatment of black students in Little Rock, together with the Court's muddled reasoning in desegregation suits from 1954 to 1959, informed his *Neutral Principles* address. Part V will show how Wechsler put theory into practice in *New York Times v. Sullivan* in 1963, providing the Supreme Court with a more strategic, process-oriented angle for advancing black interests than the one advanced by the National Association for the Advancement of Colored People (NAACP) in *Brown*.

II. DEFENDING COMMUNISTS: HERNDON'S CASE

Born in New York City in 1909, Herbert Wechsler grew up far from black life in the American South. His grandparents on both sides were Hungarian Jews. His father practiced law in New York, and Wechsler himself spent his early life in the city, attending public schools and then City College before entering Columbia University Law School in 1928. During his second year at Columbia, Wall Street suffered one of its most dramatic downturns in history, triggering a severe economic depression that would last for over a decade.²¹

(discussing a lecture given by Henry Hart to his final "Federal Courts" class); HORWITZ, *supra* note 6, at 255; LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 42 (1996); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (discussing the dichotomy between individualism and altruism as legal doctrines); Mark V. Tushnet, *Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307 (1979) (defending Oliver Wendell Holmes' criticism that the common law developed without any single unifying theory). Michael J. Klarman is one of the few legal scholars to recognize the potential of political process thinking for civil rights. Klarman, *supra* note 17. While some might argue that "political process" and "legal process" are not exactly the same, Ely's sanction of Supreme Court intervention in order to improve minority "access" to the political process coincides closely with the emphasis that legal process theorists placed on the institutional competency of courts vis-a-vis legislatures. Laura Kalman even goes so far as to argue that Ely represented legal process theory "at its purest." *Id.* at 91.

21. Wechsler, *Selections*, *supra* note 11, at 854.

One year into the Great Depression, Wechsler graduated, gained a teaching position at Columbia from 1931 to 1932 and then, after the 1932 spring semester, won a prestigious clerkship with former Columbia Law School Dean and Supreme Court Justice Harlan Fiske Stone. Stone, at the time, was one of Wechsler's heroes.²² His tendency to side with realist justices Oliver Wendell Holmes and Louis Brandeis in favor of upholding state and federal business regulations against formalist notions of substantive due process impressed Wechsler, who possessed an "unqualified disdain" for the Court's *Lochner*-era jurisprudence.²³ Wechsler viewed the conservatives on the Court, men like George Sutherland, Pierce Butler and James C. McReynolds to be undemocratic, meanwhile admiring Stone, Brandeis and Holmes for supporting progressive business regulations and Roosevelt's ambitious New Deal.²⁴

While Wechsler admired Stone for supporting the New Deal, he did not view him to be a champion of minority rights.²⁵ Though the Republican Justice would later become famous for suggesting that the Constitution be read to protect "discrete and insular minorities" in 1938, the parties most responsible for bringing questions of minority rights to national attention in 1932 were communists.²⁶ This became clear in 1931, when the Communist Party USA, the Young Communist League, and the Communist Party's legal advocacy wing, the International Labor Defense took up the case of nine African American defendants falsely accused of raping two white women in Scottsboro, Alabama.²⁷

The ILD won representation of the defendants over NAACP and waged a massive political campaign to raise awareness for the

22. *Id.* at 854.

23. *Id.* at 865.

24. *Id.* Stone's support of the New Deal was qualified. He feared the manner in which Roosevelt accumulated power during the New Deal, even as he came to recognize the necessity of at least some degree of government control of private industry. ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 371, 446, 544 (1956).

25. Herbert Wechsler, *Stone and the Constitution*, 46 COLUM. L. REV. 764, 795 (1946) [hereinafter Wechsler, *Stone*].

26. DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 137-73 (1969); GLENDA ELIZABETH GILMORE, DEFYING DIXIE: THE RADICAL ROOTS OF CIVIL RIGHTS, 1919-1950, at 67-105 (2008); ROBIN D. G. KELLEY, HAMMER AND HOE: ALABAMA COMMUNISTS DURING THE GREAT DEPRESSION 152-58 (1990); CHARLES H. MARTIN, THE ANGELO HERNDON CASE AND SOUTHERN JUSTICE 18-19 (1963); HARVARD SITKOFF, A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE, THE DEPRESSION DECADE 139-68 (1978); PATRICIA SULLIVAN, DAYS OF HOPE: RACE AND DEMOCRACY IN THE NEW DEAL ERA 70-71 (1996).

27. SITKOFF, *supra* note 26, at 146.

“Scottsboro boys.”²⁸ Convinced that litigation alone would fail, the ILD advocated “mass action outside of courts and legislative bodies,” staging protests, rallies, and demonstrations to free the nine black defendants.²⁹ From 1931 to 1932, the ILD and its communist allies held mass demonstrations in Chicago and New York, staged a mass rally in front of the White House, and even sent the mothers of the Scottsboro boys on a national tour.³⁰ Meanwhile, the ILD and the Communist Party churned out reams of propaganda in publications like *The Daily Worker* and *New Masses*, propaganda that, by 1932, bled into more mainstream publications like *The Nation*, the *New Republic*, and the *New York Times*.³¹ By the time the case reached the Supreme Court in the fall of 1932, figures as disparate as Albert Einstein, H.G. Wells, and Maxim Gorky were speaking out against the persecution of the nine defendants.³²

In what appeared to be a direct response to the political pressure applied by the ILD, the Supreme Court intervened to help the Scottsboro boys.³³ In November 1932, while Wechsler was clerking for Stone, otherwise conservative Justice George Sutherland reversed and remanded the convictions of the nine African American defendants, applying the Fourteenth Amendment to extend the Sixth Amendment right to counsel in death penalty cases to the states.³⁴ Though Stone joined Sutherland’s opinion, Wechsler left his clerkship the following spring convinced not that his Justice had pioneered the struggle for racial equality, but that the ILD had.³⁵

As the ILD returned to the Deep South to continue fighting for the Scottsboro boys, Wechsler brought a newfound concern for racial injustice with him north to Columbia. In 1934, Wechsler came out in favor of federal anti-lynching legislation in the prominent *Yale Law*

28. CARTER, *supra* note 26, at 54–100; SULLIVAN, *supra* note 26, at 87–88; SITKOFF, *supra* note 26, at 146–47.

29. SITKOFF, *supra* note 26, at 148; CARTER *supra* note 26, at 59, 141–43, 244.

30. SITKOFF, *supra* note 26, at 146; CARTER *supra* note 26, at 146–47, 248–51.

31. SULLIVAN, *supra* note 26, at 87–88; SITKOFF, *supra* note 26, at 146–47.

32. SITKOFF, *supra* note 26, at 147.

33. *See Powell v. Alabama*, 287 U.S. 45 (1932). While it is impossible to know whether the ILD actually influenced the Court, the organization’s campaign did impress Wechsler.

34. *Id.*

35. Wechsler recalled Stone’s attitude towards minority rights to be one of relative “ambivalence” in the early 1930s, not truly congealing around the idea of protecting minority access to the political process until 1938. This stood in marked contrast to the communist intervention on behalf of southern blacks in 1931. Wechsler, *Selections*, *supra* note 11, at 873–79.

Journal.³⁶ Lynching, a problem that had gradually been in decline in Dixie, spiked in 1930 and continued to rise through 1932 and 1933.³⁷ This violence led to a surge in anti-lynching activism as the NAACP pushed for the enactment of a federal anti-lynching bill and New Deal liberals like Will Alexander, then employed by the Roosevelt administration, formed a commission to study the problem.³⁸

In a review of two books on lynching sponsored by Alexander's commission, Wechsler argued that "significant reconstruction" of the South was necessary and that federal legislation was "[f]ar more" likely to achieve reform than solutions sponsored by southern states.³⁹ In fact, Wechsler strongly advocated federal judicial intervention in southern affairs, noting that federal prosecutors "answerable to Washington," federal judges "enjoying life tenure," and federal jurors "drawn from a higher economic and social stratum" promised to be much more effective than "the southern legislator."⁴⁰ Further, if anyone regarded the question of race relations in the South "as local and unfit for federal action," continued Wechsler, they should "reread the Fourteenth Amendment."⁴¹

These were remarkable claims. Not only did Wechsler express a considerable degree of support for federal intervention in the South, a position that contradicted his earlier anti-*Lochner* aversion to judicial intervention in state affairs, he even anticipated a second "reconstruction" of the region, something that would not come to fruition until the 1960s. Further, Wechsler endorsed a bold reading of the Fourteenth Amendment in favor of racial minorities, something that the Supreme Court would not engage in until the 1950s. Four years before his mentor Harlan Fiske Stone articulated a concern for discrete and insular minorities in footnote four of *Carolene Products*,⁴² Wechsler articulated an express interest in using federal power to ameliorate the injustices suffered by southern blacks. Not only did he see a need to stop lynching, he lamented "the political impotence" that black voters suffered under poll taxes, literacy tests, and other modes of

36. Wechsler, *Review*, *supra* note 10, at 193.

37. SITKOFF, *supra* note 26, at 244–45.

38. *Id.* at 270–74; SULLIVAN, *supra* note 26, at 24–25. Interestingly, one of the authors of the Costigan-Wagner Anti-lynching bill turned out to be Columbia University Law Professor Karl Llewellyn, a colleague and former professor of Herbert Wechsler. SITKOFF, *supra* note 26, at 281.

39. Wechsler, *Review*, *supra* note 10, at 193.

40. *Id.*

41. *Id.*

42. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

disfranchisement.⁴³ He also derided the “unequal allocation of public funds devoted to educational purposes” several years before the Supreme Court would begin to consider such matters in *Gaines v. Canada*.⁴⁴ Further, Wechsler suggested that the government do more than simply enact voting laws, school equalization requirements and anti-lynching measures. The “job of the government” noted Wechsler, was nothing less than “the creation of a more abundant life for the negro.”⁴⁵

That Wechsler declared the government’s job to be improving black life was remarkable, particularly at a moment when southern segregationists seemed more determined than ever to retain white supremacy. Nowhere was this more obvious than in the context of lynching.⁴⁶ From 1934 to 1938, as lynching spiked in the South, the NAACP mounted campaigns to push the very anti-lynching bills that Wechsler endorsed through Congress, often publicizing gruesome details of southern lynchings to do so.⁴⁷ To take just one example, only a few months before Wechsler’s *Yale Law Journal* piece went to press, the NAACP advertised the brutal murder of an African American named Claude Neal at the hands of a white mob in Northwest Florida.⁴⁸ Neal, suspected of raping a white farmer’s daughter near Marianna, had been retrieved by a mob from a jail in neighboring Alabama and brought back to Florida only to have his fingers, toes, and genitals cut off before being hung from a tree outside the county courthouse.⁴⁹ The NAACP produced a pamphlet describing the murder and distributed it nationally in an attempt to boost support for an anti-lynching bill.⁵⁰

Though the NAACP would continue to publicize southern atrocities through the 1930s, southern intransigence in the Senate foiled every attempt.⁵¹ This failure, caused in part by Senate rules allowing a minority of states to thwart majority will through procedural devices like the filibuster, convinced Wechsler that American federalism posed profound challenges to the advancement of black rights. It also pushed

43. Wechsler, *Review*, *supra* note 10, at 193.

44. *Id.* at 191; State of Mo. *ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

45. Wechsler, *Review*, *supra* note 10, at 191.

46. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition of the National Government*, 54 COLUM. L. REV. 543 (1954) [hereinafter Wechsler, *Safeguards*].

47. SITKOFF, *supra* note 26, at 277–88.

48. *Id.* at 286.

49. “*They Done Me Wrong*,” TIME, Nov. 5, 1934; SITKOFF, *supra* note 26, at 286.

50. SITKOFF, *supra* note 26, at 286.

51. *Id.* at 284, 287–88.

him, later in his career, to argue that America's federal system, thanks not only to the filibuster but also to seniority rules in the Senate, was well protected by political safeguards rendering southern concerns over federal domination redundant.⁵²

Given that political safeguards written into the Constitution made national legislation on behalf of southern blacks difficult, Wechsler looked for other ways to ameliorate racism in Dixie. Interestingly, he found one in the ILD. Though no communist, Wechsler drew inspiration from the ILD's commitment to grassroots protest and mass politics, even as he became inspired by the ILD's tendency to frame racial injustice in ostensibly neutral terms that were unlikely to invoke a conservative backlash. The core principle at stake in *Powell v. Alabama*, after all, was one that few could disagree with: indigent clients, regardless of color, deserved legal counsel before the state could put them to death.⁵³

Largely because of his admiration for the ILD's work in the Scottsboro case, Wechsler responded positively to ILD lawyer Carol Weiss King when she asked him for help on a case involving a black communist in Georgia.⁵⁴ The communist, an African American named Angelo Herndon, had been arrested by Georgia authorities in 1932 for possessing documents advocating a black-led "revolution" in the Deep South; an act that led him to be charged with inciting insurrection.⁵⁵ While Herndon's charge rested on his possession of written material, a relatively innocuous act, authorities were aware that he had helped organize a demonstration of the unemployed in Atlanta only a month before, thereby evincing an arguably more militant show of commitment to social change. Also, Herndon had been involved in communist organizing in neighboring Alabama for several years, and had even worked on the ILD's campaign to free the Scottsboro nine.⁵⁶

Hoping that Herndon's case might become another Scottsboro, the ILD rushed to help Herndon in Georgia.⁵⁷ Unfortunately, the ILD's trial attorneys met ironclad resistance at the state level, resulting in a

52. Wechsler, *Safeguards*, *supra* note 46, at 548.

53. *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

54. Charles Martin maintains that it was Walter Gellhorn, one of Wechsler's colleagues, who approached him about representing Herndon. This contradicts Wechsler's memory of events. Wechsler recalls that Carol Weiss King contacted him, Gellhorn, and Jerome Michael at roughly the same time about aiding Herndon's case. Interview by Norman Silber & Geoffrey Miller with Herbert Wechsler, in New York, NY (Aug. 11, 1978), at 125 [hereinafter Wechsler, Interview]. *But see* MARTIN, *supra* note 26, at 140.

55. SITKOFF, *supra* note 26, at 150.

56. MARTIN, *supra* note 26, at 10.

57. *Id.* at 12-14.

sentence of eighteen to twenty years on a chain gang for Herndon.⁵⁸ The penalty's severity prompted Carol Weiss King to approach Wechsler through his colleague Walter Gellhorn at Columbia, in the hopes of mounting a more robust federal appeal.⁵⁹ While Wechsler was eager to work on the case, he was not yet eligible to argue before the Supreme Court, a factor that led the ILD to recruit New York Republican and former Hoover official Whitney North Seymour, who Wechsler knew from Washington, to make the oral arguments.⁶⁰

Herndon's appeal proved to be a substantial commitment for Wechsler, one that lasted from 1934 to 1937. It also proved to be an education on the intersection between federalism and black protest, forcing Wechsler to develop a theory of how the Fourteenth Amendment might be used to protect black activists like Herndon in the South. Though only one of what would eventually become six lawyers on Herndon's team, Wechsler later recalled writing the "bulk" of Herndon's legal briefs himself, documents that, much like Wechsler's 1934 *Yale Law Journal* piece, suggest a remarkable awareness of the black struggle in the South.⁶¹ For example, Wechsler's first brief began with a legal history of slavery and Reconstruction in Georgia, showing how the colony abandoned its initial opposition to slavery in 1750, moved to increasing regulation of slaves and free blacks over the course of the eighteenth century, and eventually enacted its first anti-insurrection statute in 1804 midst fears that "free Negroes," "Spanish invaders," and "hostile Indians," might "arouse" the slave population "to insurrection."⁶² Never completely confident that its slaves were content, Georgia reinscribed its insurrection statute in 1817, 1833, and 1861. Then, Georgia reenacted its statute to meet what Wechsler called the "special and unprecedented" dangers that Georgia faced following the Civil War, including fears that disgruntled ex-Confederates, or what

58. *Id.* at 61.

59. Wechsler, Interview, *supra* note 54, at 125.

60. Also involved in the Herndon case from Columbia Law School was Wechsler's colleague Walter Gellhorn. According to some accounts, Carol Weiss King approached Gellhorn, who then approached Wechsler. According to others, King approached Wechsler, Gellhorn, and Jerome Michael, who later bowed out due to his southern ties. Wechsler's account is that King contacted him and Gellhorn simultaneously, and that he and Gellhorn contacted Whitney North Seymour. Wechsler Interview, *supra* note 54, at 125–26. Charles Martin suggests a slightly different version of events, based on Seymour's memory, which is that he enlisted Wechsler and Gellhorn to aid in him in preparing the briefs. MARTIN, *supra* note 26, at 140–42.

61. Atlanta attorneys Elbert P. Tuttle and William A. Sutherland also participated in the case, though Wechsler remembered them to be involved primarily in Herndon's second appeal. Brief for the Appellant, *Herndon v. Georgia*, *supra* note 12. See also Wechsler, Interview, *supra* note 54, at 125–27.

62. Brief for the Appellant, *Herndon v. Georgia*, *supra* note 12, at 25–26.

he termed “die-hard secessionists,” “jayhawkers,” and “incipient Ku Kluxers,” might use physical violence to overthrow Georgia’s Republican government.⁶³ “So great were the fears of disorder and insurrection,” Wechsler argued, that the Georgia Constitutional Convention recommended formation of a statewide police force while the state legislature passed the insurrection act that was used against Herndon.⁶⁴

After completing his history of Georgia, Wechsler argued that the “dangers then facing the South” had “passed,” and that Herndon, who had organized at best “five or six actual members” of the communist party in Georgia, posed no actual threat to the state.⁶⁵ In fact, Wechsler maintained that even though Herndon possessed documents calling for a black-led “revolution” in the South, this word simply described “a new political or economic program” that did not involve the use of “force.”⁶⁶ Once he established that Herndon did not envision using force to effect a black revolution in the South, Wechsler invoked Oliver Wendell Holmes’s “clear and present danger” test to challenge the prevailing Supreme Court rule for determining when states could infringe on a citizen’s First Amendment rights. That rule, established in 1925 by *Gitlow v. New York*,⁶⁷ held that a defendant’s speech need not represent a “clear and present danger” to established government, but need only “tend to subvert or imperil” that government.⁶⁸ This “bad tendency,” or “dangerous tendency” test, as it came to be known, meant that states did not have to measure when a defendant’s conduct would actually lead to revolt, if it ever did.⁶⁹ “The State,” the *Gitlow* Court held, could not be required to measure the danger of every radical’s utterances “in the nice balance of a jeweler’s scale,” but rather should seek to control all revolutionary rhetoric given that a “single revolutionary spark” could quickly “burst into a sweeping and destructive conflagration.”⁷⁰

Though two decades of Supreme Court decisions were against him, Wechsler gambled that he could use the clear and present danger doctrine to create a more robust shield against state intrusions on black

63. *Id.* at 25–36.

64. *Id.* at 36–37.

65. *Id.* at 38.

66. *Id.* at 52.

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

68. *Id.* at 667.

69. DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 284 (Arthur McEvoy & Christopher Tomlins eds., 1997).

70. *Gitlow*, 268 U.S. at 669.

protest.⁷¹ Relying on an argument advanced by Harvard Law Professor Zachariah Chafee in 1919, Wechsler argued that in order for a jury to decide that Herndon posed a “clear and present danger” it would have to find that he posed an immediate, violent threat to the state.⁷² Anything else, he argued, would be an exercise in pure speculation, an attempt to “imagine” Herndon’s influence on “hypothetical communities.”⁷³ This, in Wechsler’s opinion, was unreasonable. “Due process,” he noted eloquently, “denies clairvoyance so major a role in determining liability.”⁷⁴

Georgia disagreed.⁷⁵ To it, clairvoyance was not the issue so much as common sense. After all, Herndon had been found with literature advocating that land held by whites be “confiscated and turned over to the negroes.”⁷⁶ Herndon had also been found with literature calling for the formation of a new independent “black belt” state in the Deep South where African Americans possessed the “complete right of self determination.”⁷⁷ A more threatening proposal to white government in the South would be hard to imagine.

And, according to Herbert Wechsler, blacks had ample tools at their disposal to effect revolutionary change. These included “mass actions” and “demonstrations,” both of which the civil rights movement would eventually use in the 1960s.⁷⁸ Interested in creating constitutional room for radical black protest in the South, Wechsler’s argument thrust “the jeweler’s scale” onto Georgia authorities, forcing them to prove that black activists were actually on the verge of inciting violent rebellion. Of course, this left the door wide open for activists like Herndon to organize demonstrations, strikes, and any other type of peaceful “mass action” that they saw fit in order to effect change, free from prosecution under Georgia’s insurrection statute. That such organizing might lead to an “overthrow” of the government was irrelevant, so long as that overthrow was “peaceful.”⁷⁹ Further, the fact that whites might resort to violence in order to stop the “revolution” was also irrelevant, so long as the demonstrators did not engage in violence themselves.⁸⁰

71. RABBAN *supra* note 69, at 323–24, 331–33.

72. *Id.* at 325.

73. Brief for the Appellant, Herndon v. Georgia, *supra* note 12, at 12.

74. *Id.*

75. Brief for the Appellee at 7, 9, Herndon v. Georgia, 295 U.S. 441 (1935) (No. 635).

76. *Id.* at 8.

77. *Id.* at 8–9.

78. Brief for the Appellant, Herndon v. Georgia, *supra* note 12, at 54.

79. *Id.* at 55–56.

80. *Id.*

Firmly embedded in Wechsler's first brief on behalf of Angelo Herndon was nothing less than a constitutional strategy for protecting the process through which blacks would ultimately achieve reform in the South in the 1960s. Barred from voting, blacks still retained a variety of means for achieving reform, particularly if they did not fear prosecution for insurrection.⁸¹ By raising the state's burden of proof on insurrection charges, Wechsler opened the door for more aggressive protest in Georgia, and arguably the rest of the South as well.

The radical possibilities that went with allowing peaceful "insurrection" in the South alarmed more than just Georgia authorities. In fact, Zachariah Chafee, Jr., the very constitutional theorist who had laid the foundations for Wechsler's protective use of the clear and present danger standard, also came to fear the kind of revolution that Herndon in particular might spark. Out of "all the chief sedition defendants" of the early twentieth century, noted Chafee, "all but one" seemed "harmless."⁸² The only one that Chafee believed actually posed a "clear and present danger" to the state was Herndon.⁸³ Like Wechsler, Chafee realized that African Americans in the South were not just ready for change, but possessed a variety of methods for effecting it. Unlike Wechsler, however, who did not seem to think that such change would devolve into violence, Chafee feared that black revolution would lead quickly to a southern race war.⁸⁴ "Smoking is alright," warned Chafee in a veiled allusion to black protest, "but not in a powder magazine."⁸⁵

The Supreme Court, perhaps sharing some of Chafee's concerns, proved reluctant to release Herndon. In a procedural dodge, the Court rejected Herndon's appeal on the technical ground that his attorneys had not raised the constitutional challenge to Georgia's insurrection statute successfully at trial.⁸⁶ Though technically correct, the Court ignored the fact that the Georgia appellate court had actually changed its interpretation of the insurrection statute after trial, raising issues

81. Two such means were labor organizing and unionism. *See, e.g.*, GILMORE, *supra* note 26, at 69–78; ROBERT RODGERS KORSTAD, *CIVIL RIGHTS UNIONISM: TOBACCO WORKERS AND THE STRUGGLE FOR DEMOCRACY IN THE MID-TWENTIETH CENTURY SOUTH* 142–66 (2003). Another strategy for black advancement that achieved gains in the 1920s and 30s was litigation. *See, e.g.*, MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 117–20, 123–27, 131–33 (2004).

82. ZACHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 397 (1941).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Herndon v. Georgia*, 295 U.S. 441 (1935).

regarding its constitutionality that Herndon's trial attorneys could not possibly have anticipated.⁸⁷

Angered by this clear avoidance of the constitutional question, Wechsler personally began digging through Georgia state law to find some alternate ground for carrying Herndon's case forward.⁸⁸ Interestingly, he discovered a Georgia law that kept state petitions of *habeas corpus* open in cases where questions concerning a statute's constitutionality existed but had not been addressed at trial.⁸⁹ Convinced that Herndon's was such an instance, Wechsler drafted a *habeas corpus* petition and convinced Whitney North Seymour to continue with the suit. Seymour agreed, re-enlisting two prominent Atlanta attorneys, William A. Sutherland and Elbert Tuttle, who argued the petition in Georgia and won at the trial level.⁹⁰ Though the Georgia Supreme Court reversed, the United States Supreme Court upheld the trial court's decision, overturning Herndon's conviction under Georgia's insurrection statute in April 1937.⁹¹

At first glance, Herndon's sudden victory seemed to have had little to do with Wechsler's brief-writing. On the same day that *Lowry* came up for oral argument, President Roosevelt publicly announced a plan to pack the Court with a new justice for every judge on the bench who was over seventy.⁹² This "court-packing plan" as it came to be known, sought to pressure the Justices into endorsing ambitious New Deal programs that pushed traditional boundaries of federal power.⁹³ To many, the plan also pushed the Court to take a different view of cases brought by minority plaintiffs seeking civil rights like Angelo Herndon.⁹⁴

Yet, Roosevelt never suggested that he wanted the Court to begin protecting black plaintiffs from southern racism.⁹⁵ In fact, the President had refused to publicly endorse anti-lynching legislation precisely because he was worried about alienating the segregationist wing of the

87. *Id.*; see also Wechsler, Interview, *supra* note 54, at 128.

88. Wechsler, Interview, *supra* note 54, at 130.

89. *Id.* at 130.

90. *Id.* at 131.

91. *Herndon v. Lowry*, 301 U.S. 242 (1937). For a discussion of *Lowry's* significance, see RABBAN, *supra* note 69, at 375; see also HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 169–75 (1988).

92. MARTIN, *supra* note 26, at 182.

93. LEUCHTENBURG, *supra* note 13, at 231–38.

94. Historians of the Herndon case place considerable weight on the court-packing plan as the deciding factor in Herndon's victory. See, e.g., MARTIN, *supra* note 26, at 182; SITKOFF, *supra* note 26, at 151.

95. LEUCHTENBURG, *supra* note 13, at 186.

Democratic Party in the South.⁹⁶ Further, even if Roosevelt had secretly wanted the Court to assume the burden of protecting racial minorities in the South, there was little evidence that his court-packing plan would have that desired effect.⁹⁷ Not only did the plan stumble in Congress, but it failed to muster substantial popular support nationally.⁹⁸

A more careful study of the Court suggests that its shift towards Herndon had less to do with the court-packing plan than with the manner in which Herbert Wechsler recast Herndon's case. Thanks to his own research, for example, Wechsler found a clear statutory basis for challenging the constitutionality of Georgia's insurrection law, a move that Herndon's initial attorneys had arguably failed to do. For justices like Hughes and Roberts, who had expressed sympathy for minority clients and civil liberties in the past, Wechsler's work might have pushed them to decide in Herndon's favor on the law alone.⁹⁹

Another possible reason the Supreme Court might have taken a second look at Herndon is that Wechsler re-characterized his case in a manner that coincided with a surge in judicial support for "labor's rights" following the 1936 presidential election.¹⁰⁰ For example, Wechsler lifted a discussion of the demonstration that Herndon had organized in Atlanta out of the footnotes and into the main text, making sure to note that Herndon had been demonstrating not just for blacks but for "unemployment relief" and "unemployment insurance" for all workers.¹⁰¹ Further, Wechsler made sure to note that while some of Herndon's literature advocated the creation of a black state, a terrifying proposition to southern whites, the sum of Herndon's material merely

96. *Id.*

97. Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 208–28 (1994).

98. Barry Cushman argues convincingly that the court-packing plan played a less significant role in the Court's move towards upholding New Deal programs than many previously thought. BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 11–32 (1998). *But see* WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 132–62 (1995) (arguing that the Court shifted position due largely to Roosevelt's court-packing plan).

99. Barry Cushman discusses the influence that legal drafting had on Hughes and Roberts in CUSHMAN, *supra* note 98, at 38. *See also* James A. Henretta, *Charles Evans Hughes and the Strange Death of Liberal America*, 24 L. & HIST. REV. 115 (2006).

100. Again, I borrow the term "labor's rights" from Risa Goluboff, who charts a move towards upholding the rights of labor on the Court in the late 1930s. *See* GOLUBOFF, *supra* note 12, at 30–31.

101. Brief for the Appellant at 16–17, *Herndon v. Lowry*, 301 U.S. 242 (1937) (Nos. 474 & 475).

endorsed the “peaceful organization of the unemployed.”¹⁰² Both modifications coincided with a surge in union membership and labor organizing following Roosevelt’s 1936 presidential victory, a political development that was accompanied by a spike in pro-labor decisions on the Supreme Court.¹⁰³

In addition to Wechsler’s strategic revisions, another factor that may have contributed to Herndon’s victory in 1937 was the ILD.¹⁰⁴ Just as it had with the Scottsboro boys, the ILD mounted a campaign of demonstrations, propaganda and mass protest in favor of Herndon. During the summer of 1935, for example, the ILD arranged for Herndon to tour the west coast, even building a cage like the ones used to house prisoners on Georgia chain gangs to accompany him.¹⁰⁵ That October, the ILD held a mass demonstration in New York during which Herndon himself argued that the Supreme Court had denied his appeal not on legal deficiencies but in order to keep “white and Negro workers from organizing” in the Deep South.¹⁰⁶ Herndon’s fusion of the black struggle in the Deep South with the struggle of labor generally cast his own case in a broader light, one that implicated the Supreme Court’s initial decision against him as part of a larger move to suppress labor and the New Deal. Similar fusions of black civil rights and labor spiked from 1935 to 1937, as the ILD reached out to prominent organizations like the NAACP and the American Civil Liberties Union (ACLU), to build support for Herndon’s case.¹⁰⁷

102. *Id.* at 28.

103. GOLUBOFF, *supra* note 12, at 30–31. Roosevelt enjoyed a landslide victory in 1936, a win buoyed by alliances of labor organizations like the Congress of Industrial Organizations, or CIO, and the Labor Nonpartisan League, or LNPL. SULLIVAN, *supra* note 26, at 92–93. As support for New Deal Democrats surged, African Americans abandoned the Republican Party’s northern wings in droves, forming a New Deal coalition of workers, blacks, and the poor that would come to define the Democratic Party for decades to come. LEUCHTENBURG, *supra* note 13, at 186–87; *see also* NANCY J. WEISS, *FAREWELL TO THE PARTY OF LINCOLN: BLACK POLITICS IN THE AGE OF FDR* (1983).

104. Interestingly, the rise of fascism abroad seemed to help activists like Herndon at home as well. In April 1936, for example, not long after Hitler mobilized German troops in the Rhineland, anti-war protests broke out on college and high school campuses across the United States. *Nation’s Students Join Peace Rallies*, N.Y. TIMES, April 23, 1936, at 14. Though unrelated to race, the protests did have implications for free speech as students promised not to strike at those institutions allowing them to “express their views without censorship,” many taking “Oxford” oaths not to fight in future wars. *Id.* Angelo Herndon, in a testament to his growing notoriety, spoke at one such rally held by Yale University. *Id.* Herndon also addressed a crowd of over 20,000 people at Madison Square Garden in New York City in November 1936, denouncing racism in the South and fascism abroad. *Fascism Is Issue, Browder Contends*, N.Y. TIMES, Nov. 3, 1936, at 18. *See* GILMORE, *supra* note 26, at 67–105, 112–54.

105. MARTIN, *supra* note 26, at 154.

106. *Herndon Cheered as Martyr by 2,000*, N.Y. TIMES, Oct. 22, 1935, at 15.

107. Mack, *Politics*, *supra* note 15, at 44–46; SITKOFF, *supra* note 26, at 148–89.

Even as the ILD worked to build a political coalition on the Left, Wechsler also added a twist to his argument that promised to appeal to the Right. Citing *De Jonge v. Oregon*, a Supreme Court opinion issued in January 1937, Wechsler noted that it was “imperative”¹⁰⁸ that the government not crack down on political protestors like Herndon, precisely so that it could remain “responsive to the will of the people.”¹⁰⁹ So long as the government remained responsive to the “people,” argued Wechsler, it would not alienate them, thereby ensuring that political reforms were pursued through “peaceful means.”¹¹⁰ This last claim was strategic. By linking Herndon’s case to the preservation of order, Wechsler provided the Court with an opportunity to save Herndon on essentially conservative grounds, namely the absorption of radical politics into the mainstream political process.¹¹¹ Wechsler also provided the Court with an opportunity to reinforce democracy in the South, transforming what was essentially a black minority claim into a defense of popular “will.”¹¹²

Evidence that Wechsler’s re-characterization of Herndon’s case did in fact influence the Supreme Court emerged in Justice Roberts’ decision, which coincided closely with Wechsler’s brief.¹¹³ Not only did Roberts blast Georgia’s insurrection statute for serving as a “dragnet which may enmesh anyone who agitates for change,” but Roberts sanctioned Wechsler’s notion that a ruling for Herndon was a ruling for the stability of the democratic process by citing *De Jonge v. Oregon*.¹¹⁴ Conversely, Georgia’s argument that agitators like Herndon might incite violent backlashes, a Cassandra-like prophecy given the manner in

108. *De Jonge v. Oregon*, 299 U.S. 353 (1937).

109. Brief for the Appellant, *supra* note 101, at 33.

110. *Id.* (citing *De Jonge v. Oregon*, 299 U.S. 353 (1937)).

111. At the time, this was a compelling argument given that radical politics seemed to be growing in the United States, leading some to fear assaults on private property and the political process. David M. Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at United States v. Classic*, 90 YALE L.J. 741, 751, 759 (1981). See also Louis Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1 (1942) (Lusky, of course, was responsible for footnote 4 of *Carolene Products*, which cited *Herndon v. Lowry*, see *supra* note 42).

112. The 1930s witnessed a remarkable surge in fears that if courts did not check democratic majorities, then majoritarian excess would actually lead to the abolition of democratic government and the rise of fascism. See WALTER LIPPMANN, *AMERICAN INQUISITORS* 110–11 (1928); RAYMOND GRAHAM SWING, *FORERUNNERS OF AMERICAN FASCISM* (1935); DOROTHY THOMPSON, *DOROTHY THOMPSON’S POLITICAL GUIDE* (1938); SINCLAIR LEWIS, *IT COULD HAPPEN HERE* (1935). To some, the American South reflected frightening tendencies in this direction. GILMORE, *supra* note 26, at 178–82, 193–200; Bixby, *supra* note 111, at 758–59.

113. *Herndon v. Lowry*, 301 U.S. 242, 263 (1937).

114. *Id.* at 259, 263.

which civil rights gains would be won in the 1960s, emerged nowhere in Roberts's opinion.¹¹⁵

Herndon, though couched as a victory for democracy and labor, represented a procedural win for blacks. By undermining the criminal offense of insurrection, it widened avenues for African Americans in the Deep South to pursue grassroots organizing and reform. Already, this was beginning to happen as communist organizers like Herndon were operating in Deep South states like Georgia, Louisiana and Alabama, at the same time that left leaning centers like the Highlander Folk School in Monteagle, Tennessee were beginning to educate black and white members of the working class.¹¹⁶

Though Congress confronted obstacles to providing direct aid to blacks in the South thanks to "political safeguards" like the senatorial filibuster, Wechsler realized that the Supreme Court could ease the burden on political organizing at the grassroots level, increasing the possibility that change might come from below. Interestingly, such thinking did in fact appear to influence the Supreme Court. One year after Wechsler made his strategic appeal to the Supreme Court, Justice Harlan Fiske Stone cited *Herndon v. Lowry* in a footnote suggesting that state measures which restricted the "political processes" necessary for protecting "minorities" deserved closer scrutiny.¹¹⁷

The footnote came in a case that challenged a federal statute prohibiting the sale of "filled" milk, meaning skimmed milk augmented by other ingredients to make it appear whole.¹¹⁸ While Justice Stone held that the federal law was a reasonable exercise of federal regulatory power, he reserved the right to apply stricter scrutiny to measures that were either "directed at" racial minorities, or impinged on the "political processes" ordinarily relied on to "bring about repeal of undesirable legislation."¹¹⁹ Because Stone cited *Herndon v. Lowry* in his footnote, Wechsler came to believe that the Court was moving down a path towards protecting minority involvement in the political process that he had helped pave.¹²⁰ In fact, Wechsler later remembered *Lowry* to be

115. *Id.*

116. CARTER, *supra* note 26, at 121–31; GILMORE, *supra* note 26, at 67–105, 112–33; KELLEY, *supra* note 26, at 1–100. For a discussion of Highlander Folk School, see ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* 139–57 (1984).

117. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 155 (1938); Wechsler, Interview, *supra* note 54, at 154.

118. *Carolene Prods. Co.*, 304 U.S. at 155.

119. *Id.* at 155 n.4.

120. Louis Lusky, one of Stone's law clerks, drafted paragraph two of footnote 4, which cited *Herndon v. Lowry*. Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82

“important” precisely because it established a “foundation” for how the First Amendment might be given “some meaning and teeth,” not simply as an abstract right, but as a vehicle for achieving “historical fidelity” to the initial “impulse” behind the Fourteenth Amendment.¹²¹ While Wechsler had repositioned *Herndon* as a hero of labor not race, he nevertheless retained his view that the Fourteenth Amendment’s initial “impulse” meant helping African Americans in the South, something that he had noted in his 1934 *Yale Law Journal* piece.¹²² In fact, Wechsler took *Herndon* to be part of what he called a “second revolution” in American constitutional law, a restoration of the Fourteenth Amendment as a tool for aiding the plight of African Americans in the United States.¹²³

That Wechsler saw his work in *Herndon v. Lowry* to be part of the foundation for footnote four of *Carolene Products* is significant. Among other things, it places him—along with his former mentor Harlan Fiske Stone—at the ground level of an approach to judicial review that would later become known as “process theory.”¹²⁴ According to process theory’s most articulate proponent, constitutional scholar John Hart Ely, footnote four of *Carolene Products* provided nothing less than a justification for judicial review that existed independently of notions of fundamental rights or constitutional text.¹²⁵ Predicated on the need for a functioning democracy, process theory took footnote four’s second and third paragraphs and separated them into two separate prongs: the first sanctioning judicial intervention to guarantee access to the political process generally and the second sanctioning judicial intervention to bolster “those political processes” aimed at protecting “discrete and insular minorities” from majority prejudice.¹²⁶

Though he predated Ely by a generation, Wechsler believed strongly that courts should reinforce minority access to the political process. His

COLUM. L. REV. 1087, 1093 (1982). Lusky was a student at Columbia Law from 1934 to 1937, the same time that Wechsler was busy working on *Herndon*’s briefs. While it is possible that he had some contact with Wechsler during this period, it is unlikely that he derived his inspiration for footnote 4 from him. MASON, *supra* note 24, at 513; Albert J. Rosenthal, *Louis Lusky—An Outstanding Scholar and a Dedicated Crusader for Justice*, 101 COLUM. L. REV. 986 (2001). It is probably more likely that Lusky was responding to a growing feeling among both liberal and conservative elites that “unrestrained majoritarianism” not only threatened minority interests, but echoed the rise of fascism abroad. Bixby, *supra* note 111, at 752–59.

121. Wechsler, Interview, *supra* note 54, at 82.

122. Wechsler, *Review*, *supra* note 10, at 191.

123. Wechsler, Interview, *supra* note 54, at 154; Wechsler, *Stone*, *supra* note 25, at 795.

124. For a discussion of process theory that resonates with Wechsler’s approach to reform, see Klarman, *supra* note 17, at 755, 788–819.

125. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

126. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

work in *Herndon v. Lowry*, for example, aimed to protect black organizers and demonstrators in Georgia from being prosecuted for insurrection, a move predicated on an expansive notion that included political protest, not just voting. To Wechsler, this expansive vision of the political process derived directly from the “mass politics” of the ILD in the 1930s, a politics that relied heavily on grassroots organizing and demonstration to build popular support for constitutional reform.¹²⁷

Interestingly, even though Wechsler endorsed the “access” prong of footnote four, he would never feel completely comfortable endorsing footnote four’s “prejudice” prong, meaning the position that courts should intervene directly to protect minorities from majority abuse. This too was linked to his civil rights work in the 1930s. Unlike later process theorists, Ely perhaps foremost among them, Wechsler never believed that courts could go against majority will, even in extreme cases of flagrant abuse of minorities. To him, judicial defiance of majority will invited retaliation, whether of the kind embodied in Roosevelt’s court-packing plan or more subtle forms like congressionally mandated “jurisdiction stripping” legislation.¹²⁸ This was an element of Wechsler’s thinking that led him both to critique the Warren Court and to help guide it out of the political thicket in 1959. Regardless of the Supreme Court’s perceived power, Wechsler remained convinced that it occupied a “subordinate” position in the American political process, a position that demanded judges move strategically on matters dealing with minority rights.¹²⁹

Wechsler’s attention to the institutional competency of courts, particularly their subordinate relationship to the other political branches, made him a progenitor not just of process-based approaches to civil rights reform, but a larger school of thought known as “legal process” theory.¹³⁰ Proponents of legal process, including scholars like Albert M. Sacks and Henry M. Hart, with whom Wechsler would co-write a legendary federal courts casebook, all believed that courts should proceed cautiously when entering areas of law that lent themselves to value-laden, policy-style judgments.¹³¹ If they did enter such areas,

127. Wechsler’s emphasis on process coincides with Michael J. Klarman’s argument that bolstering black voting rights in the South could have accomplished a considerable amount. Klarman, *supra* note 17, at 788–819.

128. Wechsler wrote the chapter on congressional control of federal court jurisdiction in the federal courts casebook that he co-authored with Henry M. Hart. Wechsler, Interview, *supra* note 54, at 58; HENRY M. HART & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, 288–399 (1953).

129. Wechsler, *Safeguards*, *supra* note 46, at 560.

130. Eskridge & Frickey, *supra* note 20, at xci, c–ciii; KALMAN, *supra* note 20, at 34–37.

131. Eskridge & Frickey, *supra* note 20, at xciv–xcvi; KALMAN, *supra* note 20, at 30.

legal process theorists like Henry Hart believed they needed to do so with “reasoned elaboration” of the constitutional principles upon which such action rested.¹³² Relying on sociological data, as extreme proponents of legal realism advocated, was not enough.¹³³ Nor was a simple conviction that constitutional results be moral or fair. This adherence to legal formality, though often derided as conservative and reactionary by later proponents of Warren Court activism, aligned process theorists with early proponents of judicial restraint: men like Felix Frankfurter who rejected the Court’s ambitious invalidation of state and federal law during the *Lochner* era.¹³⁴

Frankfurter, like Stone, was one of Wechsler’s early heroes.¹³⁵ His academic writings and legal opinions reinforced many of the lessons that Wechsler learned from the ILD, among them the notion that courts alone could not effect reform.¹³⁶ Frankfurter also impressed upon Wechsler the notion that courts could not withstand majority will for long, and should strive for process rather than rights-based reform.¹³⁷

Frankfurter’s influence helps explain why Wechsler couched Angelo Herndon’s second appeal in terms of popular “will.”¹³⁸ It also explains his interest in protecting minority protest: a device that he believed could be used, like the ILD believed it could, to influence majority opinion. In fact, this explains Wechsler’s strategy, and success, in *Herndon v. Lowry*. In essence, Wechsler embraced a robust type of democratic mass politics, one in which minorities would be allowed, and even encouraged, to develop creative means of building popular support for their causes, even if it meant incurring violence. This approach appealed to Wechsler for several reasons. First, it helped minorities without making the Court appear biased towards them. Second, it promoted minority interests without ostensibly undermining majority rule, or established constitutional law. For example, while Wechsler recognized that the Constitution sanctioned judicial review, he also understood the potential unpopularity, even political backlash, that courts might incur when they defied majority will. Not only might

132. HART & SACKS, *supra* note 20, at 145–52.

133. KALMAN, *supra* note 20, at 16 (explaining the legal realists’ use of social science to analyze the law).

134. *Id.* at 30.

135. Wechsler, Interview, *supra* note 54, at 49.

136. Felix Frankfurter, *Mr. Justice Brandeis and the Constitution*, 45 HARV. L. REV. 33, 77–79 (1931); Felix Frankfurter, *Can the Supreme Court Guarantee Toleration?*, in LAW AND POLITICS 195, 197 (1939); Felix Frankfurter, *The Paths Must Be Kept Open*, in OF LAW AND MEN 236–38 (1956); Bixby, *supra* note 111, at 770.

137. *See* sources cited *supra* note 136.

138. Wechsler, Interview, *supra* note 54, at 81.

court decisions be ignored, Wechsler recognized, but elected officials could pose a variety of threats to the Court's autonomy. President Roosevelt made this painfully clear in 1937 by threatening to increase the number of justices to bolster his New Deal programs. Though Roosevelt's court-packing plan failed to gain sufficient congressional support, Wechsler became interested in other ways that "legislators" might modify the "norms" governing judicial review, particularly stripping federal courts of their jurisdiction.¹³⁹ In fact, Wechsler wrote an entire chapter dealing with "congressional control of jurisdiction" in the federal courts casebook that he co-authored with Hart in 1953.¹⁴⁰

The rough and tumble constitutional politics of the 1930s convinced Herbert Wechsler that "in the end" all constitutional strategies for helping minorities in a democratic system had to be "utilitarian."¹⁴¹ This meant that reformers had to think strategically about the type of constitutional arguments that they advanced, not to mention the manner in which those arguments were likely to be received by judges and voters. "Votes," believed Wechsler, were ultimately "determinative" in democratic systems, even when it came to implementing judicial decisions.¹⁴²

Though Wechsler sympathized with the notion that courts should protect the interests of "discrete and insular" minorities, particularly racial minorities, he did not think that courts could withstand majority pressure for long, as a matter of political reality. Consequently, by the time that Wechsler's old mentor Harlan Fiske Stone penned footnote four of *Carolene Products* in 1938, his former law clerk had already begun to articulate strategic ways of protecting the process through which minorities might effect grassroots change. In *Herndon v. Lowry*, Wechsler advanced creative expansions of the First Amendment to weaken insurrection laws, an age-old tool for crushing black protest in the South.

Herndon v. Lowry did something else as well: it convinced Herbert Wechsler that augmenting litigation with mass politics, as the ILD sought to do through demonstrations and propaganda, could prepare the public for constitutional reform, even the invalidation of popular law. By the time of Herndon's second appeal, for example, Wechsler remembered that even "lots of people in Georgia were uncomfortable"

139. *Id.* at 281.

140. Wechsler, Interview, *supra* note 54, at 279; HART & WECHSLER, *supra* note 128.

141. Wechsler, Interview, *supra* note 54, at 117.

142. *Id.*

with the fact that Herndon had received a “long sentence” but had not received “a hearing on the constitutional claims involved.”¹⁴³

Wechsler’s involvement in the ILD facilitated this appreciation for merging litigation and mass politics. Throughout the 1930s, many considered the ILD to be an even more “outspoken” defender of black rights than the NAACP, a position bolstered not only by its defense of Angelo Herndon, but its even more sensational defense of the Scottsboro nine.¹⁴⁴ While the NAACP proved reluctant to mix litigation and protest, the ILD held mass demonstrations in favor of the Scottsboro boys in northern cities like New York, even as it mounted a vigorous legal defense, all the while maintaining that “confidence in the courts” alone could never bring “justice.”¹⁴⁵ For true reform to occur, in other words, the ILD believed that grassroots political activism, including mass demonstrations like those held in favor of the Scottsboro boys and Angelo Herndon, had to accompany judicial appeals.

The ILD’s fusion of litigation and mass politics influenced Wechsler’s thinking on civil rights for the rest of his career. Even through the 1950s and 1960s, he never abandoned the position that courts alone could not achieve social change, and that reform on behalf of minorities required at least some degree of majority support. He also retained his interest in preserving minority access to the political process. In fact, as the next section will show, Wechsler continued to pursue a process-based approach to advancing minority interests in the 1940s, setting the stage for his critique of *Brown* in 1959.

III. *UNITED STATES V. CLASSIC* AND THE RIGHT TO VOTE

Three years after Herbert Wechsler helped Angelo Herndon gain his freedom from a Georgia chain gang, he returned to the question of racial politics in the American South. Yet, he did so in what could only be

143. *Id.* at 132.

144. See CARTER, *supra* note 26, at 62–63 (contrasting the ILD’s bold defense of black rights in comparison to the NAACP’s strategy of “gradualism, good will, and conciliation”); MARTIN, *supra* note 26, at 13 (detailing the role of mass protests in conjunction with the ILD’s legal strategies in the Angelo Herndon case); SULLIVAN, *supra* note 26, at 87–88 (distinguishing the ILD’s use of “mass protests” with the NAACP’s “cautious, legalistic approach” in the Scottsboro case).

145. See CARTER, *supra* note 26, at 138 (explaining the protests in the Scottsboro case); MARTIN, *supra* note 26, at 13 (noting, in regard to Scottsboro, “[o]nly confidence in the might and power of the organized efforts of the American working class is the method of obtaining the freedom of these innocent boys”); SULLIVAN, *supra* note 26, at 87 (addressing the “inadequacy” of the NAACP’s more reserved approach in the Scottsboro case). *But see* Mack, *Politics*, *supra* note 15, at 54 (arguing that Charles Hamilton Houston, a leader of the NAACP litigation department, came to recognize the value of the ILD’s mass politics approach to reforms by the 1940s).

described as a racially neutral way. In September 1940, a grand jury indicted four election commissioners in New Orleans for tampering with votes in a primary race for the United States Congress.¹⁴⁶ The indictment alleged that the commissioners conspired to alter ballots and falsify vote counts in violation of the constitutional rights of United States citizens to have their votes counted pursuant to Article I, Section 2 of the Constitution.¹⁴⁷

The citizens in question were all white, and all supporters of Paul H. Maloney and Jacob Young, two white Democrats challenging T. Hale Boggs for New Orleans' congressional seat.¹⁴⁸ Though not a case about race discrimination,¹⁴⁹ the Democratic primary in Louisiana, like the Democratic primary in other southern states, essentially operated as a de facto election process from which blacks were barred.¹⁵⁰ This meant that any decision successfully bringing primary elections under federal supervision opened a doorway through which black claimants could use federal civil rights laws to gain access to the southern political process.¹⁵¹

Herbert Wechsler, who assumed a position as an assistant in the United States Solicitor General's office in 1940, recognized the manner in which a victory for the plaintiffs in *Classic* could pave the way for black entry into the political process in the South.¹⁵² Though he did not volunteer to participate in *Classic* like he had in *Herndon*, Wechsler took Attorney General Robert H. Jackson's request that he write the brief as an opportunity to expand minority access to the political process in the South. Key to his argument was the notion that even though primary elections were essentially private affairs, run by political parties out from under the purview of state government, election commissioners in primary elections were nevertheless operating "under color of law" and therefore subject to prosecution under federal law.¹⁵³

146. Brief for the United States at *4–7, *United States v. Classic*, 313 U.S. 299 (1941) (No. 618).

147. *See id.* at 16 (noting those qualified to vote have a constitutional right to choose their representatives).

148. *Id.* at 5.

149. MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961*, at 104 (1994).

150. *See Bixby, supra* note 111, at 789 (discussing the development of the "white primary" and its effect of "excluding blacks from any political power in the South").

151. *Id.* at 788–89 (indicating a deviation from the previous notion that primary elections were "purely domestic affairs" of the state" and therefore beyond the constitutional powers of Congress).

152. Wechsler, Interview, *supra* note 54, at 168.

153. Brief for the United States at 14, *United States v. Classic*, 313 U.S. 299 (1941) (No. 618).

Standing in Wechsler's way was a Supreme Court ruling decided in 1935 that held primary elections were essentially "private" matters beyond the reach of federal supervision.¹⁵⁴ In this case, *Grove v. Townsend*, an African American in Houston claimed the state's all-white primary prevented him from voting.¹⁵⁵ To distinguish *Grove* from *Classic*, Wechsler argued that Texas had not made the primary "part of the electoral process" to the extent that Louisiana had.¹⁵⁶ For example, Louisiana had enacted legislation holding the state responsible for providing "ballots," "stationery," and all other "expenses necessary" to administer primary elections.¹⁵⁷ Louisiana had also enacted an elaborate scheme by which disputed primary results were resolved in state courts and the "form of the primary ballot," the "location of polling places," and the "hours of voting" were all established by the state.¹⁵⁸ For all these reasons, Wechsler argued that the primary was an "integral" and "dispositive" part of the general election in Louisiana, and that private action interfering with that primary violated the right to "choose" under Article I, Section 2 of the Constitution.¹⁵⁹ Impressed by Wechsler's mastery of Louisiana voting law, Justice Stone relied heavily on his former clerk's brief to decide that the election officials had in fact violated federal law.¹⁶⁰

For civil rights lawyers like Thurgood Marshall, *United States v. Classic* represented a significant departure from *Grove v. Townsend*, opening up the possibility that a frontal attack on the southern white primary might succeed.¹⁶¹ Yet, when Marshall asked Wechsler to join him in a direct attack on the all-white primary in Texas, Wechsler refused.¹⁶² Part of this refusal had to do with a conviction on

154. *Grove v. Townsend*, 295 U.S. 45 (1935), *overruled by* *Smith v. Allwright*, 321 U.S. 649 (1944); Bixby, *supra* note 111, at 791 (summarizing the holding in *Grove*).

155. *Grove*, 295 U.S. at 45-46.

156. Brief for the United States, *supra* note 153, at 34.

157. *Id.* at 25 n.11.

158. *Id.* at 26 n.12.

159. Bixby, *supra* note 111, at 795, 798 (explaining the government's argument that the "right to choose" elected representatives was a right guaranteed by Article I, Section 2 of the Constitution and thus applied to primaries as well as general congressional elections).

160. *United States v. Classic*, 313 U.S. 299, 311-15 (1941) (holding that "included in the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections," and primary elections fit within this "right to choose").

161. Thurgood Marshall, *The Rise and Collapse of the "White Democratic Primary,"* 26 J. NEGRO ED. 249, 252 (1957) (noting how *Classic* "paved the way" for more favorable judicial decisions).

162. Richard Kluger discussed *Classic* with Wechsler in a private, unpublished interview, the results of which he mentions in RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 233 (rev. ed. 2004)

Wechsler's part that his participation in Marshall's appeal might actually jeopardize the case by making his argument in *Classic* suddenly appear racially motivated.¹⁶³ Though it is impossible to tell whether this would have happened, Marshall went on to use *Classic* as one of his primary cases for challenging the all white Texas primary in *Smith v. Allwright* in 1944.¹⁶⁴ Marshall's victory in *Allwright* marked a substantial advancement for black access to the political process in the South, a move closely in line with the "access" prong of footnote four of *Carolene Products*.¹⁶⁵

United States v. Classic was not Wechsler's only foray into the question of black access to the political process in the Deep South in the 1940s. In 1943 Attorney General Francis Biddle asked him to put together a federal plan enabling servicemen stationed overseas to vote.¹⁶⁶ To insure that members of the military could participate in national elections, Wechsler drafted a bill authorizing the War and Navy Departments to print ballots, distribute them, and then report the results back to voters' home districts, ordering local registrars to count the votes.¹⁶⁷ At the time, this involved what Wechsler remembered to be an "enormous dislocation" of state control over the franchise, a move that alarmed southern Congressmen like Mississippi Representative John Rankin, who feared that the measure would form "an opening wedge" for Congress to begin "breaking down the disfranchisement of blacks."¹⁶⁸ Wechsler not only realized this was a possibility, but put in extra effort on the bill precisely in the hopes that it would, one day, help African Americans in the South.¹⁶⁹

In fact, Wechsler worked so hard that Rankin attacked him personally during a confirmation hearing in 1944, deriding him as "Weshler, who calls himself Wechsler," in an attempt to impugn his character by implying that he was a Jew masquerading as a gentile.¹⁷⁰ Though Wechsler was in fact Jewish, Rankin seemed blind to the fact that few members of Congress considered religion to be relevant to the question

(quoting Wechsler as telling Biddle "not to go in with Marshall").

163. *Id.*

164. Reply Brief of Petitioner at 5, *Smith v. Allwright*, 321 U.S. 649 (1944) (No. 51) (arguing that "[t]he only sound test of the status of the officials in question for the purpose of determining whether restrictions of the Federal Constitution apply to their official conduct is that stated in *United States v. Classic*").

165. Klarman, *supra* note 17, at 831.

166. Wechsler, Interview, *supra* note 54, at 181.

167. *Id.* at 182.

168. *Id.* at 182–85.

169. *Id.* at 185.

170. *Id.* at 187.

of whether one could serve as an effective Assistant Attorney General. Yet, Rankin's job illustrated the manner in which Wechsler was himself reminded of the fact that he belonged to a minority; a reminder that only reinforced his awareness of the tenuous position that minorities generally held in the United States. Indeed, Wechsler's Judaism, though not something that he stressed in his professional career, helps explain his acute interest in how, precisely, the law might best be used to preserve minority rights against the often abusive power of majority rule.¹⁷¹

Wechsler's attempts at improving black access to the political process in the American South in the 1940s both resonated with the lessons he learned in the 1930s and came to inform his criticism of *Brown* in the 1950s. As we shall see in the next section, one problem that Wechsler had with *Brown* was that it did not hinge on a process-based approach to achieving civil rights reform, but an equal protection claim rooted in the psychological harm that segregation caused black children. While this claim would appear sympathetic to many in the North, Wechsler realized that it placed the Court in the difficult position of assessing "ad hoc" sociological results.¹⁷² As if that were not enough, the Court had also made itself responsible for altering the entire southern educational system, a job that it proved fundamentally incapable of doing without the help of black mass action.

IV. NEUTRAL PRINCIPLES AND THE TROUBLE WITH *BROWN*

The efforts that Herbert Wechsler made to expand black access to the political process in the 1930s and 1940s profoundly influenced his approach to Supreme Court decisions in the 1950s, particularly decisions regarding race. Long attuned to the difficulties of achieving racial reform through litigation alone, Wechsler balked at a string of Supreme Court rulings from 1954 to 1959 that boldly set out to invalidate racial segregation in the American South. To Wechsler, these opinions lacked doctrinal consistency, defied popular opinion, and ignored many of the lessons that he had learned while an ILD-affiliated lawyer and federal official. In fact, by the spring of 1959, Wechsler came to suspect that the Supreme Court was not only confusing constitutional law but also impeding the black struggle in the South.

171. For more on Jewish sympathy for the black cause in the early Twentieth Century, see DAVID LEVERING LEWIS, *WHEN HARLEM WAS IN VOGUE* 100-03 (1981).

172. Wechsler, *Principles*, *supra* note 1, at 16.

At the heart of Wechsler's concerns lay *Brown v. Board of Education*.¹⁷³ Decided in May 1954, *Brown* marked the culmination of a determined struggle by the NAACP to win a Supreme Court ruling proclaiming southern segregated schools unconstitutional.¹⁷⁴ Though the NAACP prevailed, it did so in a way that struck Wechsler as problematic. Namely, the NAACP did not rely on the type of "mass defense" politics that the ILD had once advocated in the 1930s. Instead, it plowed into the sensitive, local issue of primary and secondary education with little grassroots organizing or support. For another, the NAACP did not rely on the type of neutral legal argument that Wechsler had worked so hard to cobble together in *Herndon*, one that positioned minority interests in a manner that appeared to advance majority rights.

"The problem for me," noted Wechsler in April 1959, was "not that the Court had departed from its earlier decisions" or "disturbed the settled patterns of a portion of the country," but that it had relied on faulty "reasoning."¹⁷⁵ One problem that Wechsler had with *Brown*'s reasoning was that the NAACP tailored its claim narrowly, arguing that public school segregation should be invalidated not because segregation was per se unconstitutional, but because segregated schools had "a detrimental effect upon [African American] children."¹⁷⁶ To prove this, the Court cited social science data assembled by sociologists like Kenneth B. Clark, who used a variety of innovative techniques, including the presentation of colored dolls to children, to prove that segregation "has a tendency to retard the educational and mental development of [African American youth]."¹⁷⁷

Though Wechsler sympathized with the NAACP's ultimate goal of improving black life in the South, he worried about the NAACP's use of social science evidence to do so. Wechsler believed that incorporating social science into law could be an effective tool for policy makers, even legislators, but was a risky proposition for courts.¹⁷⁸ Courts, in his

173. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (advancing the primary reasoning of *Brown* that separate schools adversely affected the opportunities provided to African Americans).

174. KLUGER, *supra* note 162, at 703–06 (explaining the behind-the-scenes anticipation on the morning before the Supreme Court announced its decision in *Brown*).

175. See Wechsler, *Principles*, *supra* note 1, at 31–32 (explaining the crux of Wechsler's disagreement was that the Court, instead of overruling the separate but equal provision "in form," simply held it inapplicable in a school setting).

176. *Brown*, 347 U.S. at 494.

177. See *id.* (mentioning that inferiority affects the motivation of children to learn).

178. Wechsler discussed his early interest in social science as a guide for law during an interview conducted by Norman Silber and Geoffrey Miller in August 1978. See Wechsler, Interview, *supra* note 54, at 37, 100–03. Early examples of Wechsler's interest in social science

opinion, worked best when they relied on the “fixed ‘historical meaning’” of constitutional provisions, provisions that were “neutral” and therefore able to be applied equally to all parties at all times, no matter the immediate outcome.¹⁷⁹ “A principled decision,” proclaimed Wechsler, rests on “reasons that in their generality and their neutrality transcend any immediate result that is involved.”¹⁸⁰ Cases that evaluated sociological data, on the other hand, struck Wechsler as too focused on particular interests. Not only did they presume an unconstrained “freedom” to “appraise” the pros and cons of “projected measures,” but if the projected measures in question were contingent on scientific findings, then the Court’s authority rested on it being knowledgeable in areas where it had, ironically, little knowledge.¹⁸¹

Driving Wechsler’s disapproval of sociological jurisprudence was the fact that the Supreme Court had a long and disreputable history of manipulating scientific data to arrive at undemocratic ends. Much of its *Lochner*-era jurisprudence, for example, had hinged on questionable assessments of scientific evidence, including whether bakeries caused respiratory problems and whether women should be limited in the amount of hours that they could work.¹⁸² Though the Court presented its decisions in these cases as if they were based on objective fact, Wechsler understood them to be something else. Its refusal to limit work hours in bakeries in New York, for example, struck him as a move against labor.¹⁸³ Its agreement to limit work hours for women, conversely, struck him as a scientifically flimsy endorsement of then-existing gender norms.¹⁸⁴

Wechsler’s disapproval of Supreme Court Justices pretending to be scientists applied to *Brown* as well.¹⁸⁵ Though he sympathized with the result of the opinion, he feared that the Justices had gotten the sociology wrong. Rather than ameliorate psychological harm, the South’s first

emerged in his criminal law casebook, JEROME MICHAEL & HERBERT WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION: CASES, STATUTES, AND COMMENTARIES (1940), and his work on the American Law Institute’s Model Penal Code. See Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1102–04 (1952).

179. Wechsler, *Principles*, *supra* note 1, at 16–17.

180. *Id.* at 19.

181. *Id.* at 16. Here Wechsler referred to Oliver Wendell Holmes’s opinion in *Otis v. Parker*, 187 U.S. 606, 609 (1903), as further support for his judicial philosophy. *Id.* at 19.

182. See *Lochner v. New York*, 198 U.S. 45 (1905) (striking down state regulation of working hours for bakers); see also *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding state regulation of hours women could work).

183. Wechsler, Interview, *supra* note 54, at 22.

184. *Id.*

185. Wechsler, *Principles*, *supra* note 1, at 33.

experiments with public school integration during the 1957–1958 school year actually appeared to be exacerbating the damage to black students. This became painfully obvious after nine black students integrated Central High School in Little Rock, Arkansas. The nine students gained admission to Central High from the local school board in 1957 and received no indication that their entry to the school would be blocked.¹⁸⁶ Yet, as the school year approached, Arkansas Governor Orval Faubus decided to turn the integration of Central High into a political issue, ordering the Arkansas National Guard to surround the school and refuse entry to the black teenagers.¹⁸⁷ Claiming that he was afraid of white violence, Faubus kept the soldiers at Central High until federal courts intervened, ordering him to admit the students.¹⁸⁸ At that point, Faubus dismissed the National Guard, allowing a white mob to terrorize the nine students as they entered the school.¹⁸⁹ Press footage of mobs beating innocent black victims prompted President Eisenhower to intervene personally, ordering the 101st Airborne into Little Rock to defend the black teenagers, a position they would hold until the end of November, when they were finally dismissed.¹⁹⁰

Almost immediately after federal forces left in November, harassment from white students against their black peers intensified. In a celebrated instance in December, a white student's insults prompted Minnie Jean Brown, one of the Little Rock nine, to lose her temper and dump "food on [a] white boy," conduct for which she was promptly suspended.¹⁹¹ One month later, a white student named Darlene Holloway assaulted another one of the African American girls at the school.¹⁹² Holloway's attack sparked a wave of attacks that lasted through the 1958 spring semester as white students assaulted their black peers, struck them with purses, kicked them, showered them with food,

186. See John A. Kirk, *Massive Resistance and Minimum Compliance: The Origins of the 1957 Little Rock Crisis and the Failure of School Desegregation in the South*, in *MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION* 89 (Clive Webb ed., 2005) (describing that the state's actions to undermine the integration did not surface until about 9 p.m. the night before); see also MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 326 (2004) (addressing the state's efforts to block integration of the school and Eisenhower's intervention).

187. Kirk, *supra* note 186, at 89.

188. *Id.* (noting Faubus explained in a speech that the National Guard was to "maintain or restore order and to protect the lives and property of citizens").

189. *Id.*

190. KLARMAN, *supra* note 186, at 326.

191. *Negro Suspended at Central High: Girl Dumps Food on White Boys in Little Rock*, N.Y. TIMES, Dec. 18, 1957, at 31.

192. *White Girl Reports Little Rock Penalty*, N.Y. TIMES, Jan. 11, 1958, at 23.

and intimidated them with signs encouraging them to leave.¹⁹³ In one extreme case, a white student named Billy Ferguson even threw an African American girl down a flight of stairs.¹⁹⁴

As day-to-day conditions for the African American students in Central High School worsened, Minnie Jean Brown left for New York. Following her second suspension from Central High School in January 1958, Brown had received a scholarship to attend the private New Lincoln School on West 110th Street in New York City.¹⁹⁵ Convinced that white harassment would only continue in Little Rock, Brown left Arkansas for New York in February.¹⁹⁶ Once there, she stayed with Kenneth Clark, the same social scientist whose evidence had been used to invalidate segregation, and was greeted by a representative of the Lincoln School and “fifty delegates of city youth councils and high schools in New York.”¹⁹⁷

Brown’s escape from Arkansas, coupled with the continued harassment of the eight remaining black students that spring, all made it into the *New York Times* and presumably onto Herbert Wechsler’s breakfast table. To him, the students’ trials raised the legitimate question of whether the NAACP had been correct in making the argument that integration would cure the harm to black children caused by segregation. “Was [the Court] comparing the position of the [African American] child in a segregated school with his position in an integrated school where he was happily accepted and regarded by the whites,” wondered Wechsler, “or was [the Court] comparing his position under separation with that under integration where the whites were hostile to his presence and found ways to make their feelings known?”¹⁹⁸ Wechsler’s mention of “hostile” whites was not something that the Supreme Court paid much attention to in 1954, yet it reflected the experience of the Little Rock nine perfectly. It also went to one of the central constitutional questions of the case, namely whether integration provided a suitable remedy for the type of harm that the NAACP had articulated in *Brown*.¹⁹⁹ “Only when the standing law,

193. See, e.g., *Little Rock Gets Guard at Night: Troops Posted at School as ‘Precautionary Step’ After Clash of 2 Students*, N.Y. TIMES, Jan. 17, 1958, at 10 (discussing incidents of intimidation including throwing soup, shoving, and bomb threats).

194. *Little Rock High Ousts Negro Girl*, N.Y. TIMES, Feb. 18, 1958, at 25.

195. *Little Rock Girl Sees More Strife: Expelled Pupil Doubts That 8 Remaining Negroes Can Stand Harassment*, N.Y. TIMES, Feb. 23, 1958, at 59.

196. Mildred Murphy, *School Welcomes Little Rock Girl: Director Greets Expelled Negro Pupil Here—She Hopes for Calm Stay*, N.Y. TIMES, Feb. 25, 1958, at 29.

197. *Id.*

198. Wechsler, *Principles*, *supra*, note 1, at 33.

199. Interview by Scholastic with Melba Patillo Beals (Jan. 31, 1995), *available at*

decisional or statutory, provides a remedy,” argued Wechsler in 1959, “do courts have any business asking what the Constitution may require or forbid.”²⁰⁰ Though this position sounded unsympathetic to black rights, it was firmly grounded in constitutional law, going back to one of the central tenets of *Marbury v. Madison* in 1803.²⁰¹

Wechsler’s interest in remedies helps explain his reservations about the NAACP’s decision to pitch its constitutional claim in terms of the psychological harm that segregation caused black children. Rather than argue that segregation was *per se* unconstitutional because it denied whites and blacks the freedom to associate, for example, the NAACP decided to argue that segregation was unconstitutional because it disproportionately harmed black children in schools, thereby violating their right to equal protection under the law. This was risky for several reasons. One, the NAACP underestimated the harm that integration would cause black children, as Little Rock revealed. Two, the NAACP ignored a considerable amount of sociological research showing that what happened in Little Rock was actually to be expected, as integration tended to increase anxiety among minority students.²⁰²

Respected scholars like Allison Davis and Kurt Lewin of the Chicago School of Sociology, neither of whom had any vested interest in preserving Jim Crow in the South, both held that “proximity to the dominant group—not segregation—caused psychological conflict and personality damage.”²⁰³ If members of subordinate groups were successfully segregated from dominant groups, they argued, less psychological harm resulted.²⁰⁴ Though the NAACP omitted any mention of such findings in its *Brown* brief, the question of integration’s psychological impact continued to haunt the Supreme Court for the rest of the decade. In 1958, the Little Rock School Board filed a petition before the Court explaining that the first year of integrated learning had been marked by “chaos, bedlam, and turmoil” in which there had been “repeated incidents of more or less serious violence directed against the

<http://www2.scholastic.com/browse/article.jsp?id=4799>. See also MELBA PATILLO BEALS, WARRIORS DON’T CRY: A SEARING MEMOIR OF THE BATTLE TO INTEGRATE LITTLE ROCK’S CENTRAL HIGH (1994) (detailing the hostility and abuse Ms. Beals encountered upon entry into Little Rock’s Central High).

200. Wechsler, *Principles*, *supra* note 1, at 6.

201. *Marbury v. Madison*, 1 Cranch 137, 154 (1803).

202. Daryl Scott makes the point that not only did the social science evidence in *Brown* contradict the segregationist position advanced by southern states, but it contradicted the prevailing wisdom of social science generally at the time. DARYL SCOTT, CONTEMPT & PITY: SOCIAL POLICY AND THE IMAGE OF THE DAMAGED BLACK PSYCHE, 1880–1996, at 124 (1997).

203. *Id.*

204. *Id.*

Negro students.”²⁰⁵ Lamenting that the education of the black students “had suffered,” something that anyone who read the *New York Times* probably already knew, the School Board asked for permission to postpone integration for another two and a half years.²⁰⁶ Reluctant to grant Little Rock’s request, the Supreme Court suddenly found itself casting about for another rationale to justify desegregation besides the psychological harm that Jim Crow schools caused blacks.²⁰⁷ In *Cooper v. Aaron*, decided on September 29, 1958, the Court found one in the due process clause.²⁰⁸ Acknowledging that “the educational progress of all the students, white and colored . . . [had] suffered” under integration, the Court nevertheless asserted that “[t]he right of a student not to be segregated on racial grounds in schools is indeed so fundamental and pervasive that it is embraced in the concept of due process of law.”²⁰⁹

For scholars who had wondered about the validity of the Court’s reasoning in *Brown*, *Cooper* provided little relief. The decision did little to explain how the right to attend a desegregated school had suddenly become “fundamental” on par with the right to have legal counsel in a death penalty proceeding. The decision also failed to explain how due process, which generally protected individuals from having their life, liberty, and property taken without procedural safeguards, applied to segregated schools. While the Court had used the due process clause of the Fifth Amendment to validate desegregation in Washington D.C., where the Fourteenth Amendment did not apply, it did not specify whether it was relying on the Fifth or Fourteenth Amendment in *Cooper*, nor did it ever really explain how the Fifth Amendment applied in its D.C. decision, *Bolling v. Sharpe*.²¹⁰

Wechsler found other problems with the Court’s desegregation rulings as well. One such problem was that the Court “did not declare, as many wished that it had, that the [F]ourteenth [A]mendment forbids all racial lines in legislation,” but rather that segregation simply had “no place” in public education.²¹¹ This meant that segregation might have retained “a place” in other contexts—buses, parks, beaches, or golf courses—unless of course the NAACP could prove that segregating children in these contexts damaged them as well. To Wechsler’s

205. *Cooper v. Aaron*, 358 U.S. 1, 13 (1958).

206. *Id.* at 12–13.

207. *Id.* at 15–20.

208. *Id.* at 15.

209. *Id.* at 15, 19.

210. See generally *Bolling v. Sharpe*, 347 U.S. 497 (1954) (desegregating Washington D.C. schools via the Fifth Amendment’s due process clause).

211. Wechsler, *Principles*, *supra* note 1, at 32.

dismay, neither the NAACP nor the Supreme Court made any effort to establish that segregation in contexts other than schools did harm the psychological development of black youth. Nor did the NAACP or the Supreme Court articulate any other clearly defined constitutional principle for ending segregation in other sectors of southern life.

Instead, whenever the Supreme Court did face the constitutionality of segregation in a particular context, it simply cited to *Brown*. To take just a few examples, the Court used *Brown* to invalidate segregation in public golf courses in *Holmes v. City of Atlanta* in 1955.²¹² One year later, the Court used *Brown* to invalidate segregation on public buses in *Gayle v. Browder*.²¹³ Then, in 1958, the Court used *Brown* to invalidate segregation in public parks in *New Orleans City Park Improvement Ass'n v. Detiege*.²¹⁴ Wechsler questioned the logic behind such rulings, which omitted substantive opinions in favor of *per curiam* rulings simply citing *Brown*.²¹⁵ "That these cases present a weaker case against state segregation," asserted Wechsler, "is not, of course, what I am saying. I am saying that the question whether it is stronger, weaker, or of equal weight appears to me to call for principled decision."²¹⁶

Wechsler's yearning for a principled decision might not have been so great had the Supreme Court enjoyed immediate compliance with *Brown* and its progeny. Unfortunately, however, the Court confronted

212. See *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (mem.) (vacating Fifth Circuit decree holding that *Brown v. Board of Education* does not apply to public golf courses and remanding case to be decided in conformity with *Mayor & City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955) (mem.) (affirming Fourth Circuit ruling holding that segregated beaches and bath houses are unconstitutional pursuant to *Brown v. Board of Education*); *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950); *Henderson v. United States*, 339 U.S. 816 (1950); *Bolling v. Sharpe*, 347 U.S. 497 (1954). The precise manner in which these four opinions applied to segregated beaches did not enter into the Fourth Circuit's ruling or into the Supreme Court's opinions in either *Mayor & City Council of Baltimore v. Dawson* or *Holmes v. Atlanta*.

213. See *Gayle v. Browder*, 352 U.S. 903 (1956) (mem.) (affirming district court ruling in *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956) that segregated buses violated the due process and equal protection clauses of the Fourteenth Amendment based on the Supreme Court's holdings in *Brown v. Board of Education*, *Mayor & City Council of Baltimore v. Dawson*, and *Holmes v. Atlanta*).

214. See *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (mem.) (affirming Fifth Circuit ruling that segregated public parks violate the equal protection clause of the Fourteenth Amendment whether there is psychological damage to African Americans or not, based on the Supreme Court's rulings in *Holmes v. City of Atlanta* and *Mayor & City Council of Baltimore v. Dawson*). While the argument might be made that *New Orleans v. Detiege* did not rely on *Brown* because it cited instead to *Holmes* and *Mayor*, neither *Holmes* nor *Mayor* had any clear constitutional basis independent of *Brown*. Indeed, the Court's legal reasoning had, by 1958, become almost completely circular, citing opinions that cited other opinions that lacked any sustained constitutional analysis.

215. Wechsler, *Principles*, *supra* note 1, at 22.

216. *Id.*

sustained resistance in the South. Only months after the ruling, grassroots opposition began to form in states like Mississippi.²¹⁷ By 1956, state legislatures in six southern states embraced a legal program of interposition aimed at discrediting the Supreme Court.²¹⁸ By the fall of 1957, interposition and grassroots opposition joined in a full-blown campaign of “massive resistance” against the Court.²¹⁹

Though northern audiences recoiled at the violence in Little Rock, even they seemed ambivalent about integration when it came to their own children’s well-being.²²⁰ This became obvious in New York City in October 1957 when white parents in Brooklyn resisted an attempt by the NAACP to have a school district in Bedford Stuyvesant, a predominantly black neighborhood, rezoned to incorporate white students.²²¹ Part of the hesitation resulted from increasing violence at integrated schools in the Bedford-Stuyvesant and Bushwick neighborhoods. In November 1957, a special grand jury called to investigate violence in New York City’s public schools called for the assignment of police officers to patrol hallways after reports of fights between students during class time.²²² In January 1958, the principal of John Marshall Junior High School, an integrated Brooklyn school that had become the site of increasing disorder, including the rape of a female student in the school’s basement, committed suicide by jumping off the roof of his apartment building before being scheduled to testify before a King’s County grand jury investigating school violence.²²³

Southern voices were quick to point to New York’s problems as a sign that integration was poor policy. “[I] ‘would hate to think what the metropolitan press would have done to us,’” exclaimed Arkansas Governor Orval Faubus, “if the Brooklyn school violence had happened in Little Rock. . . . [P]eople are not being told one-tenth of the trouble about racial problems going on outside the South.”²²⁴ On February 5, 1958, Georgia Governor Herman Talmadge announced that the citizens

217. BARTLEY, *supra* note 6, at 82–107.

218. *Id.* at 131.

219. *Id.* at 270–92.

220. CLARENCE TAYLOR, *KNOCKING AT OUR OWN DOOR: MILTON A. GALAMISON AND THE STRUGGLE TO INTEGRATE NEW YORK CITY SCHOOLS* 72–83 (1997); KLARMAN, *supra* note 186, at 326.

221. Benjamin Fine, *City to Spur Integration by Building of 60 Schools*, N.Y. TIMES, Oct. 31, 1957, at 1.

222. Lawrence Fellows, *Policeman for Each City School Urged by Brooklyn Grand Jury*, N.Y. TIMES, Nov. 26, 1957, at 1.

223. Emanuel Perlmutter, *Head of School Beset by Crime Leaps to Death*, N.Y. TIMES, Jan. 29, 1958, at 1.

224. *Faubus Scores School Violence*, N.Y. TIMES, Feb. 1, 1958, at 10.

of Georgia were “deeply sympathetic with the citizens of Brooklyn in the difficulties they are experiencing in maintaining the integrity and independence of their public schools.”²²⁵ Talmadge even went so far as to suggest that “the President of the United States send Federal troops to Brooklyn to preserve order in the public schools there in the same manner that he did to force a new social order upon the public schools of Little Rock, Arkansas.”²²⁶

While Talmadge mocked, more serious figures chastised the Supreme Court for plowing into a hotly contested political question like segregated schools without adequate constitutional armor, arguing that its jurisdiction should be severely curtailed. In January 1958, Learned Hand, one of the most respected Federal Circuit Judges in the United States, blasted the Supreme Court for overstepping its constitutional bounds, acting like a “third legislative chamber” and jeopardizing America’s democratic system of government.²²⁷ In his talk, Hand referenced a series of decisions—all handed down since 1950—that invalidated popularly enacted law, including the segregation cases. According to Hand, “nothing” in the Constitution explicitly granted the Court the power to invalidate Jim Crow laws in the South.²²⁸ The power of judicial review was not, as he put it, “a logical deduction from the structure of the Constitution,” but was instead a type of implied right, a “practical condition,” as he put it, necessary to preserve democratic government.²²⁹ To Hand, issues like public school segregation were not vital to national interests at all.²³⁰ In fact, he considered them to be little more than choices between “relative values” that the Court had no business deciding.²³¹ Hand even accused the Supreme Court of making a “dubious” grab for legislative power that

225. *2 Senators Clash on City’s Schools*, N.Y. TIMES, Feb. 5, 1958, at 16.

226. *Id.*

227. LEARNED HAND, THE BILL OF RIGHTS 55 (1958).

228. *Id.* at 54.

229. *Id.* at 15.

230. Whatever Hand may have believed about the harm that segregation caused black children, he clearly did not think that Jim Crow laws violated their constitutional right to equal protection. He also did not think that the persistence of segregation negatively impacted national interests. Yet, pursuant to his own analysis, Learned Hand could have argued that dismantling segregation was actually important for national security reasons, a “practical condition” necessary for America’s struggle against Soviet and Chinese Cold War propaganda. To bolster such a position, Hand could have cited the United States government’s brief in *Brown*, which made it clear that the persistence of segregation in the South hindered chances of an American victory against communism abroad, a cause for which American soldiers were already dying in Korea. Instead, Hand used *Brown* to advance a very different argument, namely that the Supreme Court had overstepped its constitutional bounds and should have its power of judicial review curtailed.

231. HAND, *supra* note 227, at 54.

did not “accord” with the “underlying presuppositions of popular government.”²³²

Others agreed, pushing for just the kind of congressionally mandated limits on the Supreme Court’s jurisdiction that Wechsler had documented in his *Federal Courts* casebook. One year before Hand delivered his lectures at Harvard, for example, Republican Senator William Jenner from Indiana introduced a bill restricting the Supreme Court’s jurisdiction in cases involving congressional investigations and domestic security issues.²³³ While domestic security measures and segregation laws had little in common, segregationists like Mississippi Senator James O. Eastland linked them, painting the Court as a left-leaning lobby, intent on catering to communists by abolishing national security measures and attempting to level American society.²³⁴ Interestingly, a former Supreme Court clerk named William H. Rehnquist penned a sensational expose in the *U.S. News and World Report* in December 1957 supporting this view.²³⁵ Rehnquist argued that left-leaning clerks slanted memos recommending certiorari in a way that threatened to influence their justices, pushing the Court to the left.²³⁶ While this claim drew obvious criticism, it reinforced conservative fears that the nation’s highest tribunal was returning to its power-hungry, *Lochner*-era days, albeit as a decidedly left-wing “legislative chamber.”²³⁷

Though Wechsler too was alarmed at the Court’s “ad hoc” jurisprudence, his fear was not that the Court had gone too far down the road of liberal reform, but that it had gone down that road in an inappropriate manner, jeopardizing its own authority in the process. In fact, Wechsler feared that if the Court did not modify its jurisprudence by making it more “neutral,” then right-wing detractors like Eastland, Jenner and even Rehnquist would begin to chip away at the Court’s jurisdiction, compromising its already limited power. “Only the maintenance and the improvement” of neutral standards of judicial review, argued Wechsler, will “protect the Court against the danger of

232. *Id.* at 73.

233. See LUCAS A. POWE, *THE WARREN COURT AND AMERICAN POLITICS* 130–31 (2000) (discussing the proponents and opponents of the Jenner Bill).

234. GEORGE LEWIS, *THE WHITE SOUTH AND THE RED MENACE: SEGREGATIONISTS, ANTICOMMUNISM, AND MASSIVE RESISTANCE, 1945–1965*, at 45 (2004).

235. William H. Rehnquist, *Who Writes Decisions of the Supreme Court?*, U.S. NEWS & WORLD REPORT, Dec. 13, 1957, at 22, available at <http://www.usnews.com/articles/opinion/2008/12/09/william-rehnquist-writes-in-1957-on-supreme-court-law-clerks-influence.html>.

236. *Id.*

237. HAND, *supra* note 227, at 55.

the imputation of a bias favoring claims of one kind or another.”²³⁸ Even though Wechsler agreed that the Supreme Court’s power of judicial review was “grounded in the language of the Constitution,” he realized that there were limits to that power.²³⁹ Consequently, in cases “where there is room for drawing lines that courts are not equipped to draw,” he argued, “I prefer to see the issues faced through legislation.”²⁴⁰

Wechsler’s interest in legislation reflected his longstanding belief that courts played a “subordinate” role in the democratic process, and should therefore refrain from overt declarations of minority rights lest some kind of backlash ensue.²⁴¹ Indeed, this had arguably already begun to happen by the spring of 1959. Not satisfied with massive resistance, states across the South had enacted a variety of measures aimed at preserving segregation through more subtle means. These measures, the most popular of which were called “pupil placement” or “assignment” plans, removed any mention of race from southern state law but nevertheless allowed local school boards to assign students to schools based on factors linked indirectly to race.²⁴² In 1958, after resistance to desegregation led President Eisenhower to send federal troops into Little Rock, Arkansas the Supreme Court declared interposition, and the political strategy of “massive resistance” that accompanied it, invalid.²⁴³ Yet, only two months later the Court declared Alabama’s pupil placement statute to be constitutional.²⁴⁴ Though framed in tentative terms, the court’s decision in *Shuttlesworth v. Birmingham* could have been viewed not only as an “ad hoc” ruling, but one that sanctioned

238. Wechsler, *Principles*, *supra* note 1, at 10.

239. *Id.* at 3.

240. *Id.* at 31.

241. Wechsler, *Safeguards*, *supra* note 46, at 560.

242. BARTLEY, *supra* note 6, at 77–78.

243. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (holding that the state legislatures were bound by federal precedent and the Fourteenth Amendment and could not thwart the desegregation of schools). For the implications of *Cooper* on Massive Resistance, see KLARMAN, *supra* note 186, at 328–29.

244. *Shuttlesworth v. Birmingham Bd. of Educ.*, 358 U.S. 101, 101 (1958) (mem.) (affirming district court ruling sanctioning Alabama’s pupil placement plan). It is worth noting here that Fred Shuttlesworth filed a total of four lawsuits against the city of Birmingham, all of which made it to the Supreme Court. The first involved Alabama’s pupil placement statute. *Id.* The second held that there can be no conviction for aiding and abetting another to do an innocent act. *Shuttlesworth v. City of Birmingham*, 373 U.S. 262, 265 (1963). The third held that a defendant who was on a sidewalk could not be convicted for obstructing traffic. *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 95 (1965). The fourth held that a licensing system arbitrarily infringing on first amendment rights was unconstitutional. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 157–58 (1969).

skillful white resistance.²⁴⁵ Suddenly, the Court appeared to be siding with southern states, against African Americans.

The Supreme Court's shift towards the South in the fall of 1958, coupled with increasing northern ambivalence regarding desegregation that winter, help explain Wechsler's critique of the Supreme Court in April 1959. If not dead, *Brown* certainly seemed to be dying. Though massive resistance was in decline, southern states were shifting rapidly to newly sanctioned pupil placement and assignment plans, keeping integration rates firmly below one percent across most of the South.²⁴⁶ Meanwhile, legal giants like Learned Hand were joining southern segregationists like James O. Eastland in calling for restrictions on the Supreme Court's power. To Wechsler, it was fast becoming imperative that the Court flee the political thicket and move "toward" a different type of constitutional jurisprudence, one that bolstered rather than antagonized black participation in the political process.²⁴⁷

Of course, Wechsler realized that the political process was not particularly conducive to civil rights either. For example, he had long understood the difficulty of getting Congress to rise against southern state interests.²⁴⁸ The Senate, in particular, believed Wechsler, functioned "as the guardian of state interests," a role supported by the "operation of seniority," and the power of the "filibuster."²⁴⁹ Yet, despite the tendency of southern senators to filibuster civil rights legislation, a Civil Rights Act had been enacted in 1957 and congressional hearings for another bill were underway in the spring of 1959, at the same time that Wechsler delivered his Harvard address.²⁵⁰ Thus, given the Supreme Court's backpedaling on school segregation, it is not surprising that Wechsler felt there was more hope in the legislative realm than the courts.

It is also possible that Wechsler continued to hope, as the ILD had once hoped, that grassroots protests would emerge and drive reform from below. Already, one of the most successful stories of desegregation in the South in the 1950s came as a result of mass organizing and direct action. From 1955 to 1956, a black led bus boycott in Montgomery, Alabama pressured local officials into

245. For the intriguing argument that *Cooper* and *Shuttlesworth* sanctioned skillful resistance, see Frederic Bloom, *Cooper's Quiet Demise (A Short Response to Professor Strauss)*, 52 SAINT LOUIS U. L.J. 1115 (2008).

246. KLARMAN, *supra* note 186, at 334, 358–60.

247. Hence his title: "Toward Neutral Principles of Constitutional Law."

248. Wechsler, *Safeguards*, *supra* note 46, at 547.

249. *Id.* at 548.

250. John D. Morris, *House Unit Opens Inquiry on Rights*, N.Y. TIMES, Mar. 5, 1959, at 24.

providing concessions to black riders on city buses, vaulting a young black minister named Martin Luther King, Jr. onto the national stage.²⁵¹ While Wechsler lamented the Supreme Court's handling of *Gayle v. Browder*, the case that came out of the boycott, New York papers like the *Times* followed the Montgomery protest closely, celebrating Martin Luther King, Jr.'s role in the demonstrations.²⁵² King's own account of the movement, *Stride Toward Freedom*, became popular reading among intellectual elites in New York in 1958. It emphasized non-violent direct action, not litigation, as the most effective means of achieving social change.²⁵³ As New Yorkers began sending money to Montgomery, black ministers inspired by King and disheartened by southern attempts to gut the 1957 Civil Rights Act formed a mass protest organization called the Southern Christian Leadership Conference (SCLC) partly as a counterpoint to the more bureaucratic, litigation-oriented NAACP.²⁵⁴ In February 1958, the SCLC mounted a grassroots effort to mobilize black voters in twenty-two southern cities, a movement that became known as the Crusade for Citizenship.²⁵⁵

Wechsler's critique of the NAACP's strategy in *Brown*, coupled with his argument that the Court move "toward" a more neutral approach to aiding the movement, coincided uncannily with the movement's own shift away from the NAACP's litigation strategy and towards "mass action" in 1957 and 1958. Indeed, northern coverage of the burgeoning

251. MORRIS, *supra* note 116, at 51–63.

252. *Gayle v. Browder*, 352 U.S. 903 (1956); *see, e.g., Negroes' Boycott Cripples Bus Line*, N.Y. TIMES, Jan. 8, 1956, at 71 (describing the circumstances of the boycott); *Alabama Indicts 115 in Negro Bus Boycott*, N.Y. TIMES, Feb. 22, 1956, at 1 (discussing the indictment of those involved in the boycott of Montgomery's busses); *Negro Leaders Arrested in Alabama Bus Boycott*, N.Y. TIMES, Feb. 23, 1956, at 1 (reporting the indictment and picturing Rosa Parks being fingerprinted); Wayne Phillips, *Montgomery Is Stage for a Tense Drama: Negroes Adopt a Policy of Passive Resistance to Segregation*, N.Y. TIMES, Mar. 4, 1956, at E6 (discussing the Montgomery controversy and ensuing events); Stanley Rowland Jr., *2,500 Here Hail Boycott Leader: Head of Montgomery Negro Bus Boycott Gets Hero's Welcome in Brooklyn*, N.Y. TIMES, Mar. 26, 1956, at 27 (highlighting Dr. Martin Luther King, Jr.'s speech given in Brooklyn); *Montgomery Line Ends Seating Bias*, N.Y. TIMES, April 24, 1956, at 1 (announcing the end to segregated bus seating in Montgomery); Stanley Rowland Jr., *Boycott Leader to Preach Here: Dr. M.L. King of Montgomery Coming to Harlem*, N.Y. TIMES, Aug. 11, 1956, at 8 (celebrating the scheduled arrival of Dr. Martin Luther King, Jr.); *Bus Boycott's End Voted by Negroes*, N.Y. TIMES, Nov. 15, 1956, at 38 (discussing the vote to end the boycott in Montgomery).

253. *See* MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY* (1958) (detailing the Montgomery movement and emphasizing the effectiveness of non-violent direct action in advancing social change); Abel Plenn, *The Cradle Was Rocked; Stride Toward Freedom: The Montgomery Story*. By Martin Luther King, Jr., N.Y. TIMES, Oct. 12, 1958, at BR24 (reviewing MARTIN LUTHER KING, JR., *supra*); *Books—Authors*, N.Y. Times, Sep. 15, 1958, at 19 (reviewing MARTIN LUTHER KING, JR., *supra*).

254. MORRIS, *supra* note 116, at 82–86.

255. *Id.* at 104–09.

grassroots campaign in the South helps explain Wechsler's withering attack on *Brown* in April 1959. A veteran of the ILD's mass politics campaigns of the 1930s, Wechsler recognized that strategies were shifting in the South and that the time was ripe for the Court to adopt a more grassroots-friendly, process-based approach.²⁵⁶ Less than four months after his *Neutral Principles* address was published in the *Harvard Law Review*, the opportunity to contribute to just such an approach fell in his lap.

V. *NEW YORK TIMES* V. *SULLIVAN* AND THE PRESS IN THE SOUTH

Herbert Wechsler was not the only proponent of racial equality who recognized that a new approach to civil rights reform was needed in 1959. Three months after the *Harvard Law Review* published his *Neutral Principles* address, four black college students at North Carolina Agricultural & Technical College walked into an all white lunch counter in Greensboro and sat down.²⁵⁷ As news of their demonstration spread, black students in Nashville, Atlanta, Memphis, Richmond, Tallahassee, Montgomery and other southern cities followed suit.²⁵⁸

Interestingly, the student sit-ins of 1960 would provide Wechsler with an opportunity to rejoin the black struggle in the South, this time as a lawyer for the prestigious *New York Times*. The events that would link Wechsler to the *Times* began when black college students from Alabama State College engaged in a sit down strike at a white lunch counter near the Montgomery courthouse in 1960, prompting local officials to expel them from school.²⁵⁹ Later that month, Martin Luther King, Jr. publicly endorsed the sit-ins, only to be arrested for lying on his state income tax returns, a trumped up charge aimed at undermining his leadership in Montgomery.²⁶⁰ Fearing King's incarceration, a civil rights organization chaired by A. Philip Randolph, an icon of civil rights in the 1930s, decided to take out a full-page advertisement in the *New York Times* soliciting money for King's legal defense.²⁶¹ The ad

256. Montgomery was not the only site of grassroots organizing in the 1950s. Similar efforts emerged in Baton Rouge, Birmingham, Tallahassee, and New Orleans as well. MORRIS, *supra* note 116, at 17–25, 63–73, 82.

257. WILLIAM H. CHAFE, *CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA AND THE BLACK STRUGGLE FOR FREEDOM* 71 (1981).

258. MORRIS, *supra* note 116, at 199–205.

259. ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 6–14 (1991).

260. *Id.* at 6.

261. *Id.*

mentioned King's incarceration and the expulsion of the student demonstrators, noting accurately that Alabama officials were attempting to "demoralize Negro Americans and weaken their will to struggle."²⁶²

Yet, the advertisement got key facts wrong. Instead of describing the sit-in as the cause of the students being expelled, the ad claimed that the students were arrested for singing "My Country, Tis of Thee" on the capitol steps.²⁶³ The advertisement then went on to charge that Montgomery police, "armed with shotguns and tear-gas" surrounded the Alabama State College campus and locked black demonstrators out of a dining hall "in an attempt to starve them into submission."²⁶⁴ None of this was true.

When Montgomery police commissioner L.B. Sullivan read the advertisement, he was so outraged that he filed suit in state court for libel.²⁶⁵ Though the advertisement did not mention Sullivan's name once, he nevertheless charged that references made to Montgomery police discredited him personally, as commissioner in charge of police.²⁶⁶ While this was not a particularly robust claim, an all white jury quickly awarded Sullivan \$500,000, a then-astronomical sum.²⁶⁷ Stunned, the *Times* scrambled to mount an appeal in Alabama's Supreme Court, even as more libel suits from Alabama officials started to roll in.²⁶⁸ Afraid that the paper might be sued into bankruptcy, Lewis Loeb, the lead attorney for the *Times*, called Herbert Wechsler.²⁶⁹

Wechsler immediately understood how libel suits could be used to thwart black protest in the Deep South.²⁷⁰ So long as southern officials could drag northern newspapers and television stations into court on libel charges, southern juries were likely to rule against them, whether they had committed libel or not.²⁷¹ This could have had a stifling effect on freedom of the press, essentially driving the northern press out of the South under fear of bankruptcy.²⁷² Once the press was gone, northern audiences would no longer learn about racial abuses in the South,

262. Committee to Defend Martin Luther King & the Struggle for Freedom in the South, *Heed Their Rising Voices*, N.Y. TIMES, Mar. 29, 1960, at L25.

263. *Id.*

264. *Id.*

265. LEWIS, *supra* note 259, at 12.

266. *Id.* at 28.

267. *Id.* at 33.

268. *See id.* at 35 (summarizing the effects of the \$500,000 judgment against the *New York Times*).

269. Wechsler, Interview, *supra* note 54, at 302.

270. *Id.* at 312.

271. *Id.* at 303.

272. *Id.*

reducing the chance that they would continue to fund civil rights groups like the one supporting King, not to mention federal civil rights legislation. For Wechsler, who had already suggested that federal legislation might be a more fruitful avenue of reform than the courts, the consequences for civil rights could be dire.²⁷³

Afraid that libel suits might choke the democratic process, Wechsler requested that the *Times* allow him to make an argument challenging “the accepted concepts about libel and the First Amendment.”²⁷⁴ Until then, libel law had been outside the realm of the First Amendment, prompting anyone accused of libel to defend either on the basis that their claims were true, or that they constituted “fair comment” based on a reasonable interpretation of the facts.²⁷⁵ Though Wechsler initially agreed to argue that the Sullivan advertisement constituted fair comment, a negative ruling by the Alabama Supreme Court convinced him that southern courts would ignore facts simply so that they could use libel as a means of punishing the northern press.²⁷⁶ As “ten or twelve” additional libel suits were filed against the *Times*, raising the paper’s potential liability to “anywhere from ten to twenty million dollars,” Wechsler lobbied for a more aggressive approach, attacking libel law generally as an infringement on freedom of the press.²⁷⁷

At first, the *Times* expressed “considerable resistance” to Wechsler’s idea.²⁷⁸ Never having lost a libel case before, the paper’s editors proved “reluctant” to “devote their prestige” to upsetting an entire field of law that had been expressly “developed for the protection of individual reputations.”²⁷⁹ But, in a meeting with the paper’s top editors, Wechsler convinced them of the “potential for abuse” that the Alabama verdict represented, both to the *Times* and to civil rights generally.²⁸⁰ After some debate, the paper’s editors agreed to let him argue their case before the Supreme Court, pushing not just for an invalidation of the Alabama court ruling, but a “progressive expansion of First Amendment protection” to the field of libel.²⁸¹

It was a considerable victory for Wechsler, and well-timed. During the spring of 1963, as Wechsler drafted his Supreme Court petition, the

273. *Id.*

274. *Id.* at 304.

275. *Id.* at 301.

276. *Id.* at 303.

277. *Id.*

278. *Id.*

279. *Id.* at 304.

280. *Id.* at 305.

281. *Id.*

civil rights movement began to engage in some of its most dramatic protests yet. Beginning in April 1963, demonstrators in Birmingham worked creatively to provoke violent reactions from local police, hoping to gain coverage in the national media.²⁸² In May, movement strategists even sent hundreds of black school children into the streets to block traffic and stir disorder, pushing police to order fire-hoses and dogs against the demonstrators, leading to some of the most dramatic photographs of southern brutality yet.²⁸³

By the time that Wechsler filed his brief in September 1963, the role of the press in advancing civil rights was growing, a point that Wechsler emphasized to the Court.²⁸⁴ “This is not a time,” wrote Wechsler in his *Sullivan* brief, “to force the press to curtail its attention to the tensest issues that confront the country.”²⁸⁵ Allowing the northern press to remain in the South was necessary, he argued, to bring about “political and social changes” that were desired by the people.²⁸⁶ Of course, southern white people did not want political or social change, but that was precisely the point. With northern media coverage, black people could gain the support of national audiences, tipping the scales against the white South.²⁸⁷

Yet, even as Wechsler understood the value of keeping northern media in the South, so too did he recognize that libel law had long been considered a state matter, beyond the reach of the First Amendment.²⁸⁸ This pushed him to make the claim that libel of public officials was not being used to protect private reputation so much as to quell “criticism of official conduct.”²⁸⁹ As such, it was akin to the doctrine of seditious libel, an unpopular offense enacted by Congress in the Sedition Act of

282. See DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 227–28 (1986) (discussing how the SCLC chose to focus its energies in Birmingham, a city with a strongly segregationist reputation and a quick-tempered Public Safety Commissioner, Bull Connor); see also DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965, at 222 (1978) [hereinafter GARROW, PROTEST] (explaining that in 1963 the SCLC decided to concentrate its efforts in Birmingham). Though Garrow’s account of Birmingham remains the most persuasive, see also GLENN T. ESKEW, BUT FOR BIRMINGHAM: THE LOCAL AND NATIONAL MOVEMENTS IN THE CIVIL RIGHTS STRUGGLE 226–28 (1997) (examining how the strategy of coercive nonviolence worked in Birmingham).

283. ESKEW, *supra* note 282, at 267–69.

284. Brief for the Petitioner at 68, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (No. 39).

285. *Id.*

286. *Id.* at 29 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

287. For the civil rights movement’s reliance on the northern media in 1963, see GARROW, PROTEST, *supra* note 282, at 161–67; ESKEW, *supra* note 282, at 227–28, 261, 269.

288. LEWIS, *supra* note 259, at 103.

289. See Brief for the Petitioner, *supra* note 284, at 45–47.

1798.²⁹⁰ Though the Sedition Act had expired by the end of the Adams administration, the Supreme Court had never formally ruled on its constitutionality, leaving the question open as to whether state or federal governments could punish seditious libel in the manner that Montgomery officials were trying to do in *Sullivan*. Thus, by digging into American legal history, Wechsler found a principle for defending the *Times* that both promised to help African Americans in the South and was racially neutral.

Impressed with Wechsler's argument, the Supreme Court held unanimously in favor of the *Times*.²⁹¹ Recognizing that the civil rights movement's "existence and objectives are matters of the highest public interest," Justice Brennan agreed with Wechsler that to allow libel actions like Sullivan's to succeed would be to "shackle the First Amendment."²⁹² Although the Supreme Court had ruled that the Constitution "does not protect libelous publications" in other contexts, Brennan followed Wechsler in distinguishing between private individuals and public officials, arguing that libel suits against public officials violated freedom of expression.²⁹³ In fact, Brennan even relied on some of the same quotes that Wechsler had used, noting that the First Amendment was designed to "assure [the] unfettered interchange of ideas" necessary to bring about "political and social changes desired by the people."²⁹⁴ Perhaps most remarkably, Brennan adopted Wechsler's analogy between Sullivan's suit and the Sedition Act of 1798. "Although the Sedition Act was never tested in this Court," wrote Justice Brennan, "the attack upon its validity has carried the day in the court of history."²⁹⁵ Further, the judgment awarded to Sullivan in Alabama was "one hundred times greater than that provided by the Sedition Act."²⁹⁶ This meant that if the Court allowed Sullivan's victory to stand, a "pall of fear" would be cast over "those who would give voice to public criticism" to the point that the "First Amendment freedoms" could not "survive."²⁹⁷

It was a remarkable victory for Herbert Wechsler. Not only had the Court adopted his expanded definition of the First Amendment, but it effectively insulated northern newspapers and television stations from a

290. *See id.*

291. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 264–65 (1964).

292. *Id.* at 266.

293. *Id.* at 268.

294. *Id.* at 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

295. *Id.* at 276.

296. *Id.* at 277.

297. *Id.* at 278.

barrage of southern libel suits that could have driven them from the South indefinitely.²⁹⁸ This would undeniably have impacted the success of the civil rights movement. Already, movement activists in Mississippi were planning to bring northern volunteers down to the Deep South for “Freedom Summer,” hoping that they would raise national awareness of racial injustice there.²⁹⁹ Without the press, it is unlikely that this campaign would have garnered much attention. As it was, however, the deaths of three Freedom Summer volunteers, Michael Schwerner, James Chaney, and Andrew Goodman became national news, making headlines for weeks.³⁰⁰

The presence of the northern press in the South played an even greater role in the civil rights movement one year later, during the opening months of 1965. Beginning in January, the Southern Christian Leadership Conference decided to target a small, “inconspicuous” town in Alabama named Selma to build national support for a federal Voting Rights Act.³⁰¹ Aware that local sheriff Jim Clark had developed an “impulsive” reputation for using violence against demonstrators, SCLC staff members planned a series of demonstrations to provoke Clark.³⁰² On January 19, 1965, they achieved their first success when Clark assaulted black protester Amelia Boynton in front of the courthouse.³⁰³ On January 24, they achieved an even greater victory when fifty-three year old black demonstrator Annie Lee Cooper punched Clark in the face, prompting him to strike her repeatedly with his club.³⁰⁴ Though Cooper had provoked the attack, reporters for the *New York Times* and the *Washington Post* only photographed Clark’s response, sending a powerful image of segregationist brutality to the nation.³⁰⁵ Still more

298. According to Morton J. Horwitz, suits like Sullivan’s could have prevented the press from ever publishing anything “controversial” about the South, particularly anything involving civil rights. MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 36 (1998).

299. CLAYBORNE CARSON, *IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S*, at 96–98 (1981); JOHN DITTMER, *LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI* 244 (1994).

300. See, e.g., DITTMER, *supra* note 299 at 247; see also, e.g., R.W. Apple, Jr., *2 of Missing Men Feared for Lives*, N.Y. TIMES, June 25, 1964, at 18; Tom Wicker, *President Sends 200 Sailors to Aid Mississippi Hunt*, N.Y. TIMES, June 26, 1964, at 1; Claude Sitton, *400 Sailors Hunt 3 in Mississippi*, N.Y. TIMES, July 1, 1964, at 23; Claude Sitton, *Mississippi Force Expanded by F.B.I.*, N.Y. TIMES, July 11, 1964, at 1; Claude Sitton, *Graves at a Dam: Discovery Is Made in New Earth Mound in Mississippi*, N.Y. TIMES, Aug. 5, 1964, at 1; Claude Sitton, *Mississippi Rights Slaying Is Being Reconstructed—Arrests Awaited*, N.Y. TIMES, Aug. 7, 1964, at 1.

301. GARROW, *PROTEST*, *supra* note 282, at 31, 35–77.

302. *Id.* at 34, 42–43.

303. *Id.* at 43.

304. *Id.* at 45.

305. *Id.*

sensational images emerged on March 7, when 600 demonstrators marched across the Edmund Pettus Bridge only to be routed by a cohort of Clark's deputies and state troopers who gassed, clubbed, and whipped the demonstrators back to the other side of the river.³⁰⁶ Video footage of the brutality made it onto national television that night, while newspaper coverage exploded the following morning, alerting the nation to the brutality of southern racism.³⁰⁷

Though national support for black voting rights was relatively high prior to March 1965, and President Johnson had even begun efforts to draft voting rights legislation as early as December 1964, news coverage of segregationist violence in Selma greatly facilitated the passage of the 1965 Voting Rights Act.³⁰⁸ Not only did press coverage ensure that the bill would be enacted "with only minimal delay," but it also ensured that there would be no "weakening amendments."³⁰⁹ In fact, newspaper and television coverage of the demonstrations produced a much more robust piece of legislation, making the federal government an active defender of black access to the southern political process.³¹⁰ Had Alabama officials like Clark been able to drive northern newspapers and television stations out of the South with astronomical libel suits, something Herbert Wechsler's victory in *New York Times v. Sullivan* prevented, it is unlikely that the 1965 Voting Rights Act would have been as strong as it was.³¹¹

VI. CONCLUSION

Herbert Wechsler's victory in *Sullivan* was more than just a triumph for the First Amendment; it was a victory for the civil rights movement. While scholars have tended to focus on the NAACP as the legal engine of the movement, at times debating the wisdom of its emphasis on school desegregation, a close look at Herbert Wechsler suggests that the NAACP was not alone in engineering constitutional reform in the 1950s and 1960s.³¹² In fact, Wechsler suggests that civil rights strategies

306. *See id.* at 73–77 (describing the events of the March 7 march).

307. *See id.* at 78 (detailing the television and newspaper coverage of the march in Selma).

308. *See id.* at 38, 156–57.

309. *Id.* at 134.

310. *See id.* at 135 (discussing the relationship between the press coverage of the demonstrations and the 1965 Voting Rights Act).

311. Though David J. Garrow does not consider *New York Times v. Sullivan* in his analysis of the Selma protests, his thesis hinges on the role that newspaper and television coverage played in facilitating national legislation. *Id.* at 163.

312. For scholars who question the wisdom of *Brown*, see GOLUBOFF, *supra* note 12, at 238–70. *See also* Mack, *Rethinking*, *supra* note 15, at 259–62 (discussing academic criticism of *Brown*).

forged in the 1930s returned in the 1960s, with surprising results. A veteran of the “mass defense” strategies of the International Labor Defense, Wechsler’s victory in *Sullivan* represented a very different approach to constitutional reform than the NAACP’s approach in *Brown*, an approach that incorporated grassroots protest, the media, and black access to the national political process.³¹³

By forcing public officials to prove malice in libel suits, *Sullivan* helped keep the northern press in the Deep South, a move that directly facilitated the civil rights movement’s direct action campaigns in Mississippi in 1964 and Alabama in 1965. Without press coverage of the demonstrations at Selma, scholars like David J. Garrow have shown, a “national consensus” might never have emerged in favor of the 1965 Voting Rights Act.³¹⁴ This means that Wechsler’s campaign to rewrite libel law, though it did not address the question of black rights directly, facilitated the process through which the civil rights movement would ultimately effect change.

Wechsler’s contribution to a process-based approach to reform, something the ILD stressed in the 1930s and that he encouraged in the 1940s, pushes us not only to reconsider civil rights lawyering in the 1960s, but legal liberalism generally at mid-century. According to historian Laura Kalman, legal liberalism assumed two basic forms in the post-*Brown* era. The first, “Warren Court activism,” stressed normative results over judicial craft and descended directly from the legal realist revolt against formalism led by progressive jurists in the 1920s, many of whom stressed the use of social science data as a guide for deciding cases.³¹⁵ The second, “legal process” approach, also derived from legal realism but maintained that decisions based simply on social science undermined the authority of the judiciary and needed to be tempered with “reasoned elaboration” and an adherence to “neutral principles” of law.³¹⁶

313. According to Pulitzer Prize winning journalists Gene Roberts and Hank Klibanoff, *Sullivan* amounted to nothing less than a “form of liberation,” for civil rights reporters in the region at the time, leaving northern media free to report on black grassroots protest in the Deep South. See GENE ROBERTS & HANK KLIBANOFF, *THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION* 364 (2006). For black reliance on the northern media in 1963, see GARROW, *PROTEST*, *supra* note 282, at 166–67. According to Morton J. Horwitz, *Sullivan*’s suit could have prevented the press from ever publishing anything “controversial” about the South, particularly anything involving civil rights. HORWITZ, *supra* note 298, at 36.

314. GARROW, *PROTEST*, *supra* note 282, at 235. For the importance of the media to the SCLC, see *id.* at 226–27.

315. KALMAN, *supra* note 20, at 48.

316. “Neutral principles” is, of course, from Wechsler, *Principles*, *supra* note 1. “Reasoned elaboration” is from Henry M. Hart and Albert M. Sacks’s popular casebook, *The Legal Process*,

Though most scholars have tended to agree with Akhil Reed Amar that legal process theorists “never fully succeeded in coming to grips with” *Brown*, Wechsler’s strategic vision of how neutrality could be used to advance minority interests suggests a more nuanced story.³¹⁷ *Brown*, to Wechsler, represented legal realism gone too far. Not only did it provide no clear, constitutional guideline for outlawing segregation in contexts other than schools, it was scientifically shaky. Wechsler, an avid supporter of social science in the criminal law context, suspected that the NAACP’s selection of scientific authorities was biased towards the results it wanted to achieve.³¹⁸ Not only did the NAACP ignore prominent theorists who argued that racial integration damaged minority groups, it failed to anticipate the terror that black children would confront in majority white schools. By the spring of 1959, that terror had been carefully documented by the *New York Times* in almost day to day coverage of the 1957–1958 school year in Little Rock. Further, white parents in New York began to express ambivalence towards integration in 1958 as black emigrants streamed into neighborhoods like Bedford-Stuyvesant and Bushwick, sparking interracial violence in public schools. With no grassroots support and growing political opposition in America’s most cosmopolitan city, *Brown* seemed, by April 1959, to be on the ropes.

With Warren Court activism flailing, legal process came, surprisingly, to the rescue. Wechsler’s resurrection of the First Amendment in *Sullivan* in 1963 advanced black interests substantially by opening up a crucial avenue of the political process: the national press. This process-based approach coincided closely with the rise of grassroots direct action protest in the South, protest led by civil rights groups like the Southern Christian Leadership Conference. As civil rights historians like Aldon Morris and David J. Garrow have shown, not only did the rise of the SCLC represent a distinctly different approach to reform than the “bureaucratic” court-centric approach pursued by the NAACP, but its approach, ultimately, carried the day.³¹⁹

finally published in 1994. HART & SACKS, *supra* note 20, at 143–52. See KALMAN, *supra* note 20, at 22–42 (explaining the process theorist approach to reform). Kalman summarizes the tension between “Warren court activism” and the “legal process” approach nicely when she writes, “[i]n the 1960s, two groups of law professors bickered, but theirs was a family quarrel between Warren Court activists and process theorists, two wings of the realist tradition.” *Id.* at 48.

317. For a sampling of prominent scholars who argue that legal process never fully came to terms with *Brown*, see sources cited *supra*, note 20.

318. For Wechsler’s support of social science in the criminal law context, see Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1953).

319. For a discussion of the NAACP’s “bureaucratic” nature, see MORRIS, *supra* note 116, at

Through grassroots organizing, mass demonstration, and strategic handling of the media, civil rights leaders like Martin Luther King, Jr. were able to convince a majority of Americans that federal legislation was needed to truly effect a Second Reconstruction.

Though Wechsler never belonged to any of the civil rights organizations of the 1960s, he was affiliated with one of the biggest civil rights organizations of the 1930s, the International Labor Defense.³²⁰ This suggests that the parallels between the legal process theory that he advocated and the manner in which he approached questions of civil rights were more than just coincidental. Precisely because Wechsler had been involved in the “mass defense” approach to reform in the 1930s, he understood how important it was for the civil rights movement to keep channels of the political process open in the 1960s.

Rather than a development that failed the civil rights movement, Wechsler’s particular brand of strategic liberalism actually served the movement well by keeping the lines of political process, particularly the press, open to black activists in the Deep South. While *Sullivan* was certainly not alone in aiding the civil rights movement, its emphasis on protecting the movement’s access to the political process places it in a different category from civil rights decisions like *Brown v. Board of Education*, which centered on more fundamental rights-based claims.³²¹ For scholars who argue that *Brown* provided little more than a “hollow hope” to blacks, *Sullivan* provides another way of looking at law’s utility, reinforcing claims by historian Michael J. Klarman that a process-based approach to reform might have provided more hope for real change.³²² Indeed, even a cursory look at the movement’s gains appears to bear this out. Not only did *Sullivan* contribute to the Voting Rights Act of 1965, for example, but press coverage of black mass action set the stage for the return of the federal courts to the education

35–37. For the SCLC’s achievements see GARROW, *PROTEST*, *supra* note 282, at 235–36.

320. During a Senate Confirmation Hearing on his appointment to Assistant Attorney General, Wechsler admitted to serving on the legal advisory committee of the International Labor Defense, though denied being a full-fledge member of the group. Wechsler also confessed to being a member of the National Lawyers’ Guild during the same hearing. *Nomination of Herbert Wechsler, of New York, to Be Assistant Attorney General: Hearing Before the Subcomm. of the S. Comm. on the Judiciary, 78th Cong.* (1944).

321. Wechsler reinforces Klarman’s argument that the access prong of *Carolene Products* posed more opportunities than the prejudice prong. See Klarman, *supra* note 17, at 748.

322. For the argument that the Supreme Court provides little more than a hollow hope to racial minorities, see GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991). For Klarman’s recovery of political process theory, see Klarman, *supra* note 17, at 748.

context as well. After a retreat from the question of segregated schools following *Shuttlesworth v. Birmingham* in 1958, the federal courts did not move forcefully to strike down southern subterfuges in the education context until Judge John Minor Wisdom called for “liquidation” of de jure segregation in *United States v. Jefferson County* in 1966.³²³ Conceding that “the courts acting alone have failed,” Wisdom admitted that he would not have decided *Jefferson County* had it not been for the civil rights movement’s gains in 1964 and 1965.³²⁴ This means that the success of school integration in the South, to the extent it succeeded, might have been due more to the direct action protest of the civil rights movement than *Brown*.

Even if scholars like Gerald N. Rosenberg overstate *Brown*’s failings, it is still possible that historians have focused on the wrong decision when it comes to assessing the Supreme Court’s role in the civil rights movement. To take just one example, *Sullivan* suggests that the Supreme Court in fact played an important, albeit supporting, role in the larger story of black mass action.³²⁵ This story of law’s interrelationship with mass action dates back to the 1930s and derives from a very different vision of how the courts can be used to effect social change. Herbert Wechsler, who predated John Hart Ely’s process theory by at least two decades, captured this vision during his sustained interaction with the long civil rights movement.³²⁶

323. *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836 (1966); JACK BASS, UNLIKELY HEROES: THE DRAMATIC STORY OF THE SOUTHERN JUDGES WHO TRANSLATED THE SUPREME COURT’S *BROWN* DECISION INTO A REVOLUTION FOR EQUALITY 297–302 (1981).

324. *Cf. Jefferson*, 372 F.2d at 846, 849–50.

325. *See generally* ROSENBERG, *supra* note 322.

326. Precisely because he came of age during the era of “mass politics” in the 1930s, Wechsler anticipated Jack Balkin and Reva Siegel’s observation, over half a century later, that “law needs social movements,” and that courts play a “reactive” rather than proactive role in those movements. *See* Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 946–48 (2006).