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“From Emergency Law to Legal Process: Herbert Wechsler and the Second World War”

Abstract:

This article begins by telling the largely unknown story of Herbert Wechsler’s leading role as the government attorney in charge of litigating *Korematsu v. United States* before the Supreme Court in 1944. In the essay’s second half, we argue that Wechsler’s wartime experience in justifying the unprecedented emergency measures that led to the internment of persons of Japanese ancestry shaped his thinking as the most important constitutional theorist of postwar America. In particular, we suggest that Wechsler’s encounter with the problem of emergency law paved the way for some of the key assumptions of the legal process school, which remains the most influential school of constitutional jurisprudence in the U.S. today.

**From Emergency Law to Legal Process:  
Herbert Wechsler and the Second World War**

“One of the members of this population, a man by the name of Korematsu, refused to obey the order, and he stood prosecution...It fell to me in my duties as Assistant Attorney General, to superintend the preparation of a brief in support of the constitutionality of the evacuation program.”

“. . . [O]ne of the ways in which a rich society avoids what might otherwise prove to be insoluble dilemmas of choice is to recognize a separation of functions, a distribution of responsibilities, . . . and this is particularly recurrent in the legal profession.”

– Herbert Wechsler, 1957<sup>1</sup>

Herbert Wechsler (1909-2000) was one of the most respected and influential constitutional scholars of the twentieth century. Today he is usually remembered for his 1959 Holmes Lectures, in which he articulated the ideal of “neutral principles” in law.<sup>2</sup> One of the most cited law review articles ever published, Wechsler’s plea for disinterested legal reasoning is justly famous. It was, however, only one aspect of a long and remarkable career that included such accomplishments as the first American criminal law casebook (jointly authored with Jerome Michael)<sup>3</sup>; stewardship of the American Law Institute’s Model Penal Code<sup>4</sup>; and publication of the “Hart and Wechsler” casebook on federal jurisdiction,<sup>5</sup> which has been described as “probably the most important and

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<sup>1</sup> Herbert Wechsler, *Some Issues for the Lawyer*, in INTEGRITY AND COMPROMISE: PROBLEMS OF PUBLIC AND PRIVATE CONSCIENCE 123, 124 (Robert M. MacIver ed., 1957).

<sup>2</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), reprinted in HERBERT WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 3 (1961), 3. Subsequent references to this essay are to the reprinted version.

<sup>3</sup> JEROME MICHAEL & HERBERT WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION: CASES, STATUTES AND COMMENTARIES (1940).

<sup>4</sup> MODEL PENAL CODE (Proposed Official Draft 1962).

<sup>5</sup> HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953).

influential casebook ever written.”<sup>6</sup> One aspect of Wechsler’s career, however, remains particularly unknown to students of the law and to historians: Wechsler’s role as Assistant Attorney General in charge of the Justice Department’s War Division towards the end of World War Two. During this time Wechsler oversaw the government’s argument in the 1944 case of *Korematsu v. United States* (affirming the U.S. government’s power to exclude citizens of Japanese ancestry from military zones).<sup>7</sup>

It is the wartime dimensions of Wechsler’s career that we focus on in this essay. We do so with a number of goals in mind. The first is simply to tell the story of the prominent role that Wechsler played in a case “steeped in infamy,”<sup>8</sup> a case that upheld a policy of discrimination based explicitly on racial grounds, a case that looks like the very paradigm of non-neutral, Supreme Court decision-making.

The second goal is to highlight Wechsler’s earnest efforts after the war to justify his role in *Korematsu*. These efforts include some of his better-known writings, such as the “Neutral Principles” essay, but also an important and neglected address that Wechsler delivered in the winter of 1955-56 to the Institute for Religious and Social Studies of the Jewish Theological Seminary of America. The address was published in 1957 in a volume entitled *Integrity and Compromise: Problems of Public and Private Conscience*.<sup>9</sup>

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<sup>6</sup> Akhil Reed Amar, *Law Story: Hart and Wechsler’s The Federal Courts and the Federal System*, 102 HARV. L. REV. 688 (1989) (reviewing the third edition of the casebook, published in 1988).

<sup>7</sup> 323 U.S. 214 (1944). Among the many sources that omit this aspect of Wechsler’s career are the American Law Institute’s obituary of Wechsler, published in THE A.L.I. REPORTER (Summer 2000), [http://www.ali.org/ali/R2204\\_Wechsler.htm](http://www.ali.org/ali/R2204_Wechsler.htm) (last viewed May 24, 2003); the memorial tributes to Wechsler published in the January 2000 issue of the COLUMBIA LAW REVIEW; Richard H. Fallon, *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953; and GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME, FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004). Roswell Perkins of the A.L.I. Council published a Memorial Minute about Wechsler in the Fall 2000 issue of THE A.L.I. REPORTER that did acknowledge Wechsler’s wartime supervision of the internment of persons of Japanese ancestry on the West coast. See [http://www.ali.org/R2303\\_memorial.htm](http://www.ali.org/R2303_memorial.htm) (last viewed May 24, 2003). The one exception to the general neglect of Wechsler’s role in the West Coast internments is the excellent book by PETER IRONS, JUSTICE AT WAR 217, 286-93, 357-58 (University of California Press 1993) (1983).

<sup>8</sup> NORMAN DORSEN, MICHEL ROSENFELD ANDRÁS SAJÓ, & SUSANNE BAER, COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 665 (2003).

<sup>9</sup> Wechsler, *supra* note 1. Wechsler also discussed the *Korematsu* litigation in a series of interviews with the Columbia University Oral History Project between 1978 and 1982: Interview by Geoffrey Miller & Norman Silber with Herbert Wechsler (*The Reminiscences of Herbert Wechsler*), Columbia University Oral History Project, 1978-1982, unpublished, 362 pp. [hereinafter Oral History]. Some excerpts of these extensive interviews were published as Geoffrey Miller & Norman Silber, *Toward ‘Neutral Principles’ in the Law: Selections from the Oral History of Herbert Wechsler*, 93 Colum.

Wechsler's post hoc efforts to justify his responsibilities as a government lawyer in *Korematsu* are a vital meditation on the bridge between the worlds of constitutional practice and constitutional thought. Indeed, it was Wechsler's view that the only authentic form of scholarly criticism is one that asks what the scholar would have done in the policymaker's position.<sup>10</sup>

A third goal of our work is to suggest that Wechsler's prominent involvement in the *Korematsu* litigation shaped his subsequent constitutional theory, including his ideas about neutral principles, federalism, and separation of powers. In contradistinction to scholars who stress that the school of thought with which Wechsler is associated, legal process theory, was first and foremost a product of the Cold War, we emphasize that Wechsler's basic legal convictions were already formed during World War II. Our emphasis, then, is less on the 1950s preoccupation with totalitarianism, which others see as central for Wechsler (as well as for other legal-process thinkers such as Henry Hart and Albert Sacks),<sup>11</sup> and more on the impact of wartime constitutional problems on Wechsler's post-war thinking.

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*L. Rev.* 854 [hereinafter Miller & Silber]. The complete interview is available on microfiche from the Columbia University Library. On both occasions, Wechsler referred back to his 1957 essay. At least on a public level, his position on the wartime internment remained constant throughout his life.

<sup>10</sup> Wechsler, *supra* note 1, at 119, 128. For similar statements of the importance of seeing history from the policymaker's perspective, see HENRY KISSINGER, *DIPLOMACY* 27 (1994) ("[T]here is a vast difference between the perspective of an analyst and that of a statesman. The analyst can choose which problem he wishes to study, whereas the statesman's problems are imposed on him. . . The analyst runs no risk. If his conclusions prove wrong, he can write another treatise."); and DAVID H. DONALD, *LINCOLN* 13 (1995) (recounting President Kennedy's view that no historian has a right to "grade" a President who has not "sat in his chair, examined the mail and information that came across his desk, and learned why he made his decisions.").

<sup>11</sup> See, e.g., Gary Peller, *Neutral Principles in the 1950s*, 21 *J.L. REFORM* 561, 566-67, 572-86, 606-07 (situating Wechsler and legal process theory in the context of postwar intellectual discourse and its concern with "the difference between freedom and domination"); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 250-268 (1992); and EDWARD A. PURCELL, *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN THE TWENTIETH CENTURY* (2000) (discussing Henry Hart's embrace of institutional process theory, including its reflection in the Hart and Wechsler casebook, in relation to Hart's abhorrence of totalitarianism). The title of one of Purcell's chapters, "Cold War Politics and Neutral Principles," makes clear that Purcell has Wechsler's own jurisprudence in mind as well as that of Henry Hart. On anti-totalitarianism in postwar American constitutional and legal thought generally, see Richard Primus, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 *YALE L.J.* 423 (1996); and Carl Landauer, *Deliberating Speed: Totalitarian Anxieties and Postwar Legal Thought*, 12 *YALE J.L. & HUMAN.* 171 (2000). The work that first served to focus the attention of legal historians on the significance of

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In fact, we suggest that Wechsler's influential post-war jurisprudence sustained, in some important ways, the wartime practice of subordinating constitutional liberties to the discretionary power of government. This transformation of emergency law into peacetime jurisprudence is the fourth theme of our essay. Understanding how Wechsler conceived of the Constitution's role in the context of wartime and national security dangers, those "limit" experiences that have served either to confirm or to undermine the applicability of conventional approaches to constitutional analysis,<sup>12</sup> is essential for understanding his legal thought as a whole. In short, using Wechsler's reflections on *Korematsu* as our text, we bring Wechsler--and with him, some of the basic structures of legal process theory--into conversation with the problem of emergency law.<sup>13</sup>

Giorgio Agamben has recently argued that the "state of emergency," originally intended to serve as a limited exception to the rule of law in constitutional societies, became the paradigm for governance even in "normal" times over the course of the twentieth century.<sup>14</sup> While Agamben's "normalization" thesis is subject to a number of qualifications (discussed further below), it does suggest a valuable and largely unappreciated perspective when considered in light of Wechsler's involvement in the Japanese internment controversy. There is indeed a sense in which the "state of emergency" has been normalized in postwar American constitutional law. The story of Wechsler's experience with *Korematsu* provides a window onto this normalization process. We seek to demonstrate that Herbert Wechsler's enduring contributions to

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totalitarianism as a theme in postwar American thought generally is EDWARD A. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 235-72 (1973) (analyzing such influential thinkers as Reinhold Neibuhr, Daniel Boorstin, and Robert Dahl in terms of an overriding concern to identify the lessons of totalitarianism).

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<sup>12</sup> Cf. MICHAEL WALZER, *Just and Unjust Wars: A Moral Argument with Historical Associations* (New York: Basic Books, 1977), xvii ("For war is the hardest place: if comprehensive and consistent moral judgments are possible there, they are possible everywhere").

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<sup>13</sup> Most of the post-9/11 scholarship neglects the historical connections between legal process thought and the wartime Constitution. See, for example, Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801 (2004) (responding to Ackerman's essay); and Bruce Ackerman, *This is Not a War*, 113 YALE L.J. 1871 (2004) (responding to Tribe and Gudridge). One partial exception is Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime*, in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY* 161-197 (Mark Tushnet ed., 2005).

<sup>14</sup> GIORGIO AGAMBEN, *STATE OF EXCEPTION* 12-14 (Kevin Attell trans., 2005) (discussing how the state of exception has become generalized as a technique of governance in Western democracies since World War Two).

American constitutional law reflect his pivotal encounter with the “state of emergency” in World War Two.

I. “Nice Cases for Testing the Role of the Government Lawyer”<sup>15</sup>

Herbert Wechsler’s first stint in government service was as a clerk to Supreme Court Justice Harlan Fiske Stone in 1932, one year after Wechsler began teaching at Columbia Law School. When Wechsler returned to Columbia in 1933, he began teaching criminal law with Jerome Michael and preparing the materials that would be published in 1940 as *Criminal Law and its Administration*, recently described as “the template for all contemporary criminal law casebooks and perhaps the modern casebook more generally.”<sup>16</sup> By the time of this book’s publication, Wechsler was well on his way towards becoming one of the leading criminal law scholars of the twentieth century, a role that he would carry forward after the Second World War as the chief architect of the American Law Institute’s Model Penal Code.

In 1940, Wechsler’s efforts in criminal law earned him an invitation from the Assistant Attorney General in charge of the Justice Department’s Criminal Division to help with various projects involving the reform of federal criminal law.<sup>17</sup> Because of internal departmental politics, however, Wechsler was assigned instead to serve as an assistant to then Solicitor General Francis Biddle.<sup>18</sup> What was initially planned as a one-year sabbatical turned into a six-year stint in government. As Wechsler later recounted to the Columbia Oral History Project, “the big thing that happened was that on December 7, 1941, the world had changed.”<sup>19</sup> More specifically, Wechsler’s continued service in Washington was prompted by an arrangement of “musical chairs” entirely characteristic of high-level government appointments then as now. At the end of the 1941-42 Supreme Court term, Chief Justice Hughes resigned, Wechsler’s former boss Justice Stone became Chief Justice, then Attorney-General Robert Jackson (for whom Wechsler would later work at Nuremberg) was appointed to fill Stone’s seat as an associate justice, and Francis Biddle was appointed to replace Jackson as Attorney General. Biddle asked Wechsler to stay on at the Justice Department,<sup>20</sup> and Wechsler agreed, working first as a deputy to Jim

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<sup>15</sup> Miller & Silber, *supra* note 9, at 884.

<sup>16</sup> Jonathan Simon, *Wechsler’s Century and Ours: Reforming Criminal Law in a Time of Shifting Rationalities of Government*, 7 BUFF. CRIM. L. REV. 247 (2004).

<sup>17</sup> Miller and Silber, *supra* note 9, at 875.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 875-76.

<sup>20</sup> FRANCIS BIDDLE, IN BRIEF AUTHORITY 159 (1962) (“Wechsler was one of an exceptionally able group of young men who worked closely with me when I was Solicitor General and Attorney General. . . . I liked the turn of his mind, and the sobriety of his measured judgment, not so much cautious as thoughtful, his humor warming his thought. He was cheerfully patient, a quality that calmed my own nervous restlessness. He was

Rowe, the Assistant to the Attorney General, and then as the Assistant Attorney General in charge of the War Division, a position to which Wechsler was confirmed by the Senate in 1944.<sup>21</sup>

The Justice Department's War Division exercised control over what Wechsler would describe later as a "mixed jurisdiction."<sup>22</sup> This included, first, control over all "alien enemy" internments and the litigation that grew out of them – the jurisdiction that would bring Wechsler into the *Korematsu* story. Second, the War Division was charged with overseeing any issues arising from the registration of foreign agents in the United States. Third, all issues involving military control over civilians were under Wechsler's new charge. This meant, among other things, supervision of all problems stemming from the imposition of martial law in Hawaii and from the evacuation of aliens and citizens alike from certain areas deemed sensitive for national security reasons by the military command. A fourth category gave the War Division the responsibility for providing the military with intelligence to assist in the selection of bombing targets. A final, miscellaneous category involved any other issues arising from the war effort that had not been assigned to other divisions of the Justice Department.<sup>23</sup> These various heads of jurisdiction inevitably brought the lawyers of the Justice Department into sustained contact with their counterparts in the Defense Department, creating opportunities not only for collaboration and exchange of information but also for turf battles of the kind that have typically characterized federal interagency relations in time of war.

Wechsler arrived at the Justice Department after the Supreme Court had heard and decided the *Hirabayashi* case in 1943,<sup>24</sup> which upheld the imposition of a nighttime curfew upon the "enemy alien" population living in the "military areas" of coastal California – a category that included Italians and Germans in addition to Japanese and American citizens of Japanese descent. By contrast, Wechsler later recounted, he was "very much involved" in the litigation that led to *Korematsu* and *Ex Parte Endo*,<sup>25</sup> the pair of cases decided on the same December 1944 day, in which the constitutionality of the exclusion and internment of persons of Japanese ancestry was at stake. Wechsler stayed on long enough in the Justice Department to argue before the Supreme Court in

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essentially happy, a virtue that I prize highly, happy largely because he possessed the quality of caring deeply for his friends, and of showing them that he cared.”).

<sup>21</sup> Miller and Silber, *supra* note 9, at 881-82. Wechsler recounted that Congressman John Rankin of Mississippi engaged in anti-Semitic stereotyping of him at the time of his nomination by implying that Wechsler had changed his name to make it sound non-Jewish. He described Rankin as “one of the most miserable characters I think I’ve ever encountered in this life . . . one of the most totally racist, prejudiced people to come to Congress, even in those days, from anywhere in the country.”

<sup>22</sup> *Id.* at 882.

<sup>23</sup> *Id.* at 882-83.

<sup>24</sup> *Hirabayashi v. United States*, 320 U.S. 81 (1943).

<sup>25</sup> 323 U.S. 283 (1944).

1946 in favor of the validity of continued martial law in Hawaii.<sup>26</sup> As he later put it, “these were nice cases for testing the role of the government lawyer.”<sup>27</sup>

The background of the *Korematsu* litigation need only be briefly summarized here. *Korematsu* had its immediate origins in President Roosevelt’s Executive Order No. 9066, issued on February 19, 1942. The Order authorized the military to demarcate “military areas” from which “any or all persons may be excluded.” It also authorized the military to provide “shelter” and “other accommodations” for the excluded persons. General John L. DeWitt’s Exclusion Order No. 34, issued on May 9, 1942, implemented the exclusion of persons of Japanese ancestry. Over the course of 1942, some 117,000 persons of Japanese descent, two-thirds of them American citizens, were forced to evacuate their homes in California, Washington, Oregon, and Arizona.<sup>28</sup> The California “military areas” included the city of San Leandro, where Fred Korematsu lived and where he was stopped for questioning by the police on May 30. Korematsu’s prosecution and conviction, technically speaking, stemmed solely from his violation of the military’s exclusion order,<sup>29</sup> and not from his refusal to obey the evacuation order.

Not surprisingly, given that exclusion and internment were but different sides of the same coin, Korematsu used his appeal to the Supreme Court to challenge both the exclusion order and the internment of persons of Japanese ancestry, which proceeded first by way of temporary “detention centers” before advancing to the use of longer-term “relocation centers.”<sup>30</sup> The *Korematsu* decision itself upheld only the exclusion order, leaving the Court to consider the constitutionality of the internment policy per se in *Ex Parte Endo*.<sup>31</sup> A reasonable observer might well wonder whether it was possible to consider the two policies as separate and distinct. But in fact it was one of the themes of the government’s (and the Court’s) position in the case that Korematsu did not have standing to challenge the internment policy, since he had made the “choice” not to submit to the internment order and had been convicted “only” of disobeying the exclusion order.

## II. The Government’s Brief in Korematsu

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<sup>26</sup> *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

<sup>27</sup> Miller & Silber, *supra* note 9, at 883.

<sup>28</sup> STONE, *supra* note 7, at 286-87. Stone notes that there was no immediate clamor for internment right after Pearl Harbor, and that it was not until several weeks after Pearl Harbor that the demand for internment surged along the West Coast.

<sup>29</sup> To be even more precise, Korematsu was convicted of infringing a federal statute that criminalized violations of the exclusion order.

<sup>30</sup> In the Columbia Oral History interviews, Wechsler observed that the term “relocation centers” was “a more appealing name” given to “what in any fair estimate could be called concentration camps.” Oral History, *supra* note 9, at 199.

<sup>31</sup> On the *Endo* case, see Patrick Gudridge, *Remember Endo?*, 116 *Harv. L. Rev.* 1633 (2003).

The government lawyers who developed this argument before the Supreme Court in October 1944, more than two years after the events in question had transpired, were led by Herbert Wechsler and Solicitor General Charles Fahy. Before becoming Solicitor General, Fahy had served as director of the Justice Department's War Division, the very position to which Wechsler was nominated.<sup>32</sup> The other principal contributors to the brief were Edward Ennis, the director of the Justice Department's Alien Enemy Control Unit, John Burling, a Justice Department lawyer working under Wechsler, and Ralph Fuchs, a member of Fahy's staff. To Burling fell the task of writing an initial draft of the brief.<sup>33</sup>

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#### A. Storm Over the DeWitt Report

The military's justifications for the exclusion order and internment policy were detailed in General DeWitt's Final Report, dated June 5, 1943, but not made public until January 1944. DeWitt's Report would turn out to be the source of much contention between Wechsler's group at the Justice Department and their counterparts in the War Department during the months leading up to the *Korematsu* decision. In particular, the Report set forth two principal justifications for the forced evacuation program. First, it argued that the efforts to encourage voluntary migration from the restricted zones had failed. Second, the Report claimed that persons of Japanese ancestry were engaged in efforts to "sabotage" the American war effort against Japan. Perhaps the most inflammatory and unfounded of these latter allegations was that persons of Japanese ancestry were using illumination and radio devices to send signals to Japanese submarines stationed off the west coast – allegations that had been investigated and rejected by the FBI and Federal Communications Commission.<sup>34</sup> Building upon suggestions of a Japanese-American "fifth column" that had been developed in the press and by West Coast lobbying groups, the Report argued that it was impossible to distinguish between loyal and disloyal persons of Japanese descent, and that military necessity, combined with the time pressures of the war effort, required an indiscriminate approach to evacuation of the military areas.<sup>35</sup>

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<sup>32</sup> IRONS, *supra* note 7, at 286.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> STONE, *supra* note 7, at 292-95. In a recent debate with Geoffrey Stone on the subject of civil liberties in wartime, televised on CSpan on June 11, 2005, Judge Richard Posner evoked the widespread fear of a "fifth column" that prevailed in the Western democracies during the Second World War. He also noted that Japanese submarines stationed off the West coast had fired upon American coastal facilities, implying that the internment was a justifiable response to this security situation. Posner did not explain, though, how the reports of firings by Japanese submarines could be connected to the internment of 117,000 persons of Japanese ancestry. For a more thoughtful effort to evoke the factors that could have led some reasonable persons to doubt Japanese loyalty, see PAUL BREST, SANFORD LEVINSON, J. M. BALKIN, & AKHIL REED AMAR, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 820-821 (4<sup>th</sup> ed. 2000). The

As Peter Irons has recounted, the Justice Department lawyers working under Wechsler were far from sympathetic to the claims of DeWitt's Report. Burling used his draft of the *Korematsu* brief to try to discredit the War Department. In a footnote that would go on to have a very long career, he wrote that

[t]he recital of the circumstances justifying the evacuation as a matter of military necessity . . . is in several respects . . . in conflict with information in the possession of the Department of Justice. In view of the contrariety of the reports on this matter we do not ask the Court to take judicial notice of the recital of those facts contained in the Report.<sup>36</sup>

Because he was unwilling to disclose to the Supreme Court the existence of the FBI and FCC reports, Charles Fahy revised Burling's footnote to state simply that the Justice and War Departments differed on the question of military necessity. Burling promptly took his case to Wechsler, noting in a memorandum dated September 11, 1944 that the FBI and FCC reports had identified "intentional falsehoods" in the Final Report. Some two weeks later, Fahy had succumbed to a plea from John McCloy and Adrian Fisher, the Defense Department lawyers responsible for implementation of the evacuation program, to have the offending footnote removed. On Saturday, September 30, 1944, as Burling's draft of the *Korematsu* brief was going to press, Fahy ordered the Justice Department's Printing Office to stop printing of the brief.<sup>37</sup>

Asked by Fahy to negotiate a resolution to the dispute with McCloy and Fisher, Burling and Ennis appealed once again to Wechsler for support in retaining the original footnote, and asked that he take the issue directly to Attorney General Biddle. In a 1982 interview with Peter Irons, Wechsler described his position on the dispute as a matter of searching for "negotiated language in a situation that from the War Department's and the Solicitor General's point of view was a public relations problem."<sup>38</sup> Wechsler referred the matter to Fahy, attaching the Burling and Ennis memorandum contradicting the allegations of the Final Report. Fahy in turn decided to stand by the original version of

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editors emphasize that traditional prejudices against persons of Asian background, hostile treatment of Japan on the part of U.S. foreign and immigration policymakers during the first two decades of the twentieth century, and federal and state legal discrimination against Japanese persons would themselves have constituted grounds for doubting the loyalty of Japanese Americans. "It would have required almost heroic denial for all persons of Japanese descent to feel unambiguous attachment to a country that had systematically stigmatized them on racial grounds and, moreover, systematically denigrated their country of origin." *Id.* at 821. While the government brief in *Korematsu* claimed that wartime relocation of persons of Japanese ancestry along the West Coast would itself generate local hostility, *see* Brief for the United States at 45-47, 53, *Korematsu v. United States*, 323 U.S. 214 (1944), the factors discussed by Brest et al. do not appear to have been used as justifications for the internment in its own time.

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<sup>36</sup> IRONS, *supra* note 7, at 286.

<sup>37</sup> *Id.* at 287-88.

<sup>38</sup> *Id.* at 289.

Burling's footnote. This is where matters stood when, later that same Saturday, Fisher called to insist that the Justice Department brief ask the Supreme Court to take judicial notice of the facts in DeWitt's Report.<sup>39</sup>

The accounts of the participants differ as to what happened after Fisher made this demand, but it seems that Fahy, while not necessarily remaining committed to the original Burling footnote, was adamant that some indication of the conflict between DeWitt's Report and the FBI/FCC reports be expressed in the brief. Ennis and Burling thereupon appealed to Wechsler once again for their more robust version of the footnote. Wechsler had by this time already sent the brief to the Printing Office with Fahy's more moderate version of the footnote in place. Faced with a threat of resignation from Ennis and Burling, whose signatures Wechsler needed in order to show the Supreme Court that the Justice Department was not divided over *Korematsu*, Wechsler called Fuchs (who had been delegated responsibility for the final printing of the brief) and ordered that the printing be stopped for a second time.<sup>40</sup>

The effect of all this back-and-forth was to prompt Wechsler to draft his own alternative to the two existing versions of the disputed footnote:

The Final Report of General DeWitt . . . is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice, and we rely upon the Final Report only to the extent that it relates to such facts.<sup>41</sup>

Peter Irons correctly notes that this [reformulation](#) – in which Wechsler intended to distinguish subtly between acceptable claims about the failure of the voluntary migration program, on the one hand, and contested claims about an actual campaign of sabotage led by persons of Japanese ancestry in the United States, on the other – amounted in practice to an endorsement of the Final Report as a whole.<sup>42</sup> Wechsler referred his new version of the footnote and the original version by Burling to Charles Fahy, who asked Wechsler to submit the choice to Fisher at the Pentagon. Not surprisingly, particularly after hearing Wechsler explain that “we could drop out any specific reference to matters in controversy” and frame the footnote “in the gentlest conceivable way,” Fisher opted for Wechsler's more accommodating version. Burling and Ennis surrendered their resistance, and the brief went to the Justice Department print shop for a third and last time.<sup>43</sup>

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Some forty years after *Korematsu* was decided, a federal district court in California vacated the decision largely on the basis of the government's failure to alert

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 290.

<sup>41</sup> Brief for the United States, *supra* note 35, at 11.

<sup>42</sup> IRONS, *supra* note 7, at 291.

<sup>43</sup> *Id.* at 291-92.

the Supreme Court to intentional falsehoods in the Final Report.<sup>44</sup> For this reason, and because the Supreme Court in *Korematsu* did in fact rely on some of the disputed allegations of DeWitt's Report, the Wechsler footnote has attained a notorious status in American constitutional history (though Wechsler's name has rarely, if ever, been attached to that notoriety). But there was, of course, much more to the brief that Wechsler was responsible for overseeing in this case than the two-sentence footnote that appeared on page eleven. It would be misleading to portray the Justice Department lawyers as offering a completely one-sided, blanket endorsement of the military's position. The footnote battles are themselves one indication of the degree of anxiety that Justice Department lawyers felt in their rationalization of the internment program. All the indications are that Attorney General Francis Biddle, moreover, was personally opposed to the War Department on the internment question, and made his voice felt with the President.<sup>45</sup> While not as adamant at the time as Ennis and Burling were, Wechsler apparently had his own reservations about internment. Nevertheless, Justice Department lawyers did not consider themselves responsible for the internment policy.<sup>46</sup> They ultimately believed that the role of the government lawyers in *Korematsu* was not to formulate policy but to justify it after the fact. Since Wechsler himself would later defend his role in the *Korematsu* litigation precisely in terms of a responsibility to justify decisions that belonged to the executive, it makes sense to look in some detail at how he framed executive authority in the *Korematsu* brief.

#### B. The Right to Decide versus Deciding What is Right

The brief conceded that *Korematsu's* loyalty to the United States was not at issue in the appeal. At his trial before the district court, *Korematsu* had testified that he would have borne arms for the United States and done anything else requested of him in the war effort against Japan. He had further stated that he did not sympathize with Japan and had been assimilated to the U.S.<sup>47</sup> After explaining how the internment program worked – and asking the Supreme Court to take limited judicial notice of DeWitt's Report -- the Justice Department brief went on to state that “[t]here was a basis for concluding” that some American citizens of Japanese descent had “formed an attachment to, and sympathy and enthusiasm for, Japan.”<sup>48</sup> Appearing to echo the argument of the DeWitt Report, the

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<sup>44</sup> *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

<sup>45</sup> BIDDLE, *supra* note 20, at 213 (“I thought at the time that the program was ill-advised, unnecessary, and unnecessarily cruel, taking Japanese who were not suspect, and Japanese Americans whose rights were disregarded, from their homes and from their businesses to sit idly in the lonely misery of barracks while the war was being fought in the world beyond”). See also STONE, PERILOUS TIMES, *supra* note 7, at 293-94, 304; and Wechsler, *supra* note 1, at 122-23.

<sup>46</sup> See BIDDLE, *supra* note 20, at 213 (noting that the individuals responsible for the internment policy were Roosevelt, Stimson, McCloy, DeWitt, and Col. Karl Bendetsen of the Army General Staff).

<sup>47</sup> Brief for the United States, *supra* note 35, at 4-5.

<sup>48</sup> *Id.* at 12.

brief made clear that it was impossible “quickly and accurately” for the military to distinguish between loyal and disloyal Japanese-Americans, whose presence in the designated military areas was “peculiarly and particularly dangerous.”<sup>49</sup> In short, there was a “substantial basis” upon which the executive could reasonably conclude that the internment of persons of Japanese ancestry as a group was a “necessary protective measure.”<sup>50</sup> Given this substantial basis, the Supreme Court should defer to the executive and not make an independent decision about whether Japanese citizens constituted a threat to security.

In so arguing, the government’s brief rendered largely pointless the conflict that had taken place within the Justice Department (and between it and the War Department) over the DeWitt Report’s claim that real acts of sabotage by Japanese Americans had already taken place. Citing the Supreme Court’s 1943 decision in *Hirabayashi*,<sup>51</sup> as the government brief did in arguing that internment was a “necessary protective measure” in the context of war, was the functional equivalent of endorsing the most controversial passages in the Final Report. And indeed the brief proceeded to do just that, relying on *Hirabayashi* again to argue that the government could reasonably find that

the entire Pacific coast . . . is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations.<sup>52</sup>

The point of this passage, of course, was not that espionage and sabotage were actually widespread among persons of Japanese descent along the west coast in 1942 and 1943. Rather, the point was that the military (and the executive branch more generally) could plausibly have concluded that the possibility of enemy activity within the United States was sufficiently real to justify the use of severe prophylactic measures. In the aftermath of *Hirabayashi*, the brief argued, there was no doubt that the President’s and Congress’s war power encompassed the ability to implement any measure for which there existed a “substantial basis” to order “a protective measure necessary to meet the threat of sabotage and espionage.”<sup>53</sup>

Through this jurisdictional doctrine concerning the executive’s sphere of decisionmaking competence (the right to decide) as opposed to an alternative doctrine that might have emphasized the Court’s core duty to figure out if the government’s claims were actually true (deciding what is right), the disputed allegations of DeWitt’s Report made their way through the backdoor into the government’s brief. In the face of references to ethnically based “espionage” and “sabotage,” the fine legal distinction

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 17.

<sup>51</sup> *Hirabayashi v. United States*, 320 U.S. 81 (1943).

<sup>52</sup> Brief for the United States, *supra* note 35, at 19. This was actually a quotation, within *Hirabayashi*, from Proclamation No. 1 (March 2, 1942), *reprinted in* Brief for the United States, *supra* note 35, at Appendix II (establishing two military areas along the Pacific coast of the U.S.).

<sup>53</sup> Brief for the United States, *supra* note 35, at 20 (quoting *Hirabayashi*, 320 U.S. 81).

between actual threats and reasonable perceptions thereof was bound to be lost on observers. So too was the distinction between reliance upon the DeWitt Report itself, which the brief was careful not to embrace as a whole, and reliance upon the *Hirabayashi* decision, which, no matter how poorly reasoned it might be, clearly had to be treated as binding precedent.

The significance of *Hirabayashi* in the *Korematsu* litigation can hardly be overestimated, for it provided a far more respectable source for the racist stereotypes that informed the executive branch's perception of what constituted military "necessity" in 1942 and 1943. The government brief cited *Hirabayashi* for the proposition that "the German invasion of the Western European countries had given ample warning to the world of the menace of the 'fifth column'" – presumably a reference to the existence of pro-Nazi sympathizers in such nations as France, Holland, and Belgium in the 1930s and early 1940s. The distinction between actual and perceived threats that Wechsler's team sought to draw went hand in hand with this adaptation of the "fifth column" metaphor to persons of Japanese descent along the west coast. And that metaphor inevitably overwhelmed whatever might have been accomplished by Wechsler's footnote and other passages in the brief that hinted at criticism of the War Department position. As the brief argued, while there might be a basis for disagreeing with the government's judgment as to the authenticity of the internal Japanese threat, it was difficult to maintain that that judgment lacked a substantial basis.<sup>54</sup> Again citing *Hirabayashi*, the brief insisted somewhat preposterously that persons of Japanese ancestry in the United States had not been singled out for discriminatory treatment because of their race, but because "other considerations made the ethnic factor relevant."<sup>55</sup>

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### C. The Issue of Standing

Despite the undeniable significance of racial stereotypes in all of this, and despite the apologetic nature of the distinction between actual and perceived threats, the government's brief in *Korematsu* did set forth a number of process-based arguments that proved difficult for the defendant to maneuver around. The government asserted that Fred Korematsu did not have standing to challenge the legality of the detention program because he had refused to submit himself to the evacuation order. By this reasoning, the internment of Japanese Americans consisted of two severable programs: the first was evacuation from the designated military areas, and the second was actual internment in the non-military areas in which the detention camps were located.

The brief reminded the Court that Korematsu had been charged not with violating the provision by which the exclusion from the military areas was "effectuate[d]" – namely, the forced relocation program -- but rather with violating a federal statute that criminalized remaining in the military areas after the exclusion order went into effect.<sup>56</sup> To the legal outsider, of course, such a distinction may seem no less slippery than the contrast between perceived and actual wartime threats, but it came with a warning about

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<sup>54</sup> *Id.* at 23.

<sup>55</sup> *Id.* at 26.

<sup>56</sup> *Id.* at 31. See the discussion of *Korematsu* in PIERCE O'DONNELL, IN TIME OF WAR: HITLER'S TERRORIST ATTACK ON AMERICA 271-83 (2005).

the specter of civil disobedience that could not but have carried weight with the Court. Thus, the brief stated that the Court,

in determining whether the constitutionality of a legislative provision may be judged separately from that of other provisions which accompany it, has followed the criterion of whether the particular provision, even though its requirements bear an administrative relationship to the others, has an essential character and . . . capacity to stand alone.<sup>57</sup>

In this case, the brief argued, the exclusion order and the detention program were in fact essentially separable because Korematsu could have submitted to the evacuation and nonetheless retained the right to challenge his detention by means of a petition for a writ of habeas corpus.<sup>58</sup> Unless this distinction were applied by the Court, the brief threatened, there was no telling what forms of civil disobedience would ensue. Thus, “[t]he consequences for the future of holding in this case that disobedience of the exclusion order was a proper means of testing its validity might be grave.”<sup>59</sup> Precedent demanded that “there are times when it is necessary for the Government to act first and litigate afterward, with respect to emergency matters which can fairly be determined in that manner.”<sup>60</sup>

As this last passage suggests, the matter of standing was closely linked in the government’s presentation to a second set of legal arguments, revolving around the themes of necessity and emergency law. The legal niceties of standing were particularly important – and the threat of civil disobedience particularly grave – in time of war, when it would sometimes be necessary for the government to act preemptively and without definite foreknowledge of the costs and benefits of its actions. By the same logic, however, even if Korematsu had obeyed the exclusion order and submitted to internment, his detention would have been constitutional, the brief argued, as a valid exercise of the President’s and the Congress’s war powers.<sup>61</sup> The decision to resort to internment had been made only after less stringent measures – that is, voluntary migration -- had proved unsuccessful in removing any significant number of persons of Japanese ancestry from the West coast.<sup>62</sup> Internment was not a first choice but a “military necessity,” the brief argued, again citing the DeWitt report.

In this sense, military necessity had assumed the status of a constitutional answer to a constitutional question. But there was even more to the analysis. The brief went on to state that the internment to which Korematsu would have been subjected had he

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<sup>57</sup> Brief for the United States, *supra* note 35, at 31-32 (internal quotations omitted).

<sup>58</sup> *Id.* at 34.

<sup>59</sup> *Id.* at 36.

<sup>60</sup> *Id.* at 37 (citing *Falbo v. United States*, 320 U.S. 549 (1944); and *Yakus v. United States*, 321 U.S. 414 (1944)).

<sup>61</sup> Brief for the United States, *supra* note 35, at 40.

<sup>62</sup> *Id.* at 40-43.

obeyed the exclusion order was within the scope of the executive order and congressional act that authorized the creation of the military areas.<sup>63</sup> But this argument cut against the very grain of the brief's insistence that exclusion and internment were separable policies for purposes of the standing analysis. If the exclusion of persons of Japanese ancestry from designated military areas also entailed the authority to provide "shelter" for them indefinitely in internment camps, then in what sense could it be said that Korematsu's challenge to the exclusion order was not also a valid challenge to the internment policy? To this question, the government brief's only answers were, again, military necessity and the welfare of the victimized population itself, given the purported failure of voluntary migration to protect persons of Japanese ancestry from the hostility of "local" communities.<sup>64</sup>

At first glance, the draconian standing doctrine that Wechsler employed in the brief looks as if it were artificially forged to enable the internment. But it is worth keeping in mind that restrictive conceptions of standing had an older and progressive pedigree. As Cass Sunstein has observed:

[C]ourts favorably disposed toward the New Deal reformation developed doctrines of standing, ripeness, and reviewability largely to insulate agency decisions from judicial intervention. Such doctrines were used enthusiastically by judges associated with the progressive movement and the New Deal, most prominently Justices Brandeis and Frankfurter, who reflected the prevailing belief that traditional conceptions of the rule of law were incompatible with administrative regulation.<sup>65</sup>

Standing doctrine, in short, was designed by legal theorists to make it hard for courts to interfere with the state's unprecedented regulatory powers. Sunstein observes that the standing doctrine originally used by progressives has been wielded recently by "judges with quite a different political orientation."<sup>66</sup> No doubt Sunstein had in mind cases of the Rehnquist era in which the Court denied citizens standing to sue government for *not* enforcing regulations. The irony that Sunstein thus alludes to is that a once pro-government standing doctrine is now associated with the retrenchment of governmental authority. However, focusing on this particular irony only serves to reinforce the distinction between "progressive" (pro-government) and "conservative" (anti-government) in a conventional manner. Contrasting the progressive impulses of yesteryear to today's judicial conservatism obscures the more troubling fact that even in the Roosevelt era, standing doctrine lent itself to purposes that were more both progressive and repressive.

The spirit of the New Deal glided easily toward the policy of Japanese internment because the New Deal had already decisively diminished enthusiasm for strict judicial scrutiny of government programs. In other words, the legal philosophy that facilitated

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<sup>63</sup> *Id.* at 44.

<sup>64</sup> *Id.* at 45-47.

<sup>65</sup> Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1437 (1988) (internal citations omitted).

<sup>66</sup> *Id.*

the New Deal, a philosophy emphasizing judicial passivity, was a respectable platform on which doctrines justifying the government's military power were situated. In fact, certain measures of the New Deal had already been conceptualized as emergency necessities. Thus, the Supreme Court affirmed in a 1934 case, holding that a moratorium on mortgage debts was not an impairment of contractual obligations, that "an emergency existed...which furnished a proper occasion for the exercise of the reserved power of the State to protect the vital interests of the community."<sup>67</sup> Applying the terminology that Wechsler later used in the famous "Neutral Principles" essay, one could say that while the "results" of such a case and the results of *Korematsu* were entirely different (the one relieving masses of people of economic hardship, the other imposing a new burden of internment), the underlying "principle" of judicial deference to government in difficult times was impeccably consistent.

In the Columbia Oral History interview, Wechsler clearly defined himself as New Dealer and drew out the implications it had for his attitude toward courts:

My views on constitutional law generally date me very definitely as somebody who began to deal with these problems in the era of the Taft Court or the early Hughes Court, the era when the decisions seemed to be a road block to legislative developments that I and many others thought to be necessary for the decent humanization of American capitalism, the industrial system.

"Having learned through that experience of the consequences of judicial excess," he added, "we became highly sensitive to it, and on the whole, I should say, eager to develop the type of critique that would contribute to avoiding it."<sup>68</sup> Wechsler distinguished

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<sup>67</sup> *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 444 (1934). Although, in *L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935), the Supreme Court refused to accept emergency-based arguments as a justification for the National Industrial Recovery Act, it did not overrule *Blaisdell*. Moreover, emergency justifications for New Deal policies came into play in subsequent cases that affirmed the government's regulatory powers. See, e.g., *Highland Farms Dairy v. Agnew*, 300 U.S. 608 (1937); *U.S. v. Rock Royal Co-Operative*, 307 U.S. 533 (1939); *Buckstaff Bath House Co. v. McKinley, Commissioner of the Department of Labor of Arkansas*, 308 U.S. 358 (1939); and *Veix v. Sixth Ward Building & Loan Association of Newark*, 310 U.S. 43 (1940). These cases were identified by examining all cases from the 1930s in which the term "emergency" is used as an argument in support of economic regulation. There appear to be many more such cases than the scholarly literature acknowledges. The general view is that the *Schechter* case put a permanent damper on the use of emergency arguments and the Court relied instead on a broad reading of the Commerce Clause to validate economic regulation. See also Michael R. Belknap, *The New Deal and the Emergency Powers Doctrine*, 62 *Tex. L. Rev.* 67; and Roger I. Roots, *Government by Permanent Emergency: The Forgotten History of the New Deal Constitution*, 33 *Suffolk U.L. Rev.* 259.

<sup>68</sup> Oral History, *supra* note 9, at 338.

himself from younger scholars, such as Laurence Tribe, who had not lived during the New Deal era and who were thus “more tolerant” of judicial “activism.”<sup>69</sup>

Wechsler and his co-editor, Henry Hart, would carve out a large place for standing doctrine in their *Federal Courts and the Federal System* (first published in 1953). The text authoritatively framed Article III’s “case and controversy” requirement so as to highlight standing as a serious and perennial separation-of-powers barrier to the presentation of constitutional grievances in court.<sup>70</sup> Some of the cases presented in the first edition to illustrate the doctrine were New Deal cases in which questioning the constitutionality of emergency economic programs was foreclosed by technical standing arguments.<sup>71</sup> However, the casebook does not place cases in historical context; it does not isolate such cases as instances of emergency power in a time of crisis. Instead, it delineates standing as a universal constitutional principle. The casebook thus helped to transform a restrictive standing doctrine that was originally formulated to justify the crisis-management powers of government into a mundane judicial standard.

#### D. The Power to Delegate

Two final steps remained in Wechsler’s *Korematsu* argument. The first was that the authority to decide upon internment had been validly delegated not only from the Congress to the President, but also from the President to the designated West coast military commander.<sup>72</sup> So long as internment was “related to the prevention of espionage and sabotage,” then it should be regarded as sufficiently constrained by administrative standards to constitute a valid exercise of delegated power.<sup>73</sup>

This embrace of a broad and flexible power to delegate legislative and executive authority is no less indicative of Wechsler’s intellectual and political roots as a New Dealer than is his advocacy of a vigorous presidential emergency prerogative. It was, after all, one of the cardinal presuppositions of the New Deal that the administrative state required “power, discretion, flexibility, ability to act” if it was to succeed in the face of daunting economic and social challenges.<sup>74</sup> Those who sought to impose limits on the discretionary powers of the New Deal administrative apparatus were primarily

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<sup>69</sup> *Id.* at 338. See also EDWARD A. PURCELL, *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN THE TWENTIETH CENTURY* (2000) (showing that a major reason for legal academic resistance to the *Brown* decision in the 1950s was the memory of the *Lochner* era and the distrust of judicial “activism” that it was its legacy).

<sup>70</sup> HART & WECHSLER, *supra* note 5, at 156-192.

<sup>71</sup> *Id.* at 163, which includes discussion of *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938) (holding that the power company lacked standing to challenge constitutionality of Emergency Public Works Administrator’s policy of granting loans in aid of competitors). See HART AND WECHSLER, *SUPRA* note 5, at 163-164 for discussion of another case challenging the Tennessee Valley Authority.

<sup>72</sup> Brief for the United States, *supra* note 35, at 47.

<sup>73</sup> *Id.* at 49.

<sup>74</sup> LAWRENCE FRIEDMAN, *AMERICAN LAW IN THE TWENTIETH CENTURY* 171 (2002).

conservatives and lawyers' groups, not progressives.<sup>75</sup> By contrast, those who resisted the 1930s and 1940s movement to constrain the excesses of the administrative process were precisely the New Dealers themselves, who were placed on the defensive by conservative invocations of the looming rise of a totalitarian state on American soil.<sup>76</sup>

Hence another paradox of twentieth-century American public law with which Wechsler and other progressive American legal scholars would grapple with after the war: the impulse to constrain a regime of ever-greater executive discretion took shape in the context of an anti-progressive coalition that was resolutely aligned against many of the social and economic objectives with which constitutional liberals were identified. Conversely, the push to expand the president's (and Congress's) ability to delegate important administrative powers to federal agencies was initially framed in terms of the very policy agenda against which postwar conservatives eventually reacted.

In Wechsler's hands, the *Korematsu* brief would embrace a broad conception of the president's ability to delegate administrative authority to federal agencies in general, and thus to defend policies that involved the delegation of authority to *military* agencies in particular--the armed forces being but several of the many agencies of the executive branch. (It is worth remembering that *Korematsu* was decided only two years before the enactment of the Administrative Procedure Act in 1946, which endowed federal courts with more robust jurisdiction to review agency actions and set aside those deemed to exceed the bounds of statutory and constitutional authority: the apotheosis of the conservative campaign to reign in the New Deal state. The first version of what would become the APA, the 1940 Walter Logan bill, was vetoed by President Roosevelt on the grounds that it would have handed too much power to the courts.<sup>77</sup>) And so it was that the prewar New Deal constitutionalism with which Wechsler identified could give rise to a justification of measures, such as the Japanese internment, that constitutional progressives would never cease from denouncing after the war!

#### E. The Government's War Power

Wechsler's brief, when it finally approached the most crucial and contentious point of argument, did in fact hand the executive the equivalent of a *carte blanche*. "The detention of evacuees in an Assembly Center as a concomitant to their removal is within the scope of the war power and is consistent with due process of law."<sup>78</sup> It is a measure of the legal creativity of Wechsler's team that it managed to portray the *Korematsu* case primarily in terms of procedural and jurisdictional issues. Only as a matter of last resort did the question of internment present itself.<sup>79</sup>

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<sup>75</sup> *Id.* at 170.

<sup>76</sup> *Id.* at 171.

<sup>77</sup> *Id.*

<sup>78</sup> Brief for the United States, *supra* note 35, at 49.

<sup>79</sup> Consistent with the rest of its restrictive standing analysis, the government brief insisted that *Korematsu* had standing only to challenge the temporary assembly centers, not the long-term internment camps whose constitutionality was at issue in *Ex Parte Endo*.

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Rather predictably, the brief rehearsed the familiar arguments from DeWitt's Final Report that "widespread hostility" to persons of Japanese ancestry had developed "in almost every state and every community" in the western United States: "It was literally unsafe for Japanese migrants."<sup>80</sup> Less familiar was the circular reasoning with which the government now attempted to justify the forced relocation program. Quoting from a congressional report describing the resentment of local communities outside the military areas to the influx of Japanese pursuant to the voluntary migration policy, the brief stated the Japanese resettlers appeared "so potentially dangerous to our national security" that it was necessary to abandon voluntary migration in favor of forced relocation.<sup>81</sup> By this reasoning, local suspicion of persons of Japanese ancestry was a product of the very government relocation policies that the military authorities and Congress sought to justify, and intensify, by invoking local hostility. Even more objectionable than this circularity was the comparison made to the detention of criminal suspects: "The arrest and detention of persons suspected of crime but presumed to be innocent, with release dependent upon ability to furnish bail, are of daily occurrence, with resulting hardships to blameless victims perhaps comparable in a year's time to the mental and spiritual sufferings of the Japanese evacuees."<sup>82</sup> By comparing the sufferings of the Japanese in the context of their extraordinary internment to the rate of error produced in criminal administration, the brief banalized the extreme nature of the internment camps. As if to underscore this lack of understanding, the brief went on in a footnote to compare persons of Japanese ancestry implicitly to the mentally ill and those with communicable diseases.<sup>83</sup>

As for the ability of government to resort to such extreme measures as forced migration and internment camps, the brief argued, the wartime context provided abundant legal justification. "The effect of a war in empowering the Government to impose restraints which might be invalid in normal times has often been noted."<sup>84</sup> The brief stated explicitly that the room for legislative and executive maneuvering in wartime included not just emergency military measures but also social and economic orders. Thus, the economic emergency measures of the Roosevelt era were lurking near the surface of this argument. And the brief confirms Giorgio Agamben's thesis that modern

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<sup>80</sup> Brief for the United States, *supra* note 35, at 52 (quoting from the Final Report).

<sup>81</sup> *Id.* at 53.

<sup>82</sup> *Id.* at 56.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 57 (citing *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yakus v. United States*, 321 U.S. 414 (1944); *Block v. Hirsch*, 256 U.S. 135 (1921); and *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

emergency law is characterized by a “tendency to conflate politico-military and economic crises.”<sup>85</sup>

### III. Wechsler’s Postwar Views: “The Separation of Functions”

Although it is not the purpose of this essay to provide an analysis of the Supreme Court’s *Korematsu* decision, it must be pointed out that the majority opinion by Justice Black very closely tracked the reasoning of the government’s brief. Thus *Hirabayashi* was cited for the proposition that the exclusion order was not beyond the war powers of Congress and the president.<sup>86</sup> Quoting from *Hirabayashi*, the Court stated that

we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of the population, whose number and strength could not be precisely and quickly ascertained.<sup>87</sup>

Although the Court was “not unmindful of the hardships imposed by [the exclusion order] upon a large group of American citizens,” such “hardships are a part of war, and war is an aggregation of hardships.”<sup>88</sup> In short, military necessity – the idea that “the power to protect must be commensurate with the threatened danger” – carried the day. Justice Black’s opinion notably echoed the government brief in two additional respects. First, it held that the exclusion and detention policies were separable for purposes of standing analysis, and that *Korematsu*’s appeal did not present an occasion to pass upon the constitutionality of the internment camps.<sup>89</sup>

Second, there was a great deal of correspondence between what government lawyers advocated and what the Court actually said about the military context of the case. It is true, as noted above, that the Justice Department lawyers who oversaw the preparation of the brief – including Wechsler – put up their own resistance to the more extreme claims of the War Department and General DeWitt’s Final Report.<sup>90</sup> But in the end, as we have seen, this resistance was one more of form than substance; the

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<sup>85</sup> AGAMBEN, *supra* note 14, at 15, 22 (discussing the “parallelism between military and economic emergencies that characterizes the politics of the twentieth century”).

<sup>86</sup> *Korematsu v. United States*, 323 U.S. 214, 217-18 (1944).

<sup>87</sup> *Id.* at 218.

<sup>88</sup> *Id.* at 219.

<sup>89</sup> *Id.* at 221-22 (noting that the companion *Endo* case “graphically illustrates the difference between the validity of an order to exclude and the validity of a detention order after exclusion has been affected”). On *Ex Parte Endo*, see Gudridge, *supra* note 31.

<sup>90</sup> Oral History, *supra* note 9, at 192 (“I didn’t make certain arguments the government wanted me to make”). As noted earlier, the Silber and Miller interviews of Wechsler were conducted between 1978 and 1982.

compromises settled upon by Wechsler and Charles Fahy implicitly incorporated the essential arguments of the Final Report. And via their reading of *Hirabayashi*, the government brief and the *Korematsu* majority opinion effectively endorsed the military's findings, above all with respect to the crucial concept of "military necessity." In the move from *Hirabayashi* to *Korematsu*, Wechsler's roles as interpreter of constitutional precedent and mediator between the Justice and War Departments were exceedingly important.

They were roles to which Wechsler himself owned up with great frankness and insight in his luncheon address to the Institute for Religious and Social Studies of the Jewish Theological Seminary of America in the winter of 1955-56. The Institute had invited Wechsler to speak on the topic of "Dilemmas and Compromises in the Life of the Jurist." Rarely commented upon by students of Wechsler's work, who tend to focus almost exclusively on the 1959 "Neutral Principles" article, the published version of this address deserves to be seen as an important contribution to modern American writing on legal ethics in general and the role of the government lawyer in particular. First and foremost, however, the essay was an attempt at justification: an attempt to answer the critics of those who had a hand in the *Korematsu* decision.

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It is difficult to determine the nature and volume of criticism Wechsler received from colleagues, friends, and strangers in the years after he left the Justice Department and returned to Columbia Law School (via a brief interlude as chief technical adviser to the American judges at the Nuremberg trials). But it is clear from Wechsler's reflections in the *Integrity and Compromise* essay, as well as passages from the Columbia Oral History, that his role in the Japanese internment episode weighed heavily on his own conscience. Wechsler's self-justifications show that he felt it was very important for him to disconnect his part from the gross indecency that critics associated with the entire policy of internment.<sup>91</sup>

In the 1950s, Wechsler himself was one of these critics. His effort to justify his role as a government lawyer was not merely a polemic with others; it was also a struggle to explain his contribution to a policy he abhorred. Wechsler made it clear that he regarded internment as barbaric. He observed that the term "relocation centers" was a euphemism for "what in any fair estimate could be called concentration camps."<sup>92</sup> Wechsler was Jewish. He was also speaking at the Jewish Theological Seminary when he uttered these words. We cannot avoid noting that at this time (the mid-1950s), and in such a setting, an inevitable association of the term "concentration camp" would have been with the Holocaust. Thus, it was a matter of some personal and moral urgency for Wechsler to dissociate himself from the heinous policy that he had helped to defend in legal terms.

In this context, one further episode relating to the internment controversy merits discussion. In the course of distributing the population of Japanese ancestry to the

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<sup>91</sup> The first and most important of these critics was Eugene Rostow, *The Japanese-American Cases: A Disaster*, 54 YALE L.J. 489 (1945). Rostow was then the dean of the Yale Law School.

<sup>92</sup> Wechsler, *supra* note 1, at 123.

internment camps, the government placed many of those who were believed to be “most dissident” towards the United States at a particular camp, at Tula Lake in Northern California.<sup>93</sup> By 1943, rioting on the part of the Tula Lake internees had resulted in a Congressional investigation that led to proposals for a law that would permit internees who proclaimed allegiance to Japan to forfeit their American citizenship. Once they altered their citizenship, these individuals could be treated as “enemy aliens” in the United States—they could be interned for the duration of the war and repatriated afterward to Japan. Claiming “large personal responsibility” for the approach that was taken, Wechsler writes that the Justice Department recommended reforming the existing law on voluntary expatriation, which limited renunciation of U.S. citizenship to persons already abroad, to facilitate renunciation on the part of persons residing in the U.S. After the Congress enacted this proposed reform, Wechsler was given responsibility for administering the Renunciation Statutes.<sup>94</sup>

In “Some Issues for the Lawyer,” Wechsler recounts that he agonized between two alternative ways of implementing the statute (“I have rarely been as divided in my mind and my emotions on any issue as I was on this”).<sup>95</sup> The first would have involved accepting renunciations only from those persons “we otherwise knew to be really loyal to Japan,” as opposed to those whom the government knew “merely to have been disaffected by the evacuation.” The second would have permitted renunciations by any person, so long as the individual testified in a hearing that his decision to renounce was freely made. Wechsler writes that he opted for this latter alternative “because I thought the law required it. I thought that the terms of the statute left no real room for choice.”<sup>96</sup> Noting that the literature that had appeared on the internment controversy since the end of the war had “generally condemned” this way of responding to the Tula Lake riots, Wechsler averred that “as I reflect on it again I’m sure that I would have made . . . the same decision.”<sup>97</sup>

In the Columbia Oral History interview, Norman Silber and Geoffrey Miller questioned Wechsler directly and pointedly about the morality of his role in *Korematsu* and [the Japanese internments](#). Wechsler responded spontaneously at first, but when the questions became particularly acute, he located his copy of “Some Issues for the Lawyer” and proceeded to read three pages of it out loud, word for word, without interruption<sup>98</sup>-- thus incorporating a large segment of the written text into his oral history, and demonstrating too that this essay was his official *apologia*.

Entitled “Some Issues for the Lawyer,” the essay in its opening pages announced a “test of responsible criticism” of public officials: “whether the critic has adequately

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<sup>93</sup> *Id.* at 124.

<sup>94</sup> *Id.* at 125.

<sup>95</sup> *Id.* at 127.

<sup>96</sup> *Id.* at 126.

<sup>97</sup> *Id.* at 127.

<sup>98</sup> Oral History, *supra* note 9, at 197-200 (reproducing the text that first appeared in Wechsler, *supra* note 1, at 122-124).

placed himself in the position of the man whose decision he undertakes to criticize.”<sup>99</sup> This “internalist” perspective was consonant with Wechsler’s recent career trajectory as an academic lawyer whose years in government office had probably left him with a pronounced sense of the limits of purely academic criticism of public policy. “Sterile criticism is that which fails to make this identification,” he wrote, “and so voices either praise or blame divorced from the reality of the situation that is the subject of praise or blame.”<sup>100</sup>

Wechsler’s emphasis on the limits of academic critique did not mean, however, that he had entirely cut his ties to the legal realism of the 1920s and 30s on which he was weaned as a law student and budding law professor. In the debate that opposed what Wechsler called the “closed” system of Christopher Columbus Langdell and the empiricists of the legal realist movement, Wechsler stood firmly in the realist camp, even while criticizing other legal realists.<sup>101</sup> Thus, he proceeded to argue that “law is intrinsically uncertain and unclear . . . [and] is shaped as it is applied.”<sup>102</sup> In shaping the law and discerning its content, jurists engaged in “the act of interpretation,” which Wechsler saw as “in part, an act of will.”<sup>103</sup>

The combination of these two perspectives on law – the sterility of academic criticism divorced from the worldly realities of public policy, and the legal realist emphasis on the indeterminacy of law -- yielded the problem to which Wechsler’s discussion of the Japanese internment cases would provide an answer. If public officials were constrained in their actions by various external realities, and if law was indeed shaped as it was applied rather than determined *a priori*, then “dilemmas and compromises” constituted the life of the law. As Wechsler put it,

in the decisions that must be made in law, the real source of the difficulty is in the clash of values, the situation in which it is not possible, with mortal limitations, to realize all the right values to the maximum extent.<sup>104</sup>

As exhibit A in this demonstration, Wechsler offered the Japanese internment controversy, seen from the perspective of the spring of 1942.

By Wechsler’s account, the *Korematsu* litigation arose in the context of a divide between the Justice and War departments over the propriety of the forced migration program. “In the Department of Justice it is a fair statement of the case to say that the view held was that no special security measures were required,” he wrote, and that whatever risks were posed by the situation on the West coast could be met by

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<sup>99</sup> Wechsler, *supra* note 1, at 119.

<sup>100</sup> *Id.*

<sup>101</sup> Oral History, *supra* note 9, at 100-01, 114-15.

<sup>102</sup> Wechsler, *supra* note 1, at 119.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 121.

individualized investigations.<sup>105</sup> As we have seen, this was indeed a fair statement of the case, so far as it went. But the position of Attorney General Francis Biddle was necessarily more complicated than this would suggest, as Wechsler himself acknowledged. Should the Attorney General, Wechsler asked, have informed the President that the proposed internment program was unconstitutional? Wechsler did not directly answer “no” to this question, but it was clear from the balance of his discussion that he believed such a position would have been untenable under the circumstances. Shifting the thrust of his analysis from the normative question of whether Biddle *should* have advised the President that internment was unconstitutional, Wechsler proceeded to describe the advice that Biddle actually *did* provide:

[Biddle] believed that it was undesirable to take this measure [i.e., tell the President that internment was illegal], but that if it were taken the United States Supreme Court would sustain its validity as an extreme war measure.<sup>106</sup>

The record bears out Wechsler’s account that Attorney General Biddle did in fact advise President Roosevelt that internment was an unnecessary and ill-advised measure: that is, wrong as a pragmatic rather than constitutional matter.<sup>107</sup> As Wechsler described it, Biddle opposed any role for the Justice Department in carrying out the wishes of the western military command. But if the War Department were to deem such measures necessary, Biddle advised, the Supreme Court would probably uphold their constitutionality. “[O]n this record and against this background the President of the United States did issue Executive Orders” providing for the creation of designated military areas and the forced relocation of persons of Japanese ancestry.<sup>108</sup>

Again, as a purely historical matter there is little if anything to quibble with in Wechsler’s reconstruction of the debate over internment circa 1942. At the normative level on which Wechsler himself proposed to discuss the internment controversy, however, what is most striking and significant about this discussion is its postponement of the ultimate constitutional question: namely, whether the internment was or was not constitutional. (As we will see, that postponement turned out to be infinite in Wechsler’s essay.) Whatever constitutional doubts Biddle had about the internment – and there is reason to believe that he had many such doubts, at least insofar as the Nisei (or American citizens of Japanese citizenry) were concerned<sup>109</sup> -- were dissolved in his prediction that

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<sup>105</sup> *Id.* at 122. Wechsler’s statement of the Justice Department’s disposition continues as follows: “[T]he danger, if there was a danger, could be met by identifying individuals whom there was cause to fear and dealing with them in accordance with law; if they were aliens, by internment; if they were citizens, by arrest in the event they were guilty of violations.”

<sup>106</sup> *Id.*

<sup>107</sup> See IRONS, *supra* note 7, at 359.

<sup>108</sup> WECHSLER, *supra* note 1, at 123.

<sup>109</sup> See BIDDLE, *supra* note 20, at 213.

the Supreme Court would uphold the internment policy as consistent with the war powers of the Congress and President. To the extent that law is what Holmes and the legal realists claimed it to be—a prediction of what the courts will do—Biddle’s approach fulfilled his responsibilities as the government’s top lawyer. To the extent that law is also inevitably a reflection upon what the courts should do, however, Biddle’s position – and Wechsler’s implicit endorsement of it – came up short. Between the constitutional objections that Biddle might have made to internment, and the pragmatic objections that he in fact did raise, there was an unbridgeable moral gap. Wechsler’s account, subtle as it was, served to emphasize that gap rather than close it.

Nonetheless, by suggesting that a policy of constitutional avoidance was morally appropriate for government attorneys, Wechsler managed to ascribe a certain integrity to Biddle’s conduct of the internment controversy. In the same spirit, he scrutinized his own conduct. Once *Korematsu*’s case arrived before the Supreme Court, Wechsler wrote, it fell to him as Assistant Attorney General to oversee the preparation of the government’s brief in support of the relocation program. “[N]o one could have felt more distressed about [the program’s] existence, other than those personally affected by it, than I,” he stated.<sup>110</sup> Despite these reservations, Wechsler confessed that he “did superintend the preparation of that brief,” which presented “the strongest arguments that I felt could be made in support of the validity of the action taken by the President.”<sup>111</sup>

Wechsler was at the Supreme Court on the day that Justice Black’s opinion was handed down. “[T]hough I had a share in winning the case,” he wrote, “it was not for me a happy day.”<sup>112</sup> Why, then, did he defend the internment, Wechsler asked? Either he or Francis Biddle could have resigned, Wechsler acknowledged. Wechsler’s explanation is worth quoting at length:

I did it because it seemed to me that the separation of functions in society justified and, indeed, required the course that I pursued; that it to say that it was not my responsibility to order or not to order the Japanese evacuation, neither was it, in fact, Mr. Biddle’s responsibility to do so. It was the responsibility of the President of the United States, who had been elected by the people of the United States. Neither was it either Mr. Biddle’s responsibility or my responsibility to determine whether the evacuation was constitutional or not constitutional. That was the responsibility, in this context at least, of the Supreme Court . . . I suggest to you, in short, that one of the ways in which a rich society avoids what might otherwise prove to be insoluble dilemmas of choice is to recognize a separation of functions, a distribution of responsibilities, with respect to problems of that kind, and this is particularly recurrent in the legal profession.<sup>113</sup>

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<sup>110</sup> Wechsler, *supra* note 1, at 123.

<sup>111</sup> *Id.* at 123-24.

<sup>112</sup> *Id.* at 124.

<sup>113</sup> *Id.*

A kind of professional necessity, in other words, paralleling the “military necessity” that underlay the government’s reasoning in *Korematsu*, compelled Wechsler to defend the legality of the internment camps. Underlying that concept of vocational duty was a version of the separation of powers, whereby decisions as to the legality of executive action fell not to lawyers within the executive branch but to the courts.

Strictly speaking, what Wechsler calls the “separation of functions” is a professional code of conduct, not a constitutional principle. Wechsler may well have selected the term “separation” to evoke the constitutional doctrine of separation of the branches of government and to give “separation of functions” a legal flavor. But the doctrine of the separation of governmental powers developed as a basic constitutional principle in early modern Europe as an answer to the problem of absolutism: the danger of unchecked executive authority. In contrast, the “separation of functions,” as Wechsler describes it, is a response to a second-order problem within the framework of a balanced constitution. The issue is what to do when one’s private beliefs about the justice of a policy conflict with one’s role as a civil servant expected to publicly defend the policy. Given that the policy-maker, in this case, the President of the United States, is not necessarily a constitutional expert, it could well be argued that government attorneys have a duty to express as forcefully as possible their legal objections to a policy (as opposed to merely calculating their chances of winning in a court).

Even if the policy-makers wished to forge ahead with the policy in spite of legal and other objections, a government lawyer’s moral dilemmas are not over. When a policy is near the extreme edge of illegality or indecency, it is very hard to see that the overall constitutional scheme of balance depends upon the government attorney defending it as opposed to writing memos against it, or resigning. Another basic issue that Wechsler bypasses is this. Suppose that a government lawyer detects a constitutional flaw in an executive policy, a flaw that even the administration’s most aggressive critics have not detected. This is the constitutional equivalent of the old philosophical problem: If a tree falls in the forest and no one is around to hear it, does it make a sound? Does a brilliant government lawyer have a duty to make the executive take notice of a constitutional flaw that is likely to pass unobserved in the outside world? Or are the only “real” arguments those that the administration’s adversaries will pose in court? In sum, granting that the Constitution requires separate branches, there is no reason to presume that each branch has to be monolithic, that is, always united within itself and devoid of serious contestation over principles.<sup>114</sup>

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<sup>114</sup> [Wechsler’s position does not quite amount to an unconditional embrace of the “unitary executive” theory that has been much in the news recently owing to debates over President Bush’s prosecution of the “war on terror” and the confirmation hearings of Justice Samuel Alito. See Jeffrey Rosen, \*Uncle Sam\*, THE NEW REPUBLIC, Jan. 30, 2006, at 20 \(distinguishing between a New Deal form of the unitary executive theory emphasizing the president’s power over executive agencies, and a more recent version of the theory that emerged during the 1980s espousing a vigorous executive power in the areas of foreign and military policy unrestrained by Congress and the courts\). Nonetheless, there is not much standing between Wechsler’s position vis-à-vis the Japanese internments and recent invocations of the unitary executive.](#)

Despite this disavowal of individual responsibility, it would be unfair to describe Wechsler's position *in toto* as avoiding all consideration of ultimate moral questions. Wechsler's position, it seems, is informed by a profound philosophical relativism. If the world is saturated, as he suggests, with "insoluble dilemmas of choice," then sticking narrowly to one's function, as opposed to endlessly contemplating questions that cannot be answered, will certainly be more efficient—more work will get done. For Wechsler, the "distribution of responsibilities" in society was itself a form of moral truth. By averting irresolvable conflicts of value, the "separation of functions" pragmatically sustained the continuity of society and of the constitutional order within it.

As an analysis of the ethical dilemmas confronting the government lawyer in the *Korematsu* litigation, however, Wechsler's explanation was incomplete at best. To be sure, Wechsler was correct that it was neither his nor Attorney General Biddle's responsibility to order the internment. As for the claim that neither Wechsler nor Biddle shared responsibility for determining the constitutionality of the evacuation policy, there was a very fine line between predicting what the Supreme Court would say about internment and making that prediction a self-fulfilling prophecy by devising creative jurisdictional and substantive arguments as to the constitutionality of the program.<sup>115</sup> Perhaps Biddle and Wechsler were persuaded that *Hirabayashi* had already predetermined the constitutionality of internment. On the other hand, the difference between a curfew and forced relocation is significant enough to merit at least some skepticism that the course the Supreme Court eventually took in *Korematsu* was entirely dictated by precedent. To say this is to take nothing away from the Justice Department lawyers – including Biddle, Wechsler, and (especially) Ennis and Burling – who took steps to rein in the more extreme claims of the War Department. Those efforts introduced some desperately needed integrity into the litigation, even if their practical effect turned out to be minimal. And Wechsler was very careful throughout "Some Issues for the Lawyer" to maintain a studied silence as to whether he himself believed *Korematsu* was correctly decided, a silence that we interpret as an implicit disapproval of the decision.

In the end, Wechsler's meditations on his role in *Korematsu* convince us that government lawyers must be prepared to make some compromises with their moral inclinations. There must be a wide margin of disagreement between conscience and duty before the former requires a deviation from professional obligations. At this level, Wechsler's meditation looks like America's counterpart to Max Weber's great essay, "Politics as a Vocation" (arguing that because the use of violence is of the essence of

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<sup>115</sup> [Wechsler's suggestion that determinations of constitutionality are the exclusive province of the judiciary partakes of a debate that has been joined on an increasing number of fronts in contemporary constitutional thought. See, e.g., Laurence H. Tribe, \*The Treatise Power\*, 8 GREEN BAG 2d 291, 304 \(criticizing the "increasingly frequent suggestions by the Court that it essentially owns the meaning of the Constitution"\). In their different ways, such scholars as Mark Tushnet, Akhil Amar, Reva Siegel, Robert Post, and Larry Kramer have all recently espoused variations of an anti-monopolist approach to constitutional interpretation.](#)

political action, political leaders cannot hope to preserve their moral purity).<sup>116</sup> True leaders, Weber suggested, must be prepared to sacrifice their souls for the general good.

However, government lawyers are not so much leaders as they are courtiers whose role is to combine the role of loyal servants and critical advisors. While loyalty is the general rule, one of the purposes for creating a pattern of loyalty is to generate the esteem that will be essential in those extreme times when one must, out of conscience, try to transform rather than flatter the ruler. Wechsler's analysis does not seem to be a step forward from what the Renaissance humanist Baldassare Castiglione wrote in *The Book of the Courtier*:

Therefore, I think that the aim of the perfect Courtier, which we have not spoken of up to now, is to win...the favor and mind of the prince whom he serves that he may be able to tell him, and always tell him, the truth about everything he needs to know, without fear or risk of displeasing him; and that when he sees the mind of his prince inclined to wrong action, he may dare to oppose him and in a gentle manner avail himself of the favor acquired by his good accomplishments, so as to dissuade him of every evil intent.<sup>117</sup>

#### IV. Wechsler's Post-War Views: "The Vindication of the Power to Govern"

From a present-day perspective, what is most striking about Wechsler's justification of his role in *Korematsu* is its consonance with the legal process school that dominated American jurisprudential thinking during the 1950s (and that continues to be influential today). Wechsler's position as an important expositor of the legal process philosophy, along with his *Federal Courts* collaborator Henry Hart, has been widely documented.<sup>118</sup> But the *Korematsu* litigation, and the broader question of American emergency or wartime law of which it is such an important part, have yet to be mapped onto the legal-process landscape.

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Wechsler's "separation of functions" was one of the hallmarks of the legal process school that developed in the 1950s American legal academy.<sup>119</sup> Indeed, Richard Fallon, an editor of the fourth and fifth editions of Hart and Wechsler's *Federal Courts* casebook, has argued that this principle "comes close to defining the Federal Courts field all by itself."<sup>120</sup>

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<sup>116</sup> MAX WEBER, *Politics as a Vocation*, in WEBER: SELECTIONS IN TRANSLATION 212-225 (W.G. Runciman ed., 1978).

<sup>117</sup> BALDASSARE CASTIGLIONE, *THE BOOK OF THE COURTIER* 289-90 (Charles S. Singleton, trans., Doubleday, 1959).

<sup>118</sup> See Fallon, *supra* note 7, at 967; Peller, *supra* note 11 at 568-72; and Amar, *supra* note 6 at 693-95.

<sup>119</sup> Fallon, *supra* note 7, at 967.

<sup>120</sup> *Id.*

Hart and Wechsler assumed a proposition for which the Hart and Sacks materials later offered detailed argument: questions of how decision-making authority should be allocated are of foremost importance. In a post-Realist world, legal norms are frequently indeterminate. Moreover, in a demonstrably pluralistic society, we cannot expect consensus about appropriate answers to many urgent questions of substantive justice. But most of us, Hart and Wechsler assume, are prepared to accept the claim to legitimacy of thoughtful, deliberative, unbiased assumptions by government officials who are reasonably empowered to make such decisions. On this assumption rest our hopes for the rule of law.<sup>121</sup>

The presence of this orientation in Wechsler's analysis of the *Korematsu* litigation is hard to dispute. Wechsler's legal-realist insistence upon the indeterminacy of legal norms was one of the starting points of "Some Issues for the Lawyer." His notion that a "rich society" requires a "distribution of responsibilities" with respect to "insoluble dilemmas of choice" exactly parallels Fallon's portrayal of the difficulties that "urgent questions of substantive justice" pose in a "demonstrably pluralistic society."<sup>122</sup>

Whether Fallon, or any other follower of the legal process approach, would agree with Wechsler's resolution of the ethical dilemmas in the *Korematsu* case is, of course, a separate matter. As suggested earlier, the very principle of "separation of functions" does not provide a clear answer to the question of whether government attorneys have a duty to present the President with the most compelling constitutional arguments against a policy. It does not clarify how government attorneys should go about justifying constitutionally dubious actions. And it does not establish criteria for when resignation is appropriate.

However, there is little in the principle of "separation of functions" that would encourage a less deferential approach on the part of the government lawyer to constitutionally questionable executive policies. To take the point one step further, there is nothing in Wechsler's vision of functional divisions that would encourage a more restrictive understanding of the Congress's and President's war powers – or a more robust conception of civil liberties – than the one embraced in the government's brief in *Korematsu*. To say this is not to deny the place of some version of the "separation of functions" in an ordered democratic society. To insist that all public officials – whether judges, legislators, or members of the executive branch – ordinarily should be specialized in their range of action appears uncontroversial. But in Wechsler's theory, the constraints on each segment of government do little to check the plenary power of government in general. For the limits of one office always correspond to the powers of another. The government lawyer's self-limiting duty to rationalize policy corresponds to the President's broad power to make it. The judge's self-limiting duty to refrain from assuming jurisdiction to review a law corresponds to the legislature's power to enact it.

With the exception of First Amendment rights, whose place in Wechsler's thought we will examine later, Wechsler's constitutional theory was not a theory of limited government. It is, rather, a theory about the prerogatives of power. When describing his

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<sup>121</sup> *Id.* at 964.

<sup>122</sup> *Id.*

formative years during the 1930s as a supporter of the New Deal and an opponent of judicial activism, Wechsler referred to the “Constitutional Revolution” that swept aside the defense of property rights on the basis of substantive due process and instituted a new era of judicial deference to the regulative state.<sup>123</sup> In an article first published in 1946, entitled “Stone and the Constitution,” Wechsler thoroughly laid out Chief Justice Stone’s vital contribution to this revolution, and hailed Stone’s achievement as “the vindication of the power to govern.”

Wechsler’s 1946 explication of Stone’s jurisprudence is in fact a précis of his own constitutional philosophy at the end of World War II. There are numerous grounds for insisting on this equivalence between Wechsler and Stone. Apart from the fact that Wechsler was Stone’s clerk and that he became the Stone Professor of Constitutional Law at Columbia, the essay formalizes Stone’s legal ideas into a neat system that Wechsler portrays with evident veneration. Also significant is that Wechsler reprinted the essay on Stone in the 1961 collection of his selected essays, *Principles, Politics, and Fundamental Law*. This is a clear indication that the essay, first published as a tribute upon Stone’s death, was not just an occasional piece of writing. There are only four essays in the *Principles* book. One of them is the “Neutral Principles” essay. The book as a whole is designed to convey Wechsler’s constitutional vision. Finally, at a key moment in the essay Wechsler describes Stone’s posture in the Japanese internment cases. The manner in which Wechsler portrays Stone at this point corresponds exactly to how Wechsler portrayed his own dilemma in his later writings. At that moment, Wechsler’s identification with Stone seems unmistakable. In fact, one could say that the Stone essay was Wechsler’s first public justification of his role in *Korematsu*. Because it also deals with the constitutional status of emergency power, this essay merits close examination.

At the beginning of the essay, in an introductory section entitled “The Court and the Constitution,” Wechsler establishes that Stone was firmly committed to the proposition that judicial review was an originally intended feature of our constitutional order.<sup>124</sup> Curiously, at the beginning of his “Neutral Principles” essay, Wechsler expresses his own commitment to the same proposition. The similar structure of the two essays is one more sign that Wechsler writing on Stone is Wechsler writing on Wechsler. For the two essays move from the same starting point in precisely the same direction. After establishing the legitimacy of judicial review, both essays set out to severely limit the circumstances in which judicial review is needed. In the Stone essay, Wechsler states that before his appointment to the Supreme Court, Stone had “opposed...all devices to limit or control judicial review.”<sup>125</sup> Once he joined the Court, according to Wechsler, Stone inevitably became more sensitive to generic limits on judicial review that were implicit in “the instrument itself,”<sup>126</sup> that is, the Constitution. These included a higher measure of deference to democratically enacted laws, and more sensitivity to the

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<sup>123</sup> Oral History, *supra* note 9, at 337.

<sup>124</sup> HERBERT WECHSLER, *Mr. Justice Stone and the Constitution*, in *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAWS* 85-86 (1961).

<sup>125</sup> *Id.* at 86.

<sup>126</sup> *Id.* at 87.

litigant's proper standing to challenge legislation. But Wechsler portrays these as minor accretions to Stone's outlook. The real source of Stone's "change and growth," according to Wechsler, was not the Constitution itself but the dramatic events of the day.

No one can turn from the Hewitt lectures [of 1915] to Justice Stone's opinions [on the Supreme Court] . . . without perceiving a shift in more than emphasis; there is, of course, discernible development in his opinions as they were written throughout the years. This is, indeed, to understate the point. The decades in question transformed the country; there was change hardly less revolutionary in its dominant legal thought.<sup>127</sup>

Wechsler observed that Stone played "the major role" in defining the impact of the new events on "fundamental law."<sup>128</sup>

Wechsler goes on to explain how Stone played a crucial part in facilitating the "capacities of government to promoted individual welfare by ordering the economic forces that industrial enterprise had unloosed."<sup>129</sup> This discussion takes place in the essay's crucial second section, called "The Power to Govern." In the area of taxation, "Justice Stone maintained in the broadest terms the freedom of legislative choice"<sup>130</sup> against restrictive applications of substantive due process. "When the Court divided, as it frequently did, he was almost always on the government side."<sup>131</sup> When it came to price and wage regulation, Stone defended both the police power of the states and what Wechsler called "an even more important struggle . . . , that of the nation to marshal its own power and resources for the solution of nation-wide problems."<sup>132</sup> By articulating a broad judicial interpretation of Congress's power to regulate interstate commerce, Stone helped to sustain the imposition of federal controls on the economy.<sup>133</sup>

Wechsler explains that the war years brought even more stringent economic regulations, such as national price controls and procedural limits barring challenges to price controls unless presented in the Emergency Court. Wechsler observes that Stone sustained these directives. Wechsler then moves immediately, without even starting a new paragraph, into the non-economic emergency powers of Congress during the war (thus illustrating what we have already described as the nexus between economic and military emergency):

The Chief Justice wrote the initial opinion of the Court affirming the awesome sweep of the war power and, having sustained the discriminatory curfew [in the *Hirabayashi* case], he concurred thereafter in upholding the evacuation of Japanese Americans from the west coast, decreed by military order supported by congressional and presidential sanction alike.

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<sup>127</sup> *Id.* at 93.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 93.

<sup>130</sup> *Id.* at 95.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 99.

<sup>133</sup> *Id.* at 105-106.

He also wrote for the Court in the *Quirin* case and again at the 1945 term in the case of *Yamashita* upholding the trial of belligerents by military tribunals for offenses under the laws of war.<sup>134</sup>

Summarizing the new judicial outlook that emerged during the years of economic and military emergency, Wechsler affirmed that its “central meaning” was “the vindication of the power to govern.”<sup>135</sup>

Wechsler’s admiring treatment of Stone up to this point in the essay makes it clear that he shared a belief in the judicial enabling of broad governmental power. But the remainder of the essay gives further evidence of Wechsler’s commitment to wartime constitutional doctrine. Immediately after concluding the section on Stone’s wartime jurisprudence, Wechsler opens a new and third section of the essay that he entitles “The Federal System.” This phrase figures of course in the casebook Wechsler later co-authored with Hart, *The Federal Courts and the Federal System*. In fact, “The Federal System” section of Wechsler’s essay on Stone outlines some of the doctrines that Wechsler and Hart incorporated into their 1953 casebook. For our purposes, the specifics of the jurisdictional doctrines contained in the “Federal System” section of the Stone essay are not crucial. Nor is it essential to determine if the doctrines mentioned are a faithful copy of Stone’s views, or already reflect to some degree Wechsler’s original efforts to systematize the field of federal jurisdiction. What matters is the architecture of the Stone essay as a whole—that is, the position that the “Federal System” acquires when it is positioned secondarily in relation to the previous discussion of emergency power. Wechsler deliberately located the whole topic of federalism right after his discussion of Stone’s “vindication of the power to govern.” Federalism, as Wechsler envisioned it, was thus posterior, not anterior, to the more fundamental doctrine of plenary governmental authority. Federalism does not limit the vast reservoir of governmental power that accrued during the Depression and World War II. Federalism merely affects the allocation of this power among the powers that exist in the United States. “Viewed in the large, the question in this area is not whether a legislature has the power to govern but in which legislature the power resides.”<sup>136</sup> The effect of this crucial statement is to make federalism an auxiliary to a theory of the awesome prerogatives of government.

The importance of this statement for interpreting Hart and Wechsler’s *Federal Courts and the Federal System*, a text that has influenced generations of judges and judicial clerks, should not be missed. Judicial deference to the other branches is built into Wechsler’s conception of federalism. Federalism, as Wechsler saw it in 1946, distributes powers among different governing agents and thus limits the powers of each—but it does not impose limits on the power of government *tout court*. Wechsler’s conception of federalism is not grounded in a theory of individual rights. An alternative to his vision would be to see federalism as part of a constitutional mindset that is distrustful of government in general—that seeks to distribute and contain powers in order to protect individual liberties. In such a vision, an active judiciary might be conceptualized as the rock of protection of human rights. But this was not Wechsler’s orientation.

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<sup>134</sup> *Id.* at 111.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 112 (emphasis added).

Wechsler's wartime experience and his more statist conception of federalism are factors that must be kept in mind when evaluating the Hart and Wechsler casebook's emphasis on the plenary power of Congress to regulate federal jurisdiction—for example, by stripping lower federal courts of their power to hear entire classes of cases involving basic rights, including habeas corpus.<sup>137</sup> It should also be noted that during the war, Wechsler litigated cases on behalf of the government in which he argued for the constriction of habeas corpus rights. In *Walker v. Johnston* (1940), a case involving an Alcatraz prisoner who alleged that he had not been informed of his right to counsel when he was tried for armed robbery, Wechsler took a very limited position of the right to counsel: "It is not enough to show that the abstract right was denied; petitioner must establish that he was in actual need of counsel either in choosing his own course or in presenting his case."<sup>138</sup> In *Holiday v. Johnston* (1941), which posed the issue of whether a judge can dispense with a trial of the factual elements of a habeas claim and appoint a special commissioner to report factual findings, Wechsler maintained that a commissioner was adequate. He argued on various grounds. One was that the procedure of referring factual claims to a commissioner was already practiced. It "originated long ago as a response to the tremendous number of petitions filed in Chinese exclusion cases." Another was that in English practice, habeas sometimes issued out of the chancery. Hence, habeas could be analogized to an equity procedure (yielding the implication that the writ was more a form of grace than a basic right).<sup>139</sup>

Wechsler was not successful in these cases. However, in its 1942 session, the Judicial Conference of the United States (a meeting of senior Circuit Court judges convened annually by the Chief Justice of the Supreme Court—in this case Stone), appointed a committee to make recommendations on habeas corpus.<sup>140</sup> In the following year, the committee presented a draft bill designed to severely limit the procedures available for petitioning federal courts to issue the writ.<sup>141</sup> The proposals were a response

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<sup>137</sup> HART & WECHSLER, *supra* note 5, at 312, 336-337, 1312. In the Columbia Oral History interview, Wechsler said that bills initiated by Senator Jesse Helms to strip federal courts of the authority to hear particular classes of constitutional complaints were constitutional. Oral History, *supra* note 9, at 147. Senator Helms over the course of his career sponsored bills limiting the power of federal courts to hear cases concerning abortion, school prayer, and flag-burning. For a critique of Hart and Wechsler's views on Congressional power to restrict federal jurisdiction, see Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985).

<sup>138</sup> *Walker v. Johnston*, 312 U.S. 275, 277-278 (1940); the oral arguments are preserved in the case report.

<sup>139</sup> *Holiday v. Johnston*, 313 U.S. 342, 344-346 (1941); again, the oral argument is part of the case report.

<sup>140</sup> REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (September 1942 Session), 18.

<sup>141</sup> REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (September 1943 Session), 22-24.

to the large growth in the annual number of habeas petitions during the war. The annual reports of the Director of the Administrative Office of the United States, a set of statistical tables prepared for the benefit of the members of the Judicial Conference, charted the explosion in habeas and other types of federal cases that occurred during the war. The reports explicitly linked the overcrowding of the federal dockets to the war.<sup>142</sup> The ultimate result of the Judicial Conference's wartime recommendations on habeas was the 1948 Judiciary Code and Procedure Act,<sup>143</sup> codified as 28 U.S.C. §§2241-2255. A provision (originally the seventh undesignated paragraph, now the fifth undesignated paragraph) of Section 2255 stated that an application for habeas "shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

In 1950 the Ninth Circuit held this part of Section 2255 to be unconstitutional, reasoning that the motion procedure was an inadequate substitute for habeas. The Court observed that the trying of motions adds months of litigation to the process. The Court also maintained that the words "or that such court has denied him relief" implied that a motion's decision adverse to the prisoner is res judicata of the issues presented, or practically conclusive upon a court that subsequently entertained a petition for the writ. The Ninth Circuit thus held that Section 2255 violated Article I, Section 9, Clause 2 of the U.S. Constitution: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."<sup>144</sup>

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In the 1952 *Hayman* case, the Supreme Court reversed and upheld Section 2255 on the ground that since the war years, the swelling of habeas petitions gave rise to "practical problems" that required a solution.<sup>145</sup> The Court also found that the "inadequate or ineffective" clause of Section 2255 was sufficient to preserve the prisoner's habeas rights.<sup>146</sup> This case became an important part of Hart and Wechsler's

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<sup>142</sup> See "Effects of the War Upon the Federal Courts," the main heading of the ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS FOR THE FISCAL YEAR 1942 (Sept. 8, 1942), 1-2; and "The Effects of the War Upon the Work of the United States Courts," ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS FOR THE FISCAL YEAR ENDING JUNE 30 (Sept. 4, 1943), 1-3.

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<sup>143</sup> Pub. L. No. 80-773, 62 Stat. 965 (1948).

<sup>144</sup> *Hayman v. United States*, 187 F.2d 456 (1950).

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<sup>145</sup> *United States v. Hayman*, 342 U.S. 205 (1952). The terms "practical problems," "practical difficulties," and "practical considerations" occur throughout the opinion and show that the reasoning technique was very pragmatic; see *id.* at 210, 213, 217 n. 25, 218. There is little reasoning based on the Constitution or on the very idea of habeas rights. Compare *Hamdi v. Rumsfeld*, 542 U.S. 507, 554-55 (2004) (Scalia, J., dissenting) (arguing that the "very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive").

<sup>146</sup> *Hayman*, 342 U.S. at 223.

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treatment of federal habeas corpus.<sup>147</sup> The editors' notes and reading suggestions make it clear that they believed that the case was correctly decided and that the attack on Section 2255 rested on the supposedly frivolous premise that any substantial diminution in the scope of the remedy constituted a suspension of the writ.<sup>148</sup>

Apart from the overt issues presented in it, the *Hayman* case poses some obvious and troubling problems that go unmentioned in Hart and Wechsler's canonization of it in *The Federal Courts and the Federal System*. The first issue is whether federal judges violate the constitutional principle of separation of powers when they propose legislation and then sit in court to decide its constitutionality. For example, Judge Ori L. Phillips, the Senior Circuit Judge from the Tenth Circuit, was not only a member of the Judicial Conference in 1942 and 1943. He was one of three members of the committee on style that assisted in the drafting of major portions of the bill, including the forerunner of Section 2255, that the Judicial Conference proposed to Congress.<sup>149</sup> He also wrote the judicial opinion for the Tenth Circuit when, in 1950, it affirmed the constitutionality of Section 2255.<sup>150</sup>

A second feature that goes unmentioned in the Hart and Wechsler casebook is that the war created the pressure to restrict habeas through legislation, but the legislation was passed in peacetime. Hart and Wechsler's belief that Congress had plenary power to regulate federal jurisdiction effectively dissolves the distinction between war and peace. Their doctrine makes it idle to consider when the impulse to restrict habeas originated because, according to Hart and Wechsler, the Congressional power to restrict federal jurisdiction is always unlimited—and what applies in peace certainly applies in war. But the danger of this approach is that students using the casebook are never properly attuned to the possibility that both the desire to impose limits on habeas and the legal doctrine used to justify these limits evolved together, during the war. In sum, the casebook, which tends to normalize wartime conceptions of power, never even gets to the issue of how the wartime constitutionalism has affected peacetime constitutionalism.

Habeas corpus is by no means the only area in which the Hart and Wechsler casebook expresses Wechsler's distinctive theory of federalism—that is, a federalism in which the judiciary vindicates the power of the other branches to govern. In this context, it is worth emphasizing the scant attention that Hart and Wechsler gave to the Fourteenth Amendment, to issues of equality, and to the evolving notion of strict scrutiny. Considering that *Federal Courts and the Federal System* appeared in 1953, just one year before the Supreme Court's evolving anti-discrimination jurisprudence reached a high point in *Brown v. Board*, the casebook was poorly synchronized with the new tendency to make Equal Protection the basis for a more interventionist conception of federal-court

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<sup>147</sup> HART & WECHSLER, *supra* note 5, at 1301-1312.

<sup>148</sup> *Id.* at 1312, editorial note 7.

<sup>149</sup> REPORT OF THE JUDICIAL CONFERENCE, *supra* note 138, at 22. *See also* HART & WECHSLER, *supra* note 5, at 1305 (discussing *Hayman*, 342 U.S. 205).

<sup>150</sup> *Barrett v. Hunter*, 180 F.2d 510 (10th Cir. 1950).

jurisdiction. Paradoxically, one of the greatest casebooks ever written was outdated from the start.<sup>151</sup>

The casebook's popularity and influence can be attributed in part to the sheer brilliance of the text—its logical and systematic consideration of contentless issues. There is something intensely stimulating about the text's isolation and amplification of formal as opposed to substantive topics, such as the reviewability of state court decisions by the Supreme Court (treated in Chapter 5, consisting of 176 pages). More than any other book, *The Federal Courts* has the capacity to make law students and professors feel lawyerly. Jurisdiction becomes a transcendent subject, the law of law. Hart and Wechsler's achievement was to constitute the study of federalism as a meta-legal subject that is separate from the nation's history and politics.

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But besides the attractive formalistic features, the silence of the text as concerns the Fourteenth Amendment—its tacit conservatism on the issue of equality—must also be considered a reason for its vogue. That is, the text may have appealed to law professors who were simply not enthusiastic about the Supreme Court's growing commitment to promoting racial justice. Some evidence that the casebook had gravitational pull on critics of equality jurisprudence can be found in the writings of Paul Bator, who, as an editor of the second edition of Hart and Wechsler, helped to extend the longevity of the casebook. In a 1986 article entitled "Equality," Bator regretted that Equal Protection had become a "trump" card over other principles in legal debate. Displaying an obvious intellectual debt to Wechsler's "Neutral Principles" essay, Bator distinguished between "policy" and "principle" and affirmed that judges had to draw "principled lines" to restrict their political commitment to equality. He also attempted to underscore some of the cultural absurdities in equality-based thinking. If equality were taken as an end in itself, Bator suggested, we might have to cut off Wilt Chamberlain's legs.<sup>152</sup>

Wechsler himself expressed reservations about equality-based jurisprudence well after the appearance of the casebook's first edition. In "The Nationalization of Civil Liberties and Civil Rights," he observed that the revivification of the Equal Protection clause was a turning point: "a new era is inaugurated in our federalism."<sup>153</sup> But Wechsler disliked this trend. The famous reservations he expressed toward *Brown v. Board* in "Neutral Principles" (first published 1959) are mild compared to those he expressed in "The Courts and the Constitution" (an article of 1965). Here he insists that "race" is an intrinsically non-neutral category. Thus, the problem of how to preserve "law" in an era of racial strife is particularly acute. Wechsler was strongly critical of judicial efforts to use the Fourteenth Amendment to outlaw private discrimination, as in

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<sup>151</sup> Cf. Fallon, *supra* note 7 at 959-60 (speculating that Hart and Wechsler's lack of sympathy for the reasoning of *Brown* and subsequent Warren Court decisions may partly explain why they failed to produce an updated version of their casebook before Hart passed away in 1969).

<sup>152</sup> Paul Bator, *Equality*, 9 HARV. J. L. & PUB. POL'Y. 21, 23 (1986) (discussing Robert Nozick's use of "the famous Wilt Chamberlain hypothetical").

<sup>153</sup> Herbert Wechsler, *The Nationalization of Civil Liberties and Civil Rights*, 12 TEXAS QUARTERLY 26 (1968) (a supplement published by the Univ. of Texas at Austin).

the store owner's refusal to sell, or the tenement owner's refusal to lease.<sup>154</sup> In sum, he did not consider the protection of equality by federal courts to be an important part of the American federal system.

Liberty and equality were simply not constituent elements of Wechsler's theory of federalism—with one exception, the First Amendment. We have focused so far on "The Power to Govern" and "The Federal System" sections of Wechsler's great essay on Stone. However, the essay concludes with one more section, entitled "The Protected Area of Liberty." Wechsler writes, "[w]e shall distort Justice Stone's participation in the reformulation of constitutional doctrine if we estimate his contribution in terms of the vindication of government alone."<sup>155</sup> In "The Protected Area of Liberty," Wechsler focuses on the development of strict-scrutiny doctrine in the area of free speech. Curiously, Stone's role in this development appears to have been minor. Wechsler observes that Stone wrote little on the topic of freedom of speech. "And when...the judgments of the Court took a position more protective of [First Amendment] liberty, the opinions were usually written by Chief Justice Hughes or Justice Roberts; Justice Stone was with them invariably in the voting but he did not state his views."<sup>156</sup> Wechsler also stated: "Joining in all these decisions, he [Stone] wrote only in the Hague case; and there the major burden of his opinion was to urge that the constitutional standard be anchored in the due process clause of the fourteenth amendment rather than in the 'privileges and immunities' clause..."<sup>157</sup>

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Wechsler does adduce Stone's seminal footnote four in *Carolene Products* to suggest that the Chief Justice, who favored judicial deference to legislators when it came to economic regulations, supported strict scrutiny of legislation which limits, as the footnote reads, "those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation."<sup>158</sup> But this famous footnote is too inclusive for Wechsler's purposes: it does not single out the First Amendment for special judicial scrutiny. One can certainly argue that free speech is essential to the legislative process, but voting and educational freedom are also of great importance. Wechsler's concern, however, was exclusively with speech. He affirms that Stone accorded a "preferred position" to the First Amendment.<sup>159</sup>

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We need not belabor the issue of whether Wechsler portrays Stone's views correctly. It is likely that Stone was concerned about how his own jurisprudence, which emphasized judicial deference to legislators, would make it impossible for judges to veto legislation that harmed important rights. Stone thus set out to qualify his enthusiasm for strong government with the footnote that tentatively affirmed the autonomy of a vaguely defined set of "political processes." Wechsler's contribution, it seems, was to make

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<sup>154</sup> Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1012-13 (1965).

<sup>155</sup> WECHSLER, *supra* note 124, at 126.

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<sup>156</sup> *Id.* at 129.

<sup>157</sup> *Id.* at 131.

<sup>158</sup> *Id.* at 130.

<sup>159</sup> *Id.* at 134.

Stone's idiosyncratic concept of strict scrutiny compatible with Stone's general emphasis on powerful government by strictly limiting strict scrutiny to the First Amendment. Thus, while Stone's own thoughts remain mysterious, it is clear that Wechsler's concept of strict scrutiny was fixed: it applied to the First Amendment, but everything else fell under rational-basis review. Wechsler's reading of the *Carolene Products* note was considerably more narrow than John Hart Ely's effort to redefine a wide range of civil rights in a "political processes" context.<sup>160</sup> In his Stone essay, Wechsler makes no effort to inscribe any but the First Amendment under the rubric of "The Protected Area of Liberty." In the Oral History Project, an interview that took place four decades after the Stone essay was first published, Wechsler reiterated that the *Carolene Products* footnote was designed to save the First Amendment from the overall theory of judicial deference to government. He also made the highly speculative statement—more revealing of his own opinions than of Stone's—that Stone would have opposed *Brown v. Board*.<sup>161</sup>

Wechsler's passion for freedom of speech would become evident in his greatest triumph as a litigator: the case of *New York Times v. Sullivan*.<sup>162</sup> That case formally vindicated the right of citizens to criticize public officials. But its factual background also linked Wechsler to the struggle for racial equality: the persons whom Wechsler successfully protected from charges of libel were leading civil rights leaders. The manner in which free-speech issues intensify judicial scrutiny is also underscored in Hart and Wechsler's *Federal Courts and the Federal System*.<sup>163</sup> In terms of the First Amendment, Wechsler's contribution to the formation of a rights-based legal culture in the United States was profound. Nevertheless, speech appears to be the only liberty that he considered worthy of intensive judicial protection.

We have focused closely on Wechsler's essay on Stone because it appears to express his entire constitutional philosophy at the end of World War II.<sup>164</sup> That

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<sup>160</sup> John Hart Ely, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

<sup>161</sup> Oral History, *supra* note 9, at 81, 86-87, 153.

<sup>162</sup> 376 U.S. 254 (1964).

<sup>163</sup> HART & WECHSLER, *supra* note 5, at 189-192, 833-842.

<sup>164</sup> We have not thus far addressed the relationship between Wechsler's wartime experiences and his ideas about international law, most notably the law of war crimes. Though his ideas about international criminal law seem to have developed relatively independently of his views about (domestic) constitutional matters, Wechsler made at least one significant postwar attempt to articulate what he had learned through his service, in 1945-46, as the chief technical adviser to the American judges for the first half of the Nuremberg trials. (At the end of the war, Attorney General Francis Biddle was appointed the senior American member of the Nuremberg tribunal, and he invited Wechsler to follow him as one of his assistants.) Wechsler became involved in the planning for the Nuremberg trials in late 1944, when he was still in charge of the Justice Department's War Division. In a December 29, 1944 memo to Biddle, Wechsler commenting on a War Department proposal for postwar trial of the Nazi leaders, Wechsler defended the proposal against charges that it would violate the prohibition against *ex post facto* laws. The gist of the charges brought against the German leaders were already embodied in the laws of war and in the criminal laws of all civilized

philosophy would remain essentially unchanged in subsequent decades. It can be summarized as follows. Wechsler believed that modern conditions of economic and military crisis require courts to defer to legislative and executive actions (“The Power to Govern”). Courts have a duty, however, to discern whether the proper regulating power is state or federal (“The Federal System”). Courts also have a special duty to scrutinize legislation that impinges on the First Amendment (“The Protected Area of Liberty”), but they have no core mission to vindicate other rights, including even habeas corpus or the Fourteenth Amendment’s promise of equality.

The balance between liberty and power is, on the whole, in favor of power. This much would be clear even if Wechsler had ended his essay on Stone with the discussion of Stone’s supposed devotion to the First Amendment. However, Wechsler returns to the question of wartime power, and specifically to the Japanese exclusion cases, before finishing the essay. For he rounds out his discussion of Stone’s concept of protected liberty by observing that the Chief Justice “was never doctrinaire.” When it came to defending freedom, Stone drew no absolute lines. He always took into account “the

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nations, Wechsler argued. However, he noted that certain of the charges – such as world domination and treaty violations – extended beyond existing international and municipal law, and he objected to the proposed use of the common law conspiracy doctrine on the grounds that it was not universally accepted in Western legal systems. Wechsler argued that these defects could be remedied with two changes. First, he proposed defining the specific crimes of the Nazis in advance, in the form of a treaty, and then using the trial to determine which of the German leaders were responsible for those specific acts. Such an approach would, moreover, avoid the possibility that the defendants would use the trial as a forum for debating the legitimacy of their actions. Second, he proposed prosecuting the defendants for joint participation in a completed criminal enterprise rather than for participation in a criminal conspiracy. Wechsler’s memo is published in Bradley F. Smith, THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD, 1944-45 (1982), 84-90.

After returning to law teaching at Columbia, Wechsler delivered a paper entitled “The Issues of the Nuremberg Trial” to the annual meeting of the American Historical Association on December 30, 1946. In it, Wechsler again defended the Allied conduct of the trials against charges that they violated the *ex post facto* principle, arguing that international society was “less stable” than domestic society and thus less admitting of the absolute protections of municipal criminal law. However, he expressed a closing concern about the Allies’ failure, in the Nuremberg trials, to assert the responsibility of all parties involved in the Second World War, including that of the American government for its decision to use atomic bombs against Japan in the waning days of the Pacific war. Herbert Wechsler, “The Issues of the Nuremberg Trial,” 62 POL. SCI. Q. 1 (1947): 11-26.

In Wechsler’s criticism of the Allied conduct of the trials for failing to hold the victors equally accountable for their wartime decisions, it may be possible to see an anticipation of Wechsler’s later essay on “neutral principles,” about which more in the next and penultimate section of this essay.

actual stakes involved” when power clashed with freedom. He accorded “a great but not necessarily dispositive value to the element of freedom impaired.”<sup>165</sup> “We may see this most clearly,” Wechsler adds, “in the Japanese curfew case.”<sup>166</sup>

Wechsler’s footnote at this point cites *Hirabayashi*, the case in which Stone wrote the Court’s opinion; but Wechsler’s footnote also states, “see also *Korematsu*.”<sup>167</sup> Having started the essay with an explication of Stone’s vindication of the power of government to rule in times of emergency, a discussion that culminated in a summary of the Japanese exclusion cases, Wechsler passed through the separate topics of federalism and protected liberty, only to revert to Japanese exclusion in his conclusion. This is the deepest point of an essay that comes full circle. It suggests that for Wechsler, emergency power is the starting point for defining governmental power and the ending point for defining the limits of liberty. It is also a moment at which Wechsler clearly achieves complete identification with Stone—thus suggesting further that the entire essay is really not about Stone’s but his own vision of law.

The examination extended to whether in the light of all the facts and circumstances there was any substantial basis for the conclusion, in which Congress and the military commander united, that the curfew as applied was a protective measure necessary to meet the threat of sabotage and espionage which would reasonably be expected to aid a threatened enemy invasion, and whether there was reasonable ground for believing that the threat was ‘real’. Concluding that this standard was satisfied, [Stone] did not ask in addition whether he would have preferred to take more chances or whether the judgment was the one he would have made.<sup>168</sup>

Wechsler does not use the term “separation of functions” in this discussion. But the distinction he draws between the human being and the person of the law foreshadows the theory of separation that he developed in the post-war years. This particular part of the Stone essay, and the essay as a whole, confirm that Wechsler’s involvement in *Korematsu* shaped the contours of his constitutional thought.

#### IV. Wechsler’s Post-War Jurisprudence: “Neutral Principles”

Thus far, we have discussed two texts – “Some Issues for the Lawyer,” published in 1957, and “Mr. Justice Stone and the Constitution,” published in 1946 but reprinted in *Principles, Politics, and Fundamental Law* in 1961 -- as evidence that Wechsler’s wartime role as a government lawyer is intimately connected to his constitutional theory. Wechsler’s most famous contribution to legal theory, the “Neutral Principles” article that he first published in the *Harvard Law Review* in 1959 and reprinted in *Principles, Politics, and Fundamental Law*, also illustrates this connection.

<sup>165</sup> WECHSLER, *supra* note 124, at 134.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 134 n. 192.

<sup>168</sup> *Id.* at 135.

The “Neutral Principles” article complements “Mr. Justice Stone and the Constitution.” Both delineate a narrow role for judicial review in the constitutional order and a correspondingly wide sphere for governmental regulation. Wechsler states in “Neutral Principles” that courts are not “an ever-open forum for the ventilation of all grievances that draw upon the Constitution for support.”<sup>169</sup> The concept of neutrality is not just a *logical* standard governing the quality of judicial reasoning; it is also a *limiting* standard requiring judges to defer to other authorities when no universal and non-partisan legal principle can resolve a political controversy.

A principled decision...is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved. When no sufficient reasons of this kind can be assigned for overturning value choices of the other branches of the Government or of a state, those choices must, of course, survive.<sup>170</sup>

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By shifting attention away from the social impact of a decision and toward the formal legal reasoning that made the decision necessary, Wechsler permits members of the legal profession to “transcend” the unpleasant “results” of their particular cases.

Wechsler makes it clear that neutrality can make one unpopular, but he presents an image of redemption through devotion to consistent principles. For Wechsler, the greatness of jurists is not measured politically by the practical ramifications of their ideas. It is measured intellectually by the consistency of their thinking over a long period of time. The true sign of legal greatness, then, is a career that strikes ordinary observers as politically incongruous, a career that is intelligible to the impartial spectator, however, as an expression of consistent devotion to one set of guidelines. In another essay, “The Courts and the Constitution,” Wechsler challenged his readers to define a set of permanent criteria for judicial decisions:

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I need not say that there are many who consider this a wholly empty question. In their view, you either like the results of decisions or you don’t, appraising them in terms of your own values or your objects of desire. Mr. Justice Curtis was a great man in Boston when he dissented powerfully in *Dred Scott*; he was a villain when in later years, after his retirement, he questioned the legality of the Emancipation Proclamation. Those who accept this view draw no distinction between politics and law.<sup>171</sup>

Philosophically, this is a fascinating passage. But also biographically, it is suggestive because Wechsler clearly perceives Curtis as a man of integrity, even though Curtis’s progressive orientation in *Dred Scott* seems to be betrayed by his critique of the emancipation procedures. There is an obvious parallel between Wechsler and Curtis. Wechsler looks progressive on the New Deal and reactionary in *Korematsu*, but a single principle, described in the Stone essay as the “vindication of the power to govern,” underlies both.

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<sup>169</sup> WECHSLER, *supra* note 2, at 9.

<sup>170</sup> *Id.* at 27.

<sup>171</sup> Wechsler, *supra* note 154, at 1009.

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Wechsler, we suggest, justified his involvement in *Korematsu* by conceptualizing it as an unpopular political result of his consistent application of the principle of judicial deference to government. One could respond that the interpretation is too speculative, in the absence of explicit reference to *Korematsu* in Wechsler's discussion of neutrality. The answer is very simple: the *Korematsu* case *is* in the text. Careful reading of "Neutral Principles" shows that it contains a major line of analysis that is essentially the same as the analysis of Curtis in "The Courts and the Constitution"--except that Wechsler takes his place next to Curtis in the hall of fame of principled jurists by evoking his role in *Korematsu*.

Near the beginning of the essay, Wechsler distinguishes between what he calls the "critic" and what he calls "history." The critic is one who judges cases on an ad hoc basis in terms of their immediate results, with no regard to enduring legal principles. "History," in contrast, discerns the integrity, the consistent commitment to constitutionalism, of a jurist over a long period of time, an integrity that often produces results that the short-sighted critic finds contradictory. Wechsler presents the instance of Curtis here, and since the discussion in this context is fuller than in "The Courts and the Constitution," we shall quote it at length:

To bring the matter even more directly home, what shall we think of the Harvard records of the Class of 1829, the class of Mr. Justice Curtis, which, we are told, praised at length the Justice's dissent in the *Dred Scott* case but then added, 'Again, *and seemingly adverse to the above*, in October 1862, he prepared a legal opinion and argument, which was published in Boston in pamphlet form, to the effect that President Lincoln's Proclamation of prospective emancipation of the slaves in the rebellious States is *unconstitutional...*' How simple the class historian could make it all by treating as the only thing that mattered whether Mr. Justice Curtis had, on the occasions noted, helped or hindered the attainment of the freedom of the slaves.<sup>172</sup>

History, then, reveals the superficiality of the critic by highlighting the enduring commitment of legal actors to law itself.

Wechsler's investment in "history" runs very deep, and his concept of time ultimately becomes multi-dimensional in order to deal with its own contradictions. An obvious objection to his theory is that an ongoing commitment to realizing a particular social "result," such as the freedom of the slaves, is just as "neutral" as any purely legal commitment. A social reformer who is willing to distort the Constitution in order to advance emancipation is no less neutral than a lawyer who is willing to obstruct emancipation in order to affirm the Constitution. Each is consistent and principled, only the content of the commitment is different. Wechsler was clearly on to this problem because he imbues "history" with another feature that resolves it.

History, he says, shows that the long-term results of an event are often different from what could be expected when the event occurred: "history in this sense is inscrutable, concealing all its verdicts in the bosom of the future; it is never a contemporary critic."<sup>173</sup> The "critic" thus becomes a person who has no sense of

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<sup>172</sup> WECHSLER, *supra* note 2, at 19-20 (italics in original).

<sup>173</sup> *Id.* at 16.

historical irony. The critic casually judges legal cases by their results but is not actually privileged to know what the results will be. The true jurist, in contrast, does not focus on what the results will be because they are incalculable until the distant future. The true jurist focuses on the reality of principles that are discernible precisely because they are not dynamic empirical facts but static abstractions.

Wechsler's endorsement of legal neutrality involved the epistemological denigration of historical predictions. In fact, "Neutral Principles" is best understood as an effort in the philosophy of history. The basic idea is that the meaning of history always comes after us, but the meaning of law is always present to us. This basic argument runs throughout "Neutral Principles." Articulated near the beginning of the article, it comes back repeatedly like a mantra and is the true source of the essay's power and unity. Thus, many pages after Wechsler first posits the history/critic antithesis, he writes:

The more I think about the past the more skeptical I find myself about predictions of the gurus. Viewed a priori would you not have thought that the invention of the cotton gin in 1792 should have reduced the need for slave labor and hence diminished the attractiveness of slavery? Brooks Adams tells us that its consequences were precisely the reverse; that the demand for slaves increased as cotton planting became highly lucrative, increased so lucratively that Virginia turned from coal and iron, which George Washington envisaged as its future, into an enormous farm for breeding slaves.<sup>174</sup>

And he offers this additional example:

Only the other day I read that the Japanese evacuation, which I thought an abomination when it happened, though in the line of duty as a lawyer I participated in the effort to sustain it in the Court, is now believed by many to have been a blessing to its victims, breaking down forever the ghettos in which they had previously lived.<sup>175</sup>

Here Wechsler has clearly wrapped his philosophy of history and his theory of neutral principles around *Korematsu* in such a way as to justify his actions. Wechsler is saying that at the time the evacuation took place, neither he nor anyone else was in a position to measure the policy's results, so it was sensible for him to abstract his legal function from the ostensibly unpleasant content of the situation at hand.

"Neutral Principles" deepens Wechsler's theory of [the](#) "separation of functions," and it deepens his justification of his role in *Korematsu*. We cannot say conclusively that his involvement in *Korematsu* was *the cause* of Wechsler's theory. But we note with certainty that the theory has the effect of exonerating Wechsler. Wechsler himself ensures that we do not miss the connection between neutrality and *Korematsu*. By likening himself to Curtis, he turns a potential badge of shame into an honor. Wechsler was one of the principal beneficiaries of his own theory of neutrality.

## V. Normalizing the Wartime Constitution

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<sup>174</sup> *Id.* at 36-37.

<sup>175</sup> *Id.* at 37 (footnote omitted, but Wechsler's reference is to a NEWSWEEK article of Dec. 29, 1958).

What can we learn from considering legal process theory as an outgrowth of the American constitutional experience during the New Deal and Second World War? Historians of legal process theory have said little about the roots of this school of thought in the actual legal confrontations of the 1930s and 1940s. Instead, they have construed legal process theory as an aspect of the academic culture formed specifically in the 1950s. They have focused on the convergence in the 1950s of two developments in particular: the “epistemological challenge of modernism” and the overriding concern about the specter of totalitarianism (both domestic and foreign).<sup>176</sup>

As Gary Peller has explained, fifties legal scholars turned their focus to institutional procedures rather than substantive results because they had come to accept the modernist claim that all knowledge and all values were relative, and thus that “any substantive vision of justice would be controversial and . . . outside the boundaries of legitimate legal analysis.”<sup>177</sup> The fifties legal scholars further believed that the rise of fascism had challenged the modernist position that all knowledge and all values were relative, a position with which most of these scholars (as children of legal realism) identified. If values were relative rather than absolute, on what basis could one denounce the crimes of fascism? The search for an answer to this question led modernist American intellectuals, inspired by John Dewey, to speak in terms of a fact/value distinction. A compromise between the claims of traditional moral absolutism and those of modernist relativism, the fact/value distinction enabled these intellectuals to posit that while matters of fact belonged to the realm of objective knowledge, claims of moral value remained relative and subject to dispute. In view of this distinction, what made democratic societies superior to totalitarian states was their willingness to tolerate debate and dissent, their refusal to impose any one conception of the good life on their citizens.<sup>178</sup>

Deleted: however,

Because democratic societies were in the business of fostering diversity and tolerance rather than repression, it followed that their most antidemocratic institutions, the federal courts, should avoid at all costs imposing substantive visions of justice. Instead, the courts should defer whenever possible to the political branches, and to the legislatures in particular.<sup>179</sup> In deciding cases, courts should ask which branch of government was most competent to deal with a particular question. In some of these institutional competence inquiries, the courts could seek guidance from the Constitution. Where the Constitution was silent, courts could resort to pragmatic general considerations such as efficiency and public safety – concerns that perhaps inevitably tilted the balance

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<sup>176</sup> Peller, *supra* note 11, at 572 n. 14, 573 (citing PURCELL, *supra* note 11). See also HORWITZ, *supra* note 11, at 253-258.

<sup>177</sup> Peller, *supra* note 11, at 572-73.

<sup>178</sup> *Id.* at 579-86.

<sup>179</sup> *Id.* at 600 (“[T]he process-theorists put enormous weight on the legitimacy of the legislature within the general institutional framework”). Peller also notes the predominance of the image of courts as “counter-majoritarian” institutions in the worldview of the fifties scholars. *Id.*

away from independent judicial determinations of individual rights and towards judicial deference to the Congress and the President.<sup>180</sup>

By situating Wechsler and other legal process scholars in this postwar political and intellectual climate, historians of 1950s American legal thought have established a meaningful relationship between legal process theory and the fight against totalitarianism.<sup>181</sup> Missing from these accounts, however, is an appreciation for how the specific legal controversies of the World War Two period figured in the intellectual and professional development of the legal process scholars.<sup>182</sup>

Wechsler came away from his wartime experiences with an enduring interest in public policy from the policymaker's perspective, and in the concrete and contemporary realities of judicial decision-making. Since the *Korematsu* litigation was a central part of Wechsler's wartime public service, and one of the most acute "dilemmas" that he ever encountered, it may not be too much to attribute his subsequent development as a legal process scholar to his understanding of the issues that courts and government lawyers

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<sup>180</sup> Although it has a different concern with legal process theory than ours, the recent essay by Issacharoff and Pildes on the wartime treatment of civil liberties by American courts, *supra* note 13, deserves further mention. Issacharoff and Pildes argue that American courts have historically used a "process-based, institutionally focused approach," as opposed to an individual rights-oriented approach, in reviewing the legality of executive action in wartime. *Id.* at 163. American courts, they argue, have tended to defer to the wartime President when he has acted with the support of the Congress. At moments of executive unilateralism, by contrast, the authors maintain that courts have tended to exercise less deference. Issacharoff and Pildes argue that recent federal cases involving challenges to President Bush's post-9/11 policies confirm this historical portrait. [The Issacharoff and Pildes essay seems to involve an adaptation of Justice Jackson's famous concurring opinion in \*Youngstown Sheet and Tube Co. v. Sawyer\*, 343 U.S. 579, 634-55 \(1952\) \(setting forth a tripartite framework for evaluating the extent of executive authority in wartime, depending on whether the President is acting pursuant to a congressional authorization, in the absence of such authorization, or contrary to the expressed or implied will of Congress\).](#)

<sup>181</sup> See the sources cited in *supra*, note 11, and the corresponding text.

<sup>182</sup> This is essentially true as well of the outstanding introduction by William Eskridge and Philip Frickey to HENRY M. HART JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* liv-xcvi (1994). Eskridge and Frickey describe Hart and Wechsler's *The Federal Courts and the Federal System* as part of the legal process canon. Eskridge & Frickey, *Introduction* to HART & SACKS cii. They trace the concern with institutional competence to Brandeis's prewar jurisprudence, notably his opinion in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Eskridge & Frickey, *Introduction* to HART & SACKS lx. Eskridge and Frickey also remind us that one of the major reasons for progressive legal academic resistance to the *Brown* decision in the 1950s was the legacy of the *Lochner* era and the progressive distrust of judicial "activism" that it generated. On this, see above all PURCELL, *supra* note 69, at 258-84.

experienced in the acute contexts of war and national emergencies.<sup>183</sup> Having appreciated the significance of judicial deference, the separation of functions, and neutral principles in negotiating conflicts over ultimate values in a society under the incomparable strains of depression and war, Wechsler was all the more prepared to accept the necessity of these ideas in normal times.

Wechsler's meditations on *Korematsu* may thus be seen as a bridge between his thinking about the wartime Constitution and the "normal" Constitution, between emergency law and legal process theory. In *State of Exception*, Giorgio Agamben has developed the idea that emergency law has become normalized as a matter of constitutional practice in the Western democracies over the course of the twentieth century. In his central chapter on "The State of Exception as a Paradigm of Government," Agamben points out that World War I led to a "permanent" state of exception in most of the warring countries.<sup>184</sup> The extension of emergency law during World War I facilitated the encroachment of executive power onto the terrain of parliamentary institutions after the war. During the global depression of the interwar period, Agamben argues, "military necessity" gave way to economic emergencies as the rationale for the state of exception. In the Axis countries, the Second World War made possible a consolidation of totalitarianism by means of the state of exception.<sup>185</sup> Since that time, all of the Western nations, including the former allied and nonaligned states, have pursued the "voluntary creation of a permanent state of emergency (though perhaps not declared in the technical sense)."<sup>186</sup>

Agamben briefly traces the twists and turns in this process as it unfolded in Britain, Italy, Germany, France, Switzerland, and the United States. At the same time, he attempts to relate it to more general concerns about sovereignty and the rule of law, in particular to the question of whether the state of exception should be seen as "internal" or "external" to the juridical order.<sup>187</sup> Although he does not analyze the post-9/11 period in

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<sup>183</sup> A similar point might also be made about Henry Hart, who served as Associate General Counsel in the Office of Price Administration from 1942-45 and then as General Counsel to the Office of Economic Stabilization in 1945-46. This frontline experience in the management of economic emergencies may have left Hart with an appreciation for the enduring dilemmas of emergency law that paralleled Wechsler's exposure to the wartime Constitution in *Korematsu*. A separate essay would be needed to bear that thesis out, however. If true, the thesis would neatly encapsulate Agamben's thesis about the "parallelism between military and economic emergencies that characterizes the politics of the twentieth century." AGAMBEN, *supra* note 14, at 22. Hart's wartime experiences are treated only briefly in the superb chapter on Hart in PURCELL, *supra* note 69. See also ESKRIDGE & FRICKEY, *supra* note 176, at lxvii-lxviii.

<sup>184</sup> AGAMBEN, *supra* note 14, at 12.

<sup>185</sup> *Id.* at 2.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 23. Agamben concludes that it should be seen as neither, but rather constitutes the creation of a "zone of indifference" in which the legal and the extra-legal "blur with

any great detail, Agamben clearly believes that recent American developments such as the USA Patriot Act and the detention of enemy combatants at Guantanamo Bay confirm his general thesis about the transformation of Western democracies via the extension of the state of exception.<sup>188</sup>

Agamben's suggestion that the post-9/11 situation in the United States can be seen as an aspect of the "voluntary creation of a permanent state of emergency"<sup>189</sup> in post-World War II Western democracies is clearly problematic. For it implies that the American government's response to 9/11 had very little, if anything, to do with the tragedies and heinous crimes of that day. Equally problematic is Agamben's view that the treatment of detainees at the American prison camp at Guantanamo Bay can be fairly compared to the treatment of Jews by the Nazi regime. Putting these two claims to the side, however, there is much to be said for Agamben's general argument and even for its particular application to the United States after 9/11. The current government, it appears, is using the emergency context to buttress executive authority at the expense of the courts and legislature and to impose constitutionally dubious restrictions on the civil liberties of citizens and non-citizens alike, as any number of critics have pointed out.<sup>190</sup>

Nonetheless, it is one thing to condemn these developments as part of a generic theory of the state of exception in "modern" times, and quite another to show how they emerge from the particularities and paradoxes of American law from the New Deal onward. Agamben's flamboyant and distorted claims about the American government's response to 9/11 are part and parcel of a larger failure of continental European theorists (who are also highly influential in the American academy) to bear down on the special features of American legal thought and practice in the twentieth century. At the same time, the example of Herbert Wechsler suggests that our distinctive legal ideas and personalities can be perplexing in their own right. For we have attempted to show that Wechsler, one of the most distinguished figures in the history of American law, played a leading role in devising a series of deep arguments in favor of governmental power at the expense of civil liberties. We have tried to show that Wechsler's stellar achievements in the areas of federal jurisdiction and first amendment law are intimately connected to his highly restrictive views of habeas corpus and personal freedom in times of emergency. There is no hero here, and no villain. Wechsler's career is simply an emblem of our entire national history in the twentieth century. It is filled with ironies we must come to understand, so that we can better understand all the implications of our decisions in this new century.

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each other." Agamben's preoccupation with Foucault and biopolitics is developed more fully in the prequel to *STATE OF EXCEPTION: GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (Daniel Heller-Roazen trans., Stanford University Press, 1998).

<sup>188</sup> AGAMBEN, *supra* note 14, at 3-4. *See also* Interview by Ulrich Rauff with Giorgio Agamben, 5 *GERMAN LAW JOURNAL* 609 (2004).

<sup>189</sup> AGAMBEN, *supra* note 14, at 2 (emphasis added).

<sup>190</sup> *See, e.g.*, DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2005).