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A LEGAL GIANT IS DEAD

*Henry Paul Monaghan**

Herbert Wechsler died at his home on April 26, 2000. Two days later, the *New York Times* obituary's headline announced the passing of a "legal giant," a richly merited appellation.¹ Herbert Wechsler was, I believe, the greatest academic figure in the history of Columbia Law School. At the height of his career, Herb stood at the top of three academic fields: criminal law, constitutional law, and federal jurisdiction. His achievements were, moreover, not confined to Columbia, the faculty of which he joined in 1933 after having served as law clerk to Justice Harlan Fiske Stone. From 1944 to 1946, Herb served as assistant attorney general in charge of the War Division. When the Nuremberg trials began, he provided technical advice to the American judges. In 1964, he argued *New York Times Co. v. Sullivan*,² the most important First Amendment decision of the twentieth century. And, of course, for over two decades, Herb was director of the American Law Institute.

For my generation, Herb was the symbol of this law school. Later legal scholars were greatly influenced by the extraordinary quality of his achievements. These included, of course, co-authorship of *The Federal Courts and The Federal System*,³ his famous Holmes Lecture, "Toward Neutral Principles of Constitutional Law,"⁴ and the ALI Model Penal Code. And even when long retired from active teaching, Herb remained an inspiration and a vital force in this school's life. On his death, numerous students approached the Dean and other faculty members requesting a commemoration. While they had never met Herb, they had studied his work, and that study had left a lasting impression.

No one writer could do justice to all of Herb's rich and varied contributions to the law. In my case, for example, the Model Penal Code, which Herb considered to be his proudest achievement, appeared four years after I had graduated from law school. And I can say very little about Herb's general ALI contributions. For me, however, the aspect of Herb's work that most stands out, an aspect that also embraces the Model Penal Code and his ALI directorship, was Herb's intense interest in what judges and lawyers actually do, the kinds of problems they face and must resolve.

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1. Tamar Lewin, Herbert Wechsler, Legal Giant, Is Dead At 90, *N.Y. Times*, Apr. 28, 2000, at C21 [hereinafter *Obituary*].

2. 376 U.S. 254 (1964).

3. Henry M. Hart, Jr. & Herbert Wechsler, *The Federal Courts and the Federal System* (1953) [hereinafter *Hart & Wechsler*].

4. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1 (1959) [hereinafter *Wechsler, Neutral Principles*].

I.

Hart & Wechsler's *The Federal Courts and the Federal System* ("Hart & Wechsler"), published in 1953, immediately achieved an extraordinary educational reputation, and rightly so. Far more than a particularly stimulating collection of cases and basic source materials, *Hart & Wechsler's* central purpose (although by no means its only one) was to examine the proper functioning of the federal (and the state) courts in "Our Federalism."⁵ But *Hart & Wechsler's* real greatness is that, through its extensive notes and its inimitable leading questions, the book constantly "prodded . . . students and [teachers] to think over their heads about the deepest problems of the legal process."⁶

I recall clearly when I first encountered *Hart & Wechsler*. In 1960, as an LL.M. candidate, I enrolled in Henry Hart's federal courts course. That course met on Tuesdays, Thursdays, and Saturdays at noon in Harvard's Langdell Hall, and it was affectionately known as "Darkness at Noon." I enrolled believing (modestly) that I already luminously understood nearly everything worth knowing, having, after all, already taken such a course (using, needless to say, a different casebook) and having clerked for a circuit judge. Fortunately, it took me no time at all to realize the depth of my mistake. Like Kant on reading Hume, the scales fell from my eyes.

II.

Herb's numerous law review articles were characterized by insight and great clarity of presentation. For example, in analyzing the rules governing the Supreme Court's appellate jurisdiction over state courts, Herb articulated the importance of distinguishing between review of state law grounds logically antecedent to disposition of federal claims, and those that are not.⁷ In his well known and highly regarded article "The Political Safeguards of Federalism," Herb argued for a relatively modest judicial role when courts are asked to impose federalism limits on Congress.⁸

5. *Younger v. Harris*, 401 U.S. 37, 44 (1971). *Hart & Wechsler* was to provide the judicial counterpart to the basic course in constitutional law, which centers upon the legislative and executive aspects of American federalism.

6. Address by Kingman Brewster, Jr., President of Yale University, in awarding an LL.D. posthumously to Professor Hart, New Haven, Connecticut, June 9, 1969, quoted in Henry P. Monaghan, Book Review, 83 Harv. L. Rev. 1753, 1753 (1970). Herb's coauthor, Henry Hart, too, surely merited the appellation "legal giant."

7. See Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 Wash. & Lee L. Rev. 1043, 1050-56 (1977).

8. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 559 (1954), reprinted in Herbert Wechsler, *Principles, Politics and Fundamental Law: Selected Essays* 49, 81-82 (1961) [hereinafter Wechsler, *Fundamentals*]. For a recent examination of this article, see Larry D. Kramer, *Putting The Politics Back Into The Political Safeguards of Federalism*, 100 Colum. L. Rev. 215 (2000). To Herb's emphasis of

That theme has always resonated in our constitutional jurisprudence, and most recently, it played a significant role in the opinions of the four dissenting justices in *United States v. Morrison*.⁹ There, a narrow majority of the Court held that Congress lacked authority to enact the Violence Against Women Act.

Herb's most famous article, however, was "Toward Neutral Principles of Constitutional Law,"¹⁰ a Holmes Lecture which was delivered in three parts in 1959 at Harvard. Herb expressed a mounting concern among segments of the bar and the judiciary that the Warren Court's decisions were inadequately "principled." "His articulation of those themes was decisive in shaping contemporary constitutional theory," Professor Whittington recently wrote.¹¹ After criticizing several important Supreme Court civil liberties decisions, including the unexplained *per curiam* applications of *Brown v. Board of Education*¹² to "public transportation, parks, golf courses, bath houses, and beaches,"¹³ he concluded his lecture by calling into question *Brown* itself,¹⁴ the century's most important civil liberties decision. Assuming equal school facilities, Herb suggested that *Brown* ultimately raised an issue of competing freedoms: freedom to associate and freedom not to associate. Was there, he then asked, "a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?"¹⁵ Whatever the merits of his analysis of *Brown* itself,¹⁶ Herb's challenge gave "[c]onstitutional theory . . . its modern form."¹⁷ In subsequent years, constitutional theorists would

such institutional factors as the composition of Congress, Professor Kramer draws attention to non-institutional factors, such as political parties.

9. 120 S. Ct. 1740, 1776–77 (2000) (Breyer, J., dissenting).

10. 73 Harv. L. Rev. 1 (1959), reprinted in Wechsler, *Fundamentals*, supra note 8, at 3.

11. Keith E. Whittington, *Herbert Wechsler's Complaint and the Revival of Grand Constitutional Theory*, 34 U. Rich. L. Rev. 509, 514 (2000).

12. 347 U.S. 483 (1954).

13. Wechsler, *Neutral Principles*, supra note 4, at 22.

14. *Id.* at 33–34.

15. *Id.* at 34.

16. Herb subsequently acknowledged criticism of his *Brown* analysis by several friends, noting only that their defenses "advance[d] reasons differing substantially from" the Court's rationale, and that for him they were not persuasive. Characteristically, Herb urged the reader to judge for himself or herself. Wechsler, *Fundamentals*, supra note 8, at xiv–xv. His only other comment on *Brown* does not cast any additional light on his thinking. Silber and Miller, *Toward "Neutral Principles in the Law: Selections From the Oral History of Herbert Wechsler*, 93 Colum. L. Rev. 854, 865–66 (1993) [hereinafter Silber & Miller, *Oral History*].

17. Whittington, supra note 11, at 513. I should add, however, that "Neutral Principles" also had an important second objective, one that has now receded from view. "Neutral Principles" was intended as a direct challenge to Judge Learned Hand's Holmes Lectures delivered just a year earlier. Learned Hand, *The Bill of Rights* (1958). See Silber and Miller, *Oral History*, supra note 16, at 931 (describing Hand's view as unacceptable to everyone). Wechsler's first lecture, "The Basis of Judicial Review," was fully devoted to rejecting Hand's claim, *id.* at 14–15, 27–29, that judicial review was an extrajudicial—albeit necessary—"import[ation]" by the Supreme Court. His second lecture, "The Standard of

struggle with this demand for adequately principled adjudication, and the focal high point of this struggle was, for most, *Roe v. Wade*.¹⁸

Discussions of “Neutral Principles” have been excessively preoccupied with the word “neutral.” What Herb insisted upon was not so much that the governing principle should be neutral, but that the applicable principle should be neutrally and generally applied.¹⁹ The lasting significance of “Neutral Principles,” however, inheres in Herb’s insistence that all adjudication must be entirely principled. “I put it to you,” he famously wrote, “that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.”²⁰ (“His point,” said Justice Ginsburg, “was that the way we decide things is very often—he’d say always, I’d say often—as important as what we decide.”²¹) For Herb, there was nothing distinctive in the nature of constitutional adjudication.

Review,” not only focused on neutral principles, but also rejected Hand’s claim that the Bill of Rights was too open-ended to be judicially enforceable. Wechsler, *Neutral Principles*, supra note 4, at 16–19. In this lecture Herb reveals a decidedly “non-originalist” approach to what he characterized as the judicial “obligation of interpreting the open-ended concepts of the Constitution.” Herbert Wechsler, *The Courts and The Constitution*, 65 *Colum. L. Rev.* 1001, 1011 (1965) [hereinafter Wechsler, *The Courts*]. “I cannot find it in my heart to regret that [constitutional] interpretation did not ground itself in ancient history but rather has perceived in [the constitutional provisions] a compendious affirmation of the basic values of a free society, values that must be given weight in legislation and administration at the risk of courting trouble in the courts.” Wechsler, *Neutral Principles*, supra note 4, at 19.

18. 410 U.S. 113 (1973). Insofar as the search for adequate “principles” extended beyond those drawn from the Constitution’s text, structure, and history, that practice was sharply challenged by Professor John Hart Ely in *Foreword: On Discovering Fundamental Values*, 92 *Harv. L. Rev.* 5, 15–55 (1978), reprinted in *Democracy and Distrust* 43–72 (1980), and in *The Wages of Crying Wolf: A Comment On Roe v. Wade*, 82 *Yale L.J.* 920 (1973).

19. See Wechsler, *Fundamentals*, supra note 8, at xiii–xiv.

As to the choice of adjective, my case is simply that I could discover none that better serves my purpose As to my meaning . . . I certainly do not deny that constitutional provisions are directed to protecting certain special values or that the principled development of a particular provision is concerned with the value or the values thus involved. The demand of neutrality is that a value and its measure be determined by a general analysis that gives no weight to accidents of application, finding a scope that is acceptable whatever interest, group, or person may assert the claim.

Id. See also Silber & Miller, *Oral History*, supra note 16, at 924–31.

20. Wechsler, *Neutral Principles*, supra note 4, at 15.

21. Obituary, supra note 1. Interestingly, no Supreme Court decision seems to have used the word “principled” to describe a quality of thought or rule as a minimum standard for constitutional adjudication before the word’s appearance in Herb’s famous article. Since then, however, Justices have considered whether they, or their colleagues, are “principled” more than two hundred times. See, e.g. *Apprendi v. New Jersey*, 120 S. Ct. 2348, 2356–60 (2000), *United States v. Morrison*, 120 S. Ct. 1740, 1755–59 (2000), *Board of Regents of the Univ. of Wis. Sys. v. Southworth*, 120 S. Ct. 1346, 1356–57 (2000), all decided last term.

One could dispute what the principles were, but the need to render generally applicable and adequately reasoned results were the defining characteristics of the judicial process.²²

Herb stood very far removed from those who insist that constitutional adjudication has no "principles" whatsoever; that it always has been, and should remain, simply politics carried on by other means.²³ Courts, he said, "are bound to function otherwise than as a naked power organ; they participate as courts of law . . . in that they are—or are obliged to be—entirely principled."²⁴ Herb was also removed, certainly by inclination, from those who would treat constitutional adjudication (at least in the area of civil liberties) as simply a branch of political, social, or moral philosophy, in which the fundamental dispute, in the end, is resolved by deciding whose philosophy is the best or the most powerful.²⁵

Herb, in fact, professed a quite modest conception of the scope of federal judicial authority. For him, the federal courts, including the Supreme Court, had no freestanding commission to enforce statutory or constitutional limits against government officials. Quite to the contrary; their sole legitimate authority was to "say what the law is" *only* when such a determination was necessary to the disposition of cases over which they had jurisdiction.²⁶ And Herb saw nothing internal to Article III itself (as opposed to "external" limitations, such as those contained in the Bill of Rights and other amendments) that limited plenary Congressional authority over the federal courts' jurisdiction, including the appellate jurisdiction of the Supreme Court.²⁷

22. See Silber & Miller, *Oral History*, *supra* note 16, at 928–29. "The requirement [of reasoned results]," Justice Scalia recently wrote, "is the only thing that prevents this Court from being some sort of nine-headed Caesar, giving thumbs-up or thumbs-down to whatever outcome, case-by-case, suits or offends its collective fancy." *Dickerson v. United States*, 120 S. Ct. 2326, 2342 (2000) (Scalia, J., dissenting).

23. For a recent such entry, see Terri Jennings Peretti, *In Defense of Political Courts* (1999).

24. Wechsler, *Neutral Principles*, *supra* note 4, at 19.

25. See, e.g., Ronald Dworkin, *Freedom's Law* 343 (1996) (arguing that constitutional interpretation, at least in the area of civil liberties, involves "fundamental questions of political morality and philosophy"). But given Herb's expansive conception of constitutional guarantees as a "compendious affirmation of the basic values of a free society," see *supra* note 19, one can understand those who see Dworkin as one embodiment of Herb's general vision of the nature of constitutional adjudication.

26. See Wechsler, *Neutral Principles*, *supra* note 4, at 6.

The duty, to be sure, is not that of policing or advising legislatures or executives, nor even, as the uninstructed think, of standing as an ever-open forum for the ventilation of all grievances that draw upon the Constitution for support. It is the duty to decide the litigated case and to decide it in accordance with the law.

Id. Thus the federal courts have no general "broad discretion to abstain or intervene." *Id.* at 9.

27. See Wechsler, *The Courts*, *supra* note 17, at 1005 (rejecting a "narrow meaning" for the "exceptions clause" as quite "antithetical to the [constitutional] plan"). Herb insisted, however, that for practical reasons the general reservation of Congressional authority was "more theoretical . . . than . . . real." *Id.* at 1007. But there remains the

III.

Herb will forever be associated with *New York Times Co. v. Sullivan*,²⁸ the most important First Amendment decision of the last century, and, I believe, in all of this country's First Amendment jurisprudence. That decision arose out of an advertisement in the *New York Times* on March 29, 1960. The advertisement alleged that police abuse had occurred in Montgomery, Alabama, during the escalating civil rights sit-ins, freedom rides, and marches in the South. It contained, at most, trivial factual misstatements, and it did not even name plaintiff Sullivan, the Montgomery City Commissioner in charge of the police.²⁹ Sullivan, nonetheless, sought \$500,000 in damages. An all-white jury returned that verdict, the then-highest defamation award in Alabama history, and the Supreme Court of Alabama affirmed. When *Sullivan* reached the United States Supreme Court, eleven additional libel suits were pending against the *Times*, seeking more than \$5 million in damages. (Other news organizations were also targets of similar litigation.)³⁰

Herb won in the Supreme Court, but that result (especially in the heyday of the Warren Court) is not surprising. It was, after all, quite clear that the national media could cover the civil rights movement in the South only at the risk of bankruptcy unless the *Sullivan* judgment were reversed. What was important, however, was the ground of victory. Here, Herb reshaped legal thinking about the relationship governing the law of libel, criticism of government officials, and the First Amendment. While settled law held that "libel" was not speech protected by the First Amendment, most lawyers understood that the First Amendment necessarily hemmed in some of the elements of the draconian common law of libel. In *Sullivan*, there was no proof of injury to Sullivan's reputation. (Indeed, it seems likely that it improved.) The Alabama courts, however, relied upon the entrenched common law paradigm that actual damages could be "presumed."³¹ Many advocates would have argued that, in suits brought by public figures, the First Amendment required proof of actual injury, but in doing so they would have had to challenge the embedded tradition of presuming actual damages. Avoiding that confrontation, Herb took a different route. Against the common law paradigm, he invoked another paradigm: the American antipathy to "seditious libel," whether prosecuted criminally, or civilly through libel actions brought by

danger that Congress may be moved to chip away at the edges. In *Felker v. Turpin*, 518 U.S. 651 (1996), the questions were whether Congress had interfered with the Supreme Court's appellate jurisdiction in certain habeas corpus cases, and if so, whether the Congressional interference was valid. While the Court answered the first question in the negative, see *id.* at 660-61, two of Herb's colleagues, Jim Liebman and I, among petitioner's counsel, argued that the creation of "one supreme Court" in article III of the Constitution itself constrains Congressional authority.

28. 376 U.S. 254 (1964).

29. *Id.* at 257-59.

30. Obituary, *supra* note 1.

31. 376 U.S. at 262-63, 267.

government officials.³² For him, the American Republic rested upon the belief that wide scope existed for criticism of government officials. The Supreme Court agreed. Seditious libel could have no place in the United States³³—and that, a prominent commentator said, was an “occasion for dancing in the streets.”³⁴

While *Sullivan* (properly, I believe) did not completely overthrow the law of defamation with respect to public officials, it did give significant practical protection to the media. Instead of focusing upon situation-specific assessments of whether the record contained sufficient proof of actual injury to an official’s reputation, the Court directed attention to the media’s knowledge of the truth. In so doing, the Court ultimately facilitated media pretrial dismissals, and it gave judges at all levels a more easily administrable role.

IV.

When I came to Columbia in 1982, Herb’s analytic ability was legendary. One of my colleagues, active in the ALI, told me that when Herb rose to address a speaker, the audience quickened, given Herb’s well-known ability to cut the heart out of an argument before the speaker even realized that he or she had incurred more than a simple flesh wound. (Indeed, my colleague, also a person of imposing talents, said that he himself could attest to such wounds.)³⁵

Despite his formidable intellectual powers, however, Herb was an eminently accessible colleague. He welcomed and responded warmly to human contact, and he never lost his intellectual curiosity. The *Times* was surely right; a legal giant is gone. The law school community will miss him.

32. Libel, because it defamed; seditious, because it undermined confidence in the government.

33. 376 U.S. at 273–77.

34. Harry Kalven, *The New York Times Case: A Note On The Central Meaning of the First Amendment*, 1964 Sup. Ct. Rev. 191, 221 n.125 (quoting private conversation with Alexander Meiklejohn). While the Court has extended the holding of *Sullivan* beyond public officials, I believe it is fair to say that the prohibition against seditious libel remains the centerpiece of our First Amendment tradition.

35. I myself can attest to Herb’s awe-inspiring reputation. One day early in the 1980s, Herb and I were discussing our upcoming course, *Federal Courts*, and I said:

“Herb, what do you think about . . . ?”

Herb looked at me, or I should say, he looked through me as though my head were a perfect vacuum, and he said: “The answer is rather obvious, isn’t it?”

I replied: “That’s what I think, too.”

(Pause.)

“Which way is it obvious, Herb?”