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Lincoln Caplan

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Anthony Lewis: What He Learned at Harvard Law School

Lincoln Caplan*

Anthony Lewis was a columnist for *The New York Times* for the unusually long tenure of thirty-two years.¹ When he retired in 2001 at the age of seventy-four, Bill Clinton awarded him the Presidential Citizens Medal for setting “the highest standard of journalistic ethics and excellence” and for being “a clear and courageous voice for democracy and justice.”² Lewis ended his last column by paraphrasing one of his heroes: “The most important office in a democracy, Justice Louis Brandeis said, is the office of citizen.”³ Lewis’ point was that the American commitment to the rule of law and the belief in reason on which it rests both depend on citizens standing up to rulers who abuse power by exercising it unreasonably – arbitrarily and unjustly.⁴

Lewis sounded like a classic outsider, who believed that his most important job as a journalist was to be a stand-in for citizens as an adversary of the government. In America today, that is the idealized stance for a journal-

* Lincoln Caplan is the Truman Capote Visiting Lecturer in Law at Yale Law School and the author of *The Tenth Justice: The Solicitor General and the Rule of Law* and *Skadden: Power, Money, and the Rise of a Legal Empire*, among other books. He wrote about the Supreme Court for *The New York Times* as a member of the paper’s editorial board. Thanks to Yale Law School, in particular Dean Robert C. Post and Deputy Deans Alvin K. Klevorick and Douglas Kysar, for the opportunity to teach there again, use its splendid library, and be reminded of its uncommon commitment to illuminating journalism about legal affairs, and to support at Yale Law School from the Truman Capote Literary Trust; to the University of Virginia Law School, in particular John C. Jeffries, Jr., Risa Goluboff, and G. Edward White, for valuable feedback when I presented a previous version of this article at a faculty workshop; to Jillian Dent and others on the *Missouri Law Review*, for their careful editing, and to Richard C. Reuben of the University of Missouri Law School, for inviting me to contribute to this symposium; to Akhil Reed Amar, Anne Coughlin, Michael Ignatieff, David Ignatius, and Rafe Sagalyn, for their generous interest in and support of this project; to Vicki Jackson, who encouraged me to take on this subject; and to Margaret H. Marshall, for entrusting me with invaluable documents and for her indispensable observations.

1. *Anthony Lewis Dies at 85; Two-Time Pulitzer Prize-Winning Journalist*, L.A. TIMES (Mar. 26, 2013), <http://www.latimes.com/local/obituaries/la-me-anthony-lewis-20130326-story.html>.

2. *President Clinton Awards the Presidential Citizens Medals*, WHITE HOUSE (Jan. 8, 2001), http://clinton5.nara.gov/WH/new/html/Mon_Jan_8_141714_2001.html.

3. Anthony Lewis, Op-Ed., *Abroad at Home; Hail and Farewell*, N.Y. TIMES (Dec. 15, 2001), <http://www.nytimes.com/2001/12/15/opinion/abroad-at-home-hail-and-farewell.html?ref=anthonylewis>.

4. *See id.*

ist. Glenn Greenwald, the former columnist for *The Guardian* who co-founded the website called *The Intercept*, is a prominent example.⁵ He was responsible for *The Guardian US* sharing the 2014 Pulitzer Prize for Public Service with *The Washington Post*.⁶ *The Guardian's* award based on Greenwald's work, the Pulitzer Prize Board said, was for the paper's "revelation of widespread secret surveillance by the National Security Agency, helping through aggressive reporting to spark a debate about the relationship between the government and the public over issues of security and privacy."⁷

In interviews about this work based on massive leaks from the former N.S.A. contractor Edward Snowden, Greenwald has avowed that in the age of the surveillance state, with the United States government eliminating much of what privacy once entailed, the role of the press is to be confrontational.⁸ The press's duty, he said, is to call-out government lies, expose unwarranted secrecy, and avoid the deplorable habit of "the establishment media"⁹ bowing in "glaring subservience to political power."¹⁰ It is the press's role, in other words, to be combative. When it is, the press provides the check and balance against the executive branch that neither Congress nor the judiciary have done anywhere near adequately. It helps reverse the anxiety-fueled swing of the pendulum toward police-state-like overprotection of national security, pushing the pendulum back toward the constitutionally guaranteed protection of individual rights.

Lewis often fit this model: he was a formidable critic of the government, in particular of its penchant for secrecy.¹¹ He was an insistent defender of citizens against government encroachments, especially of their right to privacy.¹² He was indignant about brutality that government sometimes inflicted, as when southern states used police to beat up people protesting against segregation, and about fear that government sometimes instilled in citizens to manipulate them, as in the period after the attacks against the United States

5. See *Defying Threats to Journalism*, Jeremy Scahill & Glenn Greenwald Launch New Venture, *The Intercept*, DEMOCRACY NOW! (Feb. 10, 2014), http://www.democracynow.org/2014/2/10/defying_threats_to_journalism_jeremy_scahill.

6. See *The 2014 Pulitzer Prize Winners: Public Service*, PULITZER PRIZES, <http://www.pulitzer.org/citation/2014-Public-Service> (last visited Nov. 12, 2014).

7. *Id.*

8. See Michiko Kakutani, *Snowden's Story, Behind the Scenes: 'No Place to Hide,'* by Glenn Greenwald, N.Y. TIMES (May 12, 2014), <http://www.nytimes.com/2014/05/13/books/no-place-to-hide-by-glenn-greenwald.html?hpw&rref=books>.

9. *Id.*

10. Bill Keller, *Is Glenn Greenwald the Future of News?*, N.Y. TIMES (Oct. 27, 2013), http://www.nytimes.com/2013/10/28/opinion/a-conversation-in-lieu-of-a-column.html?_r=0.

11. Anthony Lewis, MEDIA L. RESOURCE CENTER, <http://www.medialaw.org/events/185-anthony-lewis> (last visited Nov. 12, 2014).

12. *Id.*

on 9/11.¹³ Lewis condemned those wrongs and sought to right them through his journalism. He was a liberal who pushed for liberal causes: liberty, equality, and the rule of law; fair and open elections; human rights; and freedom of expression and religion.¹⁴

Yet Lewis' journalism was fundamentally not adversarial: it was defined by what he was for, much more than by what he was against. As a member of the press, in a remarkable contrast to today's idealized stance, he felt a duty to explain and stand up for the constitutional system and the government's central part in it, as well as to challenge when the government violated American laws and values.¹⁵ That's why it was apt that the presidential medal was given to him for being "a clear and courageous voice for democracy and justice."¹⁶

The story of how he developed that voice begins as an ever-receding footnote to history, but it is much more than that. Ten presidents ago, when Dwight D. Eisenhower was in the White House, going back almost one-fourth of the way through American history, the *Times* sent Anthony Lewis to study law at Harvard for one academic year, in 1956-57.¹⁷ While he received no degree, Lewis later summed up his experience like this: "The Harvard Law School opened my eyes to the law . . ."¹⁸

That year – in an era of giant change for the Court – Lewis learned about the most challenging and important ideas then being debated by scholars who specialized in the Constitution and the Supreme Court. Those ideas reinforced his liberal sympathies and ideals, but they also changed his thinking fundamentally. They led him to adopt a traditionalist view about the importance of understanding the American constitutional system and how (in his words) "history, law, and culture contribute to the process of defining what the Constitution commands."¹⁹

Those ideas also helped Lewis establish his distinctive stance as a journalist: he was fastidiously independent, yet passionately invested in the American project. He was both an outsider and an insider. He understood better than any other journalist why it was indefensible for the government to prosecute any journalist under the Espionage Act, as the Obama administration has done, unless the journalist was actually a spy.²⁰ But Lewis also understood that journalists should not get blanket immunity from subpoenas in

13. ANTHONY LEWIS, *FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT* 147-49 (2007).

14. *Anthony Lewis Dies at 85; Two-Time Pulitzer Prize-Winning Journalist*, *supra* note 1.

15. *See Anthony Lewis*, *supra* note 11.

16. *President Clinton Awards the Presidential Citizens Medals*, *supra* note 2.

17. L.A. Powe, Jr., *Writing the First Draft of History: Anthony Lewis as Supreme Court Correspondent*, 29 J. SUP. CT. HIST. 177, 177 (2004).

18. ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT*, at ix (1991).

19. LEWIS, *supra* note 13, at x-xi.

20. *See id.* at 101-30.

criminal cases, since they are subject to the law like everyone else.²¹ It is their job to hold the government to its principles, but that does not give journalists license to hide behind the law if they do their job badly, in an effort to cover up a mistake of no benefit to the Republic and of potentially great harm to an individual about whom they had been mistaken.²²

Lewis had exquisite skills as a journalist, but in the sense that British universities call law students lawyers, he was also a lawyer with remarkable skills. He loved both professions and believed that they were bound together: the press is integral to the process of governance because of its quasi-constitutional role under the First Amendment; the law is essential because it is the foundation of American government and is called on to resolve so many fundamental issues of national politics and social policy.

His reporting and writing about the law transformed legal journalism. He became American law's leading liberal tribune, but even more significantly, the country's most lucid and influential teacher about the workings of its constitutional system. The foundation of his journalism was the conviction that the effective functioning of the system of government, especially the courts, is essential to the survival and the health of the American Republic. He was a great journalist and the country's greatest journalist about legal affairs. It is an honor to be included in this symposium about him following his death in 2013 at the age of eighty-five.²³

"A Scholar Who Can Run"

Lewis was twenty-nine when he went up to Harvard,²⁴ already a star reporter with an ardent interest in stories involving law and justice. The year before he started law school, he had won a Pulitzer Prize for National Reporting,²⁵ for a six-part series²⁶ of articles in *The Washington Daily News*.²⁷ According to the prize committee, the articles "were adjudged directly responsible for clearing Abraham Chasanow, an employee of the U.S. Navy Department, and bringing about his restoration to duty with an acknowledgment by the Navy Department that it had committed a grave injustice in dismissing him as a security risk."²⁸

21. *See id.* at 90-100.

22. *See id.*

23. Adam Liptak, *Anthony Lewis, Supreme Court Reporter Who Brought Law to Life, Dies at 85*, N.Y. TIMES, Mar. 23, 2013, at A1, available at http://www.nytimes.com/2013/03/26/us/anthony-lewis-pulitzer-prize-winning-columnist-dies-at-85.html?pagewanted=all&_r=1&.

24. *See id.*

25. *1955 Winners*, PULITZER PRIZES, <http://www.pulitzer.org/awards/1955> (last visited Nov. 15, 2014).

26. CATHY D. KNEPPER, GREENBELT, MARYLAND: A LIVING LEGACY OF THE NEW DEAL 100 (2001).

27. *1955 Winners*, *supra* note 25.

28. *Id.*

In 1953, when Senator Joseph McCarthy's fear-mongering campaign was at its peak to brand dissenters as traitors and force them out of the United States government under the guise of fighting Communism, Chasanow was dismissed based on charges by an accuser who was never identified.²⁹ The Lewis series exposed this wrong and led to highly publicized hearings where the Navy produced no evidence to support the charges.³⁰ Chasanow was reinstated.³¹ The Secretary of the Navy acknowledged injustice through an official apology.³²

Lewis went to Harvard as a Nieman Fellow to prepare for covering the Supreme Court, a very different kind of assignment.³³ Paul Freund was a Harvard Law School professor and an eminent scholar about the Court and the U.S. Constitution.³⁴ He wrote that the Court then, "despite its pivotal role, has been by all odds the least adequately and intelligently covered of all government departments."³⁵ In retrospect, that isn't all that surprising. By the time Lewis arrived at Harvard Law School, the U.S. Supreme Court building was just twenty-one years-old.³⁶ Until October of 1935, the Court had heard argument in the basement of the U.S. Capitol and – because they had no courthouse – the justices worked at their own homes.³⁷ In the most basic way, the Court had been difficult to cover because it was a phantom institution without a home.

With a concerted nudge from Justice Felix Frankfurter, the *Times*' James Reston, who was the paper's Washington Bureau Chief, had decided that it was time for the *Times* to have a reporter who specialized in the Court.³⁸ He chose Lewis, who he had hired in 1955.³⁹ Reston said Lewis

29. Abraham Chasanow, 78, *an Aid Vindicated in Navy Security Case*, N.Y. TIMES (June 14, 1989), <http://www.nytimes.com/1989/06/14/obituaries/abraham-chasanow-78-an-aide-vindicated-in-navy-security-case.html>; see also 1941-1963, U.S. SENATE, http://www.senate.gov/artandhistory/history/minute/Have_you_no_sense_of_decency.htm (last visited Nov. 15, 2014).

30. Abraham Chasanow, 78, *an Aid Vindicated in Navy Security Case*, *supra* note 29.

31. *Id.*

32. *Three Brave Men Movie and Discussion*, GREENBELT IN 2012 (Feb. 10, 2012), <http://greenbelt2012.wordpress.com/2012/02/14/three-brave-men-movie-and-discussion/>.

33. Liptak, *supra* note 23.

34. Eric Pace, Paul A. Freund, *Authority on Constitution, Dies at 83*, N.Y. TIMES (Feb. 6, 1992), <http://www.nytimes.com/1992/02/06/us/paul-a-freund-authority-on-constitution-dies-at-83.html>.

35. Letter from Paul A. Freund, Carl M. Loeb Univ. Professor, Harvard Law Sch., to Advisory Board on the Pulitzer Prizes (Jan. 31, 1963) (copy on file with Margaret H. Marshall).

36. See *Frequently Asked Questions (FAQ)*, SUPREME COURT U.S., <http://www.supremecourt.gov/faq.aspx#faqgi14> (last visited Nov. 15, 2014).

37. *Homes of the Court*, SUPREME COURT HIST. SOC'Y, http://supremecourthistory.org/history_homesofthecourt.html (last visited Nov. 15, 2014).

38. Powe, Jr., *supra* note 17.

was “that rare and precious commodity in a newspaper office: a scholar who can run.”⁴⁰

At Harvard, Lewis took Freund’s course in constitutional law and learned about what the professor regarded as the conundrums of the federal system: the tensions among the executive, legislative, and judicial branches; the intertwined yet distinct powers of the federal and state governments; the layering in cases of technical, conceptual, and human issues; and the competing principles in every important constitutional question.⁴¹ The course had a lasting effect on Lewis. Freund became a regular sounding board for him when he wrote about the Supreme Court.

Yet the course that grappled most directly with these workings was a relatively new one at Harvard called Federal Courts and the Federal System.⁴² It was the course that changed Lewis’ life⁴³ – and that eventually transformed legal journalism. Professor Henry M. Hart, Jr. taught the class.⁴⁴ In 1953, with Herbert Wechsler of Columbia Law School as his co-author, Hart published *The Federal Courts and the Federal System*.⁴⁵ The book is one of the most important in American law.⁴⁶ Now in its sixth edition⁴⁷ and co-authored by four current leading scholars,⁴⁸ it is a classic in legal education – and has been since it was first published.⁴⁹

Hart had been President of the *Harvard Law Review*,⁵⁰ clerked for Justice Louis Brandeis,⁵¹ and joined the Harvard faculty in 1932.⁵² Freund was a

39. Liptak, *supra* note 23.

40. Quote by James Reston, 1964 (copy on file in the private papers of Margaret H. Marshall).

41. Notes by Anthony Lewis, Student, Harvard Law Sch., Cambridge, Mass. (1956) (on file with Margaret H. Marshall).

42. James E. Pfander, *Fifty Years (More or Less) of “Federal Courts”*: An Anniversary Review, 77 NOTRE DAME L. REV. 1083, 1090 & nn.25-26 (2002).

43. Interview with Margaret H. Marshall (Mar. 6, 2014).

44. Pfander, *supra* note 42.

45. Akhil Reed Amar, *Law Story, Hart and Wechsler’s The Federal Courts and the Federal System* by Paul M. Bator, Daniel J. Meltzer, Paul J. Mishkin, and David Shapiro. Westbury, New York: Foundation Press. 1988. 3d ed., 102 HARV. L. REV. 688, 689 (1989) (book review).

46. *Id.* at 688.

47. See *Hart and Wechsler’s The Federal Courts and the Federal System*, 6th, WEST ACADEMIC, <http://www.westacademic.com/Professors/ProductDetails.aspx?NSIID=1892> (last visited Nov. 15, 2014).

48. See *id.*

49. Henry P. Monaghan, *Federal Courts, Cases and Materials*. By David P. Currie. St. Paul: West Publishing Co. 1968, 83 HARV. L. REV. 1753 (1970) (book review).

50. Paul A. Freund, *Henry M. Hart, Jr.: In Memoriam*, 82 HARV. L. REV. 1595, 1595 (1969).

51. *Id.* at 1596.

52. *Hart, Henry Melvin. Papers, 1927-1969: Finding Aid*, HARVARD U. LIBR., <https://oasis.lib.harvard.edu/oasis/deliver/~law00107> (last visited Nov. 15, 2014).

junior editor on the law review when Hart presided, and they were colleagues for four decades.⁵³ In Freund's words, Hart was "a supremely attractive figure and a supremely compelling force" who had "formidable intellectual powers."⁵⁴

Wechsler was equally impressive, though deliberate and sometimes dour where Hart was dynamic and often dazzling. Wechsler had been Editor-in-Chief of the *Columbia Law Review*, joined the Columbia faculty immediately after graduating, left after a year to clerk for Justice (later Chief Justice) Harlan Fiske Stone, and re-joined the faculty in 1933.⁵⁵ In the words of Professor Henry P. Monaghan, who holds the Harlan Fiske Stone professorship in constitutional law at Columbia, which Wechsler long held, "When Herbert Wechsler was in his prime, he stood at the top of three separate fields, constitutional law, criminal law and federal courts."⁵⁶

In 1954, Hart explained in a law review article the density of the challenge that the casebook was designed to help judges, lawyers, and future lawyers meet:

The law which governs daily living in the United States is a single system of law: it speaks in relation to any particular question with only one ultimately authoritative voice, however difficult it may be on occasion to discern in advance which of two or more conflicting voices really carries authority. In the long run and in the large, this must be so. People repeatedly subjected, like Pavlov's dogs, to two or more inconsistent sets of directions, without means of resolving the inconsistencies, could not fail in the end to react as the dogs did. The society, collectively, would suffer a nervous breakdown. Yet the sources of the laws which say what Americans can, may or must do or not do and what happens if they act differently, or which seek to influence by official action what they are able or choose to do on their own account in the infinity of situations in which they have to decide whether to do or not do something, are exceedingly diverse. The problems of developing the necessary mechanisms for evoking or enforcing harmony are correspondingly complex.⁵⁷

Hart and Wechsler, with another Harvard professor, were the prime articulators through their scholarship and their teaching of an approach to legal analysis intended to manage the complexity, known as "the legal process

53. Freund, *supra* note 50, at 1595.

54. *Id.*

55. *Herbert Wechsler 1909-2000*, AM. L. INST., http://www.ali.org/ali_old/R2204_Wechsler.htm (last visited Nov. 15, 2014).

56. Tamar Lewin, *Herbert Wechsler, Legal Giant, Is Dead at 90*, N.Y. TIMES (Apr. 28, 2000), <http://www.nytimes.com/2000/04/28/us/herbert-wechsler-legal-giant-is-dead-at-90.html>.

57. Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 489 (1954).

school.”⁵⁸ Albert M. Sacks, a former President of the *Harvard Law Review* and later Dean of Harvard Law School, was the other professor, who, with Hart, produced a set of teaching materials known as Hart and Sacks.⁵⁹ (Sacks had been a student of Hart’s in a course on legislation: Hart’s first question in the course was, “What is our idea of ‘law,’ Mr. Sacks, President of the ‘Law’ Review?”)⁶⁰ For the two decades from before the start of the Second World War until the end of the 1950s – roughly from 1938 until 1959⁶¹ – “the legal process” was the most influential way of thinking about the American constitutional system among leading scholars.⁶²

By serendipity, for the only time in his career, Wechsler was a visiting professor at Harvard Law School the year Lewis was a student.⁶³ The law school’s dean, Erwin Griswold, invited him and two other world-class scholars (from England’s Oxford and Australia’s University of Sydney) to teach at Harvard for the year so they could debate with each other and other scholars about jurisprudence.⁶⁴ Wechsler taught one of the first-year sections of criminal law.⁶⁵ He also occasionally co-taught Hart’s federal courts course.⁶⁶ From Hart and Wechsler, then, Lewis learned what is still known as Hart & Wechsler – the iconic textbook and the philosophy it imparts.⁶⁷

For virtually every follower of the Supreme Court today, the paramount question is: What is the right outcome in substantive law? Does the First Amendment’s protection of free speech allow Congress to limit contributions to political campaigns? Does the amendment’s prohibition against government support for a specific religion allow a city to keep churches from using public schools on Sundays as places of worship?

The legal process school wasn’t fixated on outcomes. Instead, it showed how “process” – rules of procedure but also different parts of federal and

58. Amar, *supra* note 45, at 691 (internal quotation marks omitted).

59. See *Biographies*, HARVARD L. SCH., <http://www.law.harvard.edu/academics/clinical/bellow-sacks/Templates/biosacks.htm> (last visited Dec. 5, 2014).

60. William N. Eskridge, Jr. & Phillip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2037 n.31 (1994).

61. *Id.* at 2049.

62. DAVID KENNEDY & WILLIAM W. FISHER, *THE CANON OF AMERICAN LEGAL THOUGHT* 243-44 (2006).

63. Ruth Bader Ginsburg, *In Memory of Herbert Wechsler*, 100 COLUM. L. REV. 1359, 1359 (2000); Liptak, *supra* note 23.

64. See Eskridge & Frickey, *supra* note 60, at 2047-48. The “Legal Philosophy Discussion Group” at Harvard that year brought together more than thirty professors who were among that generation’s most influential thinkers about public law, dealing with relations between individuals and the government and among individuals in society. *Id.*

65. Ginsburg, *supra* note 63, at 1359. Justice Ruth Bader Ginsburg, one of nine women in a class of about 500, was a student in that section. She called him “awesome and inspiring” in a memorial piece about him after his death in 2000. *Id.*

66. See *id.* at 1359 n.1.

67. See generally RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (6th ed. 2009).

state government that affect the way a dispute is resolved – shaped substantive law.⁶⁸ Paul Freund summarized Hart’s scholarship like this: he “saw the integrity and fitness of the legal process as a kind of transcendent natural law, a law above laws”⁶⁹

The school focused on institutional competence, asking which institution should make a legal decision and how: The federal or a state government?⁷⁰ An executive agency, the legislature, or a court? A trial court or a court of appeals? If a trial court, a judge or a jury? As Hart and Wechsler explained in their casebook, “[i]n varying contexts we pose the issue of what courts are good for – and are not good for”⁷¹ The 1956-57 course catalogue of Harvard Law School put the point more formally. The “principal emphasis” of the course was “upon the central problems of legal statesmanship in the delimitation of the powers of government with which the federal courts have been and are confronted.”⁷²

During the early part of the twentieth century, the philosophy of legal realism had won many converts to the view that judges did not reach decisions by deducing principles of law from court precedents and other sources.⁷³ Law was not a series of syllogisms that judges applied in a self-contained universe of legal reasoning insulated from politics. The decisions of judges reflected their views on politics in its deepest meaning.

Yet, while judges relied increasingly on social science to help them make decisions, judgments about law reflecting policy choices – so-called purposive legal reasoning – yielded what the legal historian David M. Kennedy euphemistically called “legal pluralism and unpredictable outcomes”⁷⁴ – a mess of contradictions.

Yale Law School’s Akhil Reed Amar explained the focus of the legal process school: “Given that judges unavoidably made substantive law at times, what kinds of laws could they legitimately make, and when? What kinds of legal decisions were better left to other institutional and political actors?”⁷⁵ The federal system and, in particular, the federal courts were at the heart of this inquiry.

For most of the twentieth century until the Second World War, a conservative Supreme Court had often struck down progressive legislation

68. See Eskridge & Frickey, *supra* note 60, at 2035-36.

69. Freund, *supra* note 50, at 1596.

70. See Eskridge & Frickey, *supra* note 60, at 2032-33.

71. Amar, *supra* note 45, at 691.

72. OFFICIAL REGISTER OF HARVARD UNIV., THE CATALOGUE OF THE LAW SCHOOL 50 (1956), available at <http://www.law.harvard.edu/library/digital/harvard-law-school-catalogs.html>.

73. See Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1917 (2005); see also Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1986).

74. KENNEDY & FISHER, *supra* note 62, at 245.

75. Amar, *supra* note 45, at 693.

passed to regulate the American economy and society, based on what liberal scholars considered grounds of policy. Then, one year after the Hart and Wechsler casebook was published, a newly liberal Court under its new Chief Justice, Earl Warren, outlawed segregation in public schools, in *Brown v. Board of Education*, deciding an issue that conservative scholars considered a matter for states to decide.⁷⁶

The great proponents of judicial restraint in the early twentieth century were liberals, like Justices Louis Brandeis and Oliver Wendell Holmes, Jr.⁷⁷ They believed much of the progressive legislation struck down by the conservative Court was constitutional and in the public interest.⁷⁸ When the Warren Court applied its expanding vision of equality to other parts of American life aside from public schools, it was conservatives who advocated restraint.⁷⁹ That reversal of roles seemed to support the view of legal realists about how much politics shaped law, but it provided no way to resolve important legal differences. The legal process school did.

Amar explained: “. . . [T]he legal process theorists sought to specify with precision the boundaries and purposes of federal judicial power. Once these boundaries and purposes were specified, federal judicial decision-making could be both legitimated and restrained.”⁸⁰ Hart, Wechsler, and other scholars sought, basically, to define what “law” is and to differentiate it from policy.

They provided a way to think about significant disagreements as something other than politics. They provided a method for sorting through the many new legal conflicts that arose as a result of the dramatic expansion of federal power during the New Deal and the Second World War.⁸¹ The emphasis on thorough reasoning about a law’s purpose, in a legal process that was open and transparent, was critical to the legitimacy of the law. In emphasizing close analysis and careful argument, the method also defined the essence of good lawyering.⁸² Especially in the 1950s when the American

76. See *Brown v. Bd. of Educ. of Topeka, Kan.*, 347 U.S. 483 (1954); Henry P. Monaghan, *Hart and Wechsler’s the Federal Courts and the Federal System*. By Paul M. Bator, Paul J. Mishkin, David L. Shapiro & Herbert Wechsler. Mineola, New York: The Foundation Press, Inc. 1973, 87 HARV. L. REV. 889 (1974) (book review).

77. See Mark B. Rotenberg, *Politics, Personality and Judging: The Lessons of Brandeis and Frankfurter on Judicial Restraint: The Brandeis/Frankfurter Connection*. By Bruce Allen Murphy. New York: Oxford University Press, 1982. *The Enigma of Felix Frankfurter*. By H.N. Hirsch. New York: Basic Books, 1981, 83 COLUM. L. REV. 1863, 1874 (1983) (book review).

78. See Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 529 (2012).

79. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 526 (1966) (White, J., dissenting).

80. Amar, *supra* note 45, at 694.

81. KENNEDY & FISHER, *supra* note 62, at 243-44.

82. LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 75 (1987).

economy grew briskly, this approach reflected optimism about law as “a continuous striving to solve the basic problems of social living.”⁸³ But the authority of the approach did not turn on whether the striving succeeded. To Harvard Law School’s Richard H. Fallon, Jr., a co-author of recent revisions of Hart and Wechsler’s textbook, their “single, controlling insight” is that “authority to decide must at least sometimes include authority to decide wrongly.”⁸⁴

In constitutional law, the landmark case of *Marbury v. Madison*,⁸⁵ decided in 1803, is of overriding importance.⁸⁶ It states the basis for the exercise of judicial review under the Constitution – why the Supreme Court has the final say on the meaning of that foundational law.⁸⁷ In his course on federal courts,⁸⁸ Hart asked why the case “doesn’t belong solely to the course in Constitutional Law?”⁸⁹

Hart’s notes go on, “What gives the court power to decide whether the statute is constitutional is presence of this case before it.”⁹⁰ Under its authority to decide cases and controversies, the Supreme Court had the duty to resolve the case – what Hart called “the pure settling element.”⁹¹ But it also had the duty to do that “in accordance with law,”⁹² so “its law-declaring power exists only as an incident of the obligation to decide cases.”⁹³

Above all, the essential function of the Supreme Court and of federal courts in general was to resolve disputes that were properly before them (“concrete, narrowly focused disputes,” in the words of Richard H. Fallon, Jr.) and to leave policy-making to the states and the other federal branches, except when policy was made in what Fallon called “the interstices of statutory or constitutional commands.”⁹⁴

Lewis kept his notes from the Hart course. They are in his widow’s private papers. On the first page – in the notebook of “J.A. Lewis, 1572 Mass.

83. Eskridge & Frickey, *supra* note 60, at 2042 (quoting HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 166 (1958)).

84. Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 *VAND. L. REV.* 953, 962 (1994).

85. 5 U.S. 137 (1803).

86. Davison M. Douglas, *The Rhetorical Uses of Marbury v. Madison: The Emergence of a “Great Case”*, 38 *WAKE FOREST L. REV.* 375, 375-76 (2003).

87. *Marbury*, 5 U.S. at 177-78.

88. In 2002, Professor James Pfander of Northwestern Law School published some of Hart’s 1949 course notes, which are available at the Harvard Law School Library. See generally Pfander, *supra* note 42.

89. *Id.* at 1094.

90. *Id.*

91. *Id.* at 1096.

92. *Id.*

93. *Id.* at 1095.

94. Fallon, *supra* note 84, at 958.

Ave.” on “Sept 20”⁹⁵ – he wrote down how Hart expressed that axiom in class: “Court’s law-declaring power exists only as incident to its power to decide cases.”⁹⁶ On the second page of the notebook, opposite the continuation of his notes about legal ideas, Lewis wrote this, using the quotation marks: “Provocation by irritatingly dogmatic statement.”⁹⁷ That’s what Hart, with a word change here or there, called the style of teaching he used to get students to engage with him. It definitely worked on Lewis.

David L. Shapiro, a longtime Harvard Law School professor, now retired, who served as a Deputy Solicitor General of the United States, co-authored each of the five revisions of the Hart and Wechsler casebook.⁹⁸ Shapiro took the Hart course when Lewis was a student.⁹⁹ He recently recalled that the course – known as “Darkness at Noon” because it was held at lunchtime and was often considered baffling¹⁰⁰ – sometimes seemed like a dialogue between Hart and Lewis.¹⁰¹

Lewis’ notebook is filled with puzzles conveying the spirit of the course:

Hart Oct. 4 (+ Wechsler)

Suppose: Congress proposes law making state criminal verdicts final, no review or habeas corpus writs in Fed courts.

Constitutional?

Wechsler says Yes – valid – but bad policy.

(Notes Habeas Corpus power of Fed Cts extended only to Fed prisoners until Congressional act of 1867.)

95. Notes by Anthony Lewis, Student, Harvard Law Sch., Cambridge, Mass. (Sept. 20, 1956) (on file with Margaret H. Marshall).

96. *Id.*

97. *Id.*

98. See David L. Shapiro, HARV. L. SCH., <http://hls.harvard.edu/faculty/directory/10791/Shapiro> (last visited Nov. 15, 2014).

99. See E-mail from David L. Shapiro, William Nelson Cromwell Professor of Law, Emeritus, Harvard Law Sch., to author (Mar. 24, 2014) (on file with author).

100. Pfander, *supra* note 42, at 1098-99. In 1956-57, according to a schedule of the courses Lewis attended that he wrote on the last page of his notebook for Civil Procedure, the Hart course began at 11 a.m. on Wednesdays and Thursdays. Notes by Anthony Lewis, Student, Harvard Law Sch., Cambridge, Mass. (1956) (on file with Margaret H. Marshall). That year, according to *The Catalogue of the Law School*, Hart’s was a full-year course. OFFICIAL REGISTER OF HARVARD UNIVERSITY, *supra* note 72, at 133.

101. See E-mail from David L. Shapiro to author, *supra* note 99.

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W – Must do some “constitutional thinking” in British sense – wisdom in terms of ancient rights, not enforceable, written rights.¹⁰²

Or:

Hart Nov 1

“It seems tolerably certain that state courts have no power to annul an official determination by any federal administrative officer.”

True or false?

Tricky Q because even fed cts don’t usually annul fed laws – just ignore!

Unless Congress has given specific juris to annul, as in decisions of NLRB.

So really true.¹⁰³

Reading Lewis’ notes today, in a brown Maple Leaf spiral notebook marked “Federal,” almost sixty years after he wrote down Hart’s words and his own thoughts about them in a legible and upright cursive, is like watching Lewis – meticulous and inspired – lay the foundation for his writing about the Supreme Court for the rest of his life.¹⁰⁴

“Legislative Apportionment and the Federal Courts”

When Lewis was at Harvard Law School, Justice Frankfurter kept close ties with members of the faculty he had long been part of as a professor. At the end of Lewis’ year, Frankfurter wrote the publisher of *The New York Times*: “One of the most influential members of the faculty of that School told me the other day that Tony Lewis has upset some of the pedagogical presuppositions of the School.”¹⁰⁵

Many at the school had been “under the delusion that there is an appropriate progression” in its courses, Frankfurter went on.¹⁰⁶ As the school’s 1956-57 catalogue explained, in the first year a student was expected to

102. Notes by Anthony Lewis, Student, Harvard Law Sch., Cambridge, Mass. (Oct. 4, 1956) (on file with Margaret H. Marshall).

103. Notes by Anthony Lewis, Student, Harvard Law Sch., Cambridge, Mass. (Nov. 1, 1956) (on file with Margaret H. Marshall).

104. See Notes by Anthony Lewis, *supra* note 41.

105. Letter from Felix Frankfurter, Assoc. Justice, U.S. Supreme Court, to Arthur Hays Sulzberger, Publisher, N.Y. Times (June 24, 1957) (copy on file with Margaret H. Marshall).

106. *Id.*

“begin to develop a capacity for legal analysis and to gain an understanding of the judicial process and the factors that influence its operation.”¹⁰⁷ Constitutional Law was a second-year course, to continue that capacity building.¹⁰⁸ Federal Courts was a third-year course – and was expected to seriously test how much capacity a student had built.¹⁰⁹

In his one year of law school, Frankfurter said, Lewis had taken both of those courses “in stride.”¹¹⁰ Lewis’ Nieman Fellowship required that he take one course for one term – a half course, in other words – without being graded.¹¹¹ Lewis’ notes from his year as a law student are not explicit, but they strongly suggest that he took three full-year courses. (The third was Civil Procedure: his notebook for that subject indicates he attended two first-year procedure classes, one taught at 9 a.m. by Benjamin Kaplan, the other at noon by Albert M. Sacks, Hart’s partner in developing the legal process materials.)¹¹² Frankfurter reported to the *Times*’ publisher: “I am advised that in the two courses that are mainly concerned with the work of the Supreme Court, Tony Lewis attained marks in the examinations that very few men attain.”¹¹³

More importantly, he came away with a sophisticated understanding of American law and government as an elaborate, judicious, and progressive system, with the Supreme Court interpreting and enforcing what he described as “a Constitution drawn with ‘purposeful vagueness’ . . . in accordance with the changing needs of government and society.”¹¹⁴

Lewis wrote these words during his Nieman year in something he had never written before, a law review article. The *Harvard Law Review* published it in 1958.¹¹⁵ The law review seldom published signed articles by recent graduates, let alone “special students” like Lewis: for a young legal scholar, that was considered a coup and a major sign of a very promising career.¹¹⁶ The article made clear what exceptional use Lewis had made of his law-school year.

107. OFFICIAL REGISTER OF HARVARD UNIV., *supra* note 72, at 12.

108. *Id.*

109. *Id.* at 50-51.

110. Letter from Felix Frankfurter to Arthur Hays Sulzberger, *supra* note 105.

111. *Fellowships*, NIEMAN, <http://nieman.harvard.edu/fellowships/#faq> (last visited Nov. 15, 2014).

112. Notes by Anthony Lewis, Student, Harvard Law Sch., Cambridge, Mass. (1956) (on file with Margaret H. Marshall); *see also Professor Emeritus Benjamin Kaplan: 1911-2010*, HARV. L. SCH., (Jan. 1, 2011), <http://today.law.harvard.edu/professor-emeritus-benjamin-kaplan-1911-2010/>.

113. Letter from Felix Frankfurter to Arthur Hays Sulzberger, *supra* note 105.

114. Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1095 (1958).

115. *See id.*

116. *See, e.g.,* Owen Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965). Fiss graduated from Harvard Law School in 1964. *Id.*

Called *Legislative Apportionment and the Federal Courts*, it urged “Supreme Court action as the only effective means to correct the growing evil of inequitably apportioned legislative districts.”¹¹⁷ Lewis contended:

It is evident that one of our major national failures since World War II has been the failure to meet the problems of rapid urbanization. The decay of the center city, disorderly suburban growth, and crises in education, housing, and transportation have become familiar facts in every metropolitan area. A fundamental reason that these problems have not been adequately met is urban political weakness, stemming in large part from the underrepresentation of urban areas in the state and national legislatures.¹¹⁸

A footnote explained that the phrase “purposeful vagueness” to describe the Constitution was from a Frankfurter essay, *The Judicial Process and the Supreme Court*.¹¹⁹ In other circumstances, quoting the Justice might have been a student’s tip of the hat to a venerated master: he had been a highly influential teacher of Lewis’ teachers – Hart and Wechsler dedicated their casebook, “To FELIX FRANKFURTER who first opened our minds to these problems,”¹²⁰ as the pioneer in focusing his scholarship on the power of federal courts as opposed to their procedures for denying or considering cases.¹²¹ Lewis knew of Frankfurter’s hope, as the Justice wrote to the *Times*’ publisher, that Lewis would “demonstrate that high competence for covering the Supreme Court is as important as in covering the World Series.”¹²²

But in this instance, the use of the quotation was more likely tactical: secondarily, it was perhaps a diplomatic touch, an effort to keep the Justice from responding cantankerously, as he was known to do;¹²³ primarily, it was almost certainly a discreet appeal to Frankfurter that he reconsider his view – that “[t]he remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress.”¹²⁴ It is only a slight exaggeration to say that the man responsible for Lewis going to law school and for his chance to cover the Supreme Court was the central antagonist to Lewis’ reformist view about reapportionment. Lewis challenged Frankfurter head-on.

117. Lewis, *supra* note 114, at 1057.

118. *Id.* at 1058.

119. *Id.* at 1095 n.218 (internal quotation marks omitted).

120. FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM*, at xxxi (1927).

121. Mary Brigid McManamon, *Felix Frankfurter: The Architect of “Our Federalism”*, 27 GA. L. REV. 697, 757 (1993).

122. Letter from Felix Frankfurter to Arthur Hays Sulzberger, *supra* note 105.

123. See Jill Lepore, *The Great Paper Caper: Someone Swiped Justice Frankfurter’s Papers. What Else Has Gone Missing?*, NEW YORKER (Dec. 1, 2014), <http://www.newyorker.com/magazine/2014/12/01/great-paper-caper>.

124. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

Justice Frankfurter had made his view clear in 1946, in the prevailing opinion for the Court in the leading case on legislative apportionment, *Colegrove v. Green*. By a 4-3 vote in the case (one justice was recused;¹²⁵ another was in the hospital and unable to take part),¹²⁶ the justices rejected a challenge to unfair districting in Illinois because, Frankfurter wrote famously, “Courts ought not to enter this political thicket.”¹²⁷

Lewis’ article is a model of legal-process analysis of a major federal problem. It demonstrates how that method, which favored moderate advances in the law and was sometimes criticized for being unnecessarily cautious, could make far more persuasive a landmark assertion of judicial power:

It is the thesis of this article that the course laid out in *Colegrove* – abstention by the judiciary and reliance on the legislative branches to remedy unfairness in districting – is neither required legally nor effective practically. The precedents in the state courts show that the judiciary can deal effectively with the apportionment problem. An examination of historical material demonstrates that a right to equality of representation can be drawn from the Constitution. The evidence is overwhelming that neither Congress nor the state legislatures can be relied on to ensure equitable representation, indeed that there are virtually insurmountable, built-in obstacles to legislative action. The Supreme Court has found special justification for judicial intervention to preserve basic political liberties – of speech, press, assembly. The right to fair representation can be of no less importance. A vacuum exists in our political system; the federal courts have the power and the duty to fill this vacuum.¹²⁸

The article is also a model of how Lewis believed anyone should criticize the Court. In the *Minnesota Law Review*, in 1961, he wrote, “So long as the Supreme Court has ultimate power in our system of government, it will need the toughest criticism. So long as it has disinterested judges, they will welcome criticism as intellectual nourishment. But the criticism, like the Court’s work, must be held to a standard. It should be particular, not general; dispassionate, not biased; directed at the Justices’ performance, not their honor”¹²⁹

From October Term, 1957 through October Term, 1963, ending in the summer of 1964, when he stopped being the *Times*’ Supreme Court reporter to prepare for becoming the *Times*’ London Bureau Chief in the spring of

125. Justice Robert Jackson took no part in the decision. *Id.*; see also JOHN W. JOHNSON, HISTORIC U.S. COURT CASES: AN ENCYCLOPEDIA 260 (2d ed. 2001).

126. Chief Justice Harlan Stone resigned from the Court in April of 1946, so he also took no part in the decision. JOHNSON, *supra* note 125, at 260.

127. *Colegrove*, 328 U.S. at 556.

128. Lewis, *supra* note 114, at 1058-59.

129. Anthony Lewis, *The Supreme Court and Its Critics*, 45 MINN. L. REV. 305, 332 (1961).

1965, Lewis held the Court to that standard as no journalist had done before.¹³⁰ In *The Journal of Supreme Court History*, in 2004, the University of Texas' L.A. Powe, Jr. wrote: "Lewis was the pioneer, the first reporter to see Supreme Court decisions, not just as a won-loss, but instead as part of a continuing constitutional process where reasons and reasoning mattered."¹³¹ The sterling example is Lewis' coverage of the Court's rulings on reapportionment. For his Court reporting, he was awarded his second Pulitzer Prize for National Reporting, in 1963 – in particular, for his coverage of the landmark decision in *Baker v. Carr*.¹³²

Between 1946 in the *Colegrove* decision and 1960, when the Court decided to hear *Baker v. Carr*, it summarily rejected ten challenges to unequal districts.¹³³ Four justices who wanted to overrule *Colegrove* voted to take *Baker*, but it was not clear they had a fifth vote. The case divided the Court on the central question of whether it had the power to decide the issue. The justices took the unusual step of hearing argument twice in the case. After the second argument, the justices were split four-four, with the ninth on the fence.

But the facts of the case strongly supported what Lewis asserted in his law review article: "The evidence is overwhelming that neither Congress nor the state legislatures can be relied on to ensure equitable representation, indeed that there are virtually insurmountable, built-in obstacles to legislative action." In Tennessee, where the *Baker* case originated, the number of voters in legislative districts ranged from 2,340 to 42,298, as a result of the migration of Americans from farms to cities; some votes in a rural district counted eighteen times as much as those in an urban district because of grossly uneven apportionment.¹³⁴

Here is how Lewis reported the decision in March of 1962:

The Supreme Court held today that the distribution of seats in State Legislatures was subject to the constitutional scrutiny of the Federal courts. The historic decision was a sharp departure from the court's traditional reluctance to get into questions of fairness in legislative districting. It could significantly affect the nation-wide struggle of urban, rural and suburban forces for political power. The vote, in a case brought by Tennessee city-dwellers, was 6-2. Justice William J. Brennan Jr. wrote the opinion of the court, joined by Chief Justice Earl Warren and Justices Hugo L. Black, William O. Douglas, Tom C. Clark and Potter Stewart. Clark and Stewart also wrote separate con-

130. Lewis took up that position on April 1, 1965. E-mail from Danielle Rhoades Ha, Director of Communications, N. Y. Times Co., to author (Jan. 7, 2015).

131. Powe, Jr., *supra* note 17, at 177.

132. *1963 Winners*, PULITZER PRIZES, <http://www.pulitzer.org/awards/1963> (last visited Nov. 15, 2014).

133. Anthony Lewis, *The Most Skillful Liberal*, N.Y. REV. BOOKS (Apr. 7, 2011), <http://www.nybooks.com/articles/archives/2011/apr/07/most-skillful-liberal/>.

134. VICTOR S. NAVASKY, *KENNEDY JUSTICE* 301 (1971).

curing opinions. The dissenters – each joining in an opinion by the other – were Justices Felix Frankfurter and John Marshall Harlan. Justice Charles E. Whittaker, who has been in the hospital for ten days for a physical check-up, took no part in the decision. The Supreme Court’s action was only a first step into the apportionment field. It left many questions for decisions later.¹³⁵

The main unanswered question was what standard a state had to meet in creating voting districts. A year later, in the case of *Reynolds v. Sims*, by a vote of 8-1, the Court ruled that “the constitutional prescription for election of members of the House of Representatives” meant that, “as nearly as is practicable, one man’s vote in a congressional election is to be worth as much as another’s.”¹³⁶ The Court enunciated the rule we now know as “one person, one vote.”¹³⁷

Earl Warren later said that the ruling in *Baker* was “the most vital decision” during his tenure as Chief Justice¹³⁸ – more important than in *Reynolds* or even in *Brown*, which scholars often call the most significant Court decision of the twentieth century.¹³⁹ Great stories often produce journalism prizes, but Lewis won his 1963 Pulitzer for what Harry W. Jones, an influential professor of jurisprudence at Columbia Law School, called “unquestionably the finest news coverage of constitutional and legal affairs that I have ever read, in this country or abroad.”¹⁴⁰ Paul Freund quoted Jones’ praise when he took the rare step for an academic and wrote the Pulitzer advisory board to nominate Lewis “for his illuminating reporting of the United States Supreme Court during an epochal year”¹⁴¹

The only hint of a cloud over any part of Lewis’ career is the question whether in his reporting about the *Baker* case, he engaged in advocacy that he should not have. While he was covering the Supreme Court and the Justice Department during the Kennedy Administration, the administration was working out the position of the executive branch about legislative apportion-

135. Anthony Lewis, *Decision Is 6 to 2; Many States Likely to Be Affected by Landmark Case Supreme Court Gives U.S. Judges Voice in Reapportionment of State Legislatures*, N.Y. TIMES (Mar. 27, 1962), <http://query.nytimes.com/gst/abstract.html?res=9F0DE7DC153FE63ABC4F51DFB5668389679EDE>.

136. *Reynolds v. Sims*, 377 U.S. 533, 559 (1964) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 5 (1964) (internal quotation marks omitted)).

137. *Id.* at 558 (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963) (internal quotation marks omitted)).

138. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 67-68 (Kermit L. Hall, ed., 2d. ed. 1992).

139. See, e.g., Frederick Mark Gedicks, *Conservatives, Liberals, Romantics: The Persistent Quest for Certainty in Constitutional Interpretation*, 50 VAND. L. REV. 613, 638 (1997).

140. Letter from Paul A. Freund, *supra* note 35.

141. *Id.*

ment.¹⁴² The journalist Victor Navasky chronicled the course of action in his 1971 book *Kennedy Justice*.¹⁴³

Archibald Cox, the new Solicitor General in the new Kennedy Administration, had serious reservations about asking the Court to tackle reapportionment because of its recent precedent ruling that out on the grounds that it was a political question.¹⁴⁴ Navasky wrote that Lewis “shed any pretense at objectivity”¹⁴⁵ and “did not hesitate to let either the Solicitor or the Attorney General or their aides know how he felt about the matter.”¹⁴⁶

Navasky noted that Lewis “did his best not to overstep the boundaries of propriety”¹⁴⁷ and that “[w]hatever kibbitzing” he did “was probably less important than the contribution he had already made in the pages of the *Harvard Law Review*[.]”¹⁴⁸ But Navasky described Lewis as a “source of pressure.”¹⁴⁹

In *Kennedy Justice*, he included an unusually long quotation from an interview with Lewis in which he gave the reporter the chance to explain his behavior.¹⁵⁰ Lewis recalled his concern about propriety as a thirty-five-year-old trailblazer on a new beat for the *Times*,¹⁵¹ yet in recollecting conversations with the Solicitor General and the Attorney General (he called them “Archie” and “Bobby”),¹⁵² he described what was indisputably point-of-view reporting on his part.¹⁵³ Lewis told Navasky about his “happy – that puts it too shallowly – feeling”¹⁵⁴ that the Attorney General “was completely convinced of (a) the Constitutional rightness of one man, one vote, and (b) its urgent importance, politically and socially, for the country.”¹⁵⁵ Lewis had advocated both in his *Harvard Law Review* article. The majority opinion in *Baker v. Carr* cited it in Footnote 27.¹⁵⁶ Lewis mentioned neither his article nor the footnote’s reference to it in his *Times* coverage of the case.

“*Change does not just begin at a point in time, it builds on history.*”

From the perspective of legal history, the end of Lewis’ tenure as the *Times*’ Court reporter coincided, more or less, with the end of scholarly con-

142. NAVASKY, *supra* note 134, at 302-03.

143. *Id.*

144. *Id.* at 300.

145. *Id.* at 317.

146. *Id.* at 302.

147. *Id.*

148. *Id.* at 303.

149. *Id.* at 302.

150. *Id.* at 315-17.

151. *See id.* at 316.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. 369 U.S. 186, 207 n.27 (1962).

sensus about the role of the Supreme Court in American life.¹⁵⁷ In 1959, Herbert Wechsler gave the prestigious Holmes Lecture at Harvard Law School.¹⁵⁸ He weighed in on a freshly ignited debate about the perennial controversy surrounding judicial review and strongly defended the authority of the Court to enforce constitutional rights.¹⁵⁹

But he also questioned the Court's extension of the principle underlying its ruling in *Brown* about "inherently unequal" separate schools for blacks, "to other public facilities, such as public transportation, parks, golf courses, bath houses, and beaches, which no one is obliged to use . . ."¹⁶⁰ Wechsler argued that while he vigorously favored the outcome in the *Brown* ruling, the Court had not justified it with a "neutral principle" that could be applied in other cases.¹⁶¹ As published in the *Harvard Law Review* in 1959 (*Toward Neutral Principles of Constitutional Law*),¹⁶² Wechsler's statement of doubt is one of the most cited articles ever in legal scholarship.¹⁶³ It stirred a raft of passionate defenses, attacks, and other responses by scholars for many years.¹⁶⁴

A couple of years before, Robert Dahl, a Yale political scientist who was a giant in his field, had written:

To consider the Supreme Court of the United States strictly as a legal institution is to underestimate its significance in the American political system. For it is also a political institution, an institution, that is to say, for arriving at decisions on controversial questions of national policy. As a political institution, the Court is highly unusual, not least because Americans are not quite willing to accept the fact that it *is* a political institution and not quite capable of denying it; so that frequently we take both positions at once. This is confusing to foreigners, amusing to logicians, and rewarding to ordinary Americans who thus manage to retain the best of both worlds.¹⁶⁵

157. See Rebecca E. Zietlow, *The Judicial Restraint of the Warren Court (and Why It Matters)*, 69 OHIO ST. L.J. 255, 267-69, 287-88 (2008) (detailing the transition from the more judicially active Warren Court to the more conservative Rehnquist Court); Liptak, *supra* note 23 (detailing Lewis' move to London in 1964).

158. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 1 n.d1 (1959).

159. *Id.* at 10.

160. *Id.* at 22.

161. *Id.* at 22-23.

162. *Id.* at 1.

163. Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012).

164. See Anders Walker, "Neutral" Principles: Rethinking the Legal History of Civil Rights, 1934-1964, 40 LOY. U. CHI. L.J. 385, 436 n.6 (2009).

165. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 50 EMORY L.J. 563, 563-64 (2001) (emphasis added).

For legal scholars trying to sort out how the Supreme Court could be both a political and a legal institution, this was not a subject to joke about. Legal historian David Kennedy called Wechsler's article "the highpoint of postwar constitutional legal theory," and judged that the controversy about it marked "the end of the legal process as a consensus in American legal thought."¹⁶⁶ The Warren Court was transforming the federal courts from meek to mighty and stirring major disagreements among judges, scholars, and other Court followers.

The consensus ended about the "ought" of the method – what it said about where in the system legal problems should be addressed and how cautiously or confidently they should be solved. But the "is" could be separated from the "ought." The legal process school, in particular Hart and Wechsler on federal courts, provided a grand, detailed, and authoritative map of the American constitutional system.¹⁶⁷ In his reporting and writing, Lewis expertly followed that map, describing and championing the system while championing and challenging its big decisions.

Lewis agreed with Hart and Wechsler's main assumption about the federal system: as Richard H. Fallon, Jr. described it, "thoughtful, deliberative, unbiased decisions by government officials who are reasonably empowered to make such decisions" give the rule of law its legitimacy.¹⁶⁸ To Lewis, Hart and Wechsler's approach went beyond defining the essence of good lawyering. Its careful, fair-minded, and sophisticated reasoning embodied the integrity of the rule of law. The approach provided a standard of intellectual and moral rigor for him to live up to in his reporting about the Supreme Court.

Lewis explained the dramas about ideas at the heart of cases and the consequences of those ideas, through legal analysis, social observation, and portraits of the people involved, including the justices, advocates, and adversaries in cases.¹⁶⁹ For him, the Court was both the commanding edifice on Washington's Capitol Hill where fateful issues were decided and the pinnacle of the vast federal system – envisioned by America's founders, elaborated over time, and elucidated by Hart and Wechsler.¹⁷⁰ Lewis explained why rulings that seemed instantly to transform American law and life instead often resulted from decades of trial-and-error in the legal process.¹⁷¹ "Change does not just begin at a point in time," Lewis emphasized, "it builds on history."¹⁷²

Lewis' knowing coverage helped build trust in momentous Court rulings – dramatically, in *Gideon v. Wainwright*,¹⁷³ which, Paul Freund wrote, was

166. KENNEDY & FISHER, *supra* note 62, at 321.

167. *See generally* FALLON, JR. ET AL., *supra* note 67.

168. Fallon, *supra* note 84, at 964.

169. *See* Liptak, *supra* note 23.

170. *See* ANTHONY LEWIS & N.Y. TIMES, PORTRAIT OF A DECADE: THE SECOND AMERICAN REVOLUTION 305 (1964).

171. *See id.* at 15-16.

172. *Id.* at 5.

173. 372 U.S. 335 (1963).

about the American legal process “redeeming itself.”¹⁷⁴ In *Gideon*, in 1963, the Court overturned a roundly criticized 1942 precedent.¹⁷⁵ It had held that the Sixth Amendment’s guarantee of a right to counsel, which clearly applies in federal criminal cases, did not extend to state cases. As a result, countless poor defendants were convicted and jailed when they should not have been.¹⁷⁶

Twenty-one years later, the Court reversed that holding on grounds that the right to counsel is “fundamental and essential to fair trials.”¹⁷⁷ It found that anyone too poor to hire a lawyer must be provided one for free in any criminal case involving a felony charge.¹⁷⁸ Lewis set out to write a children’s book¹⁷⁹ about the case during a four-month newspaper strike.¹⁸⁰ The project evolved into *Gideon’s Trumpet*, a trade book for adults published in 1964.¹⁸¹ It became a bestseller and has never been out of print for the past half century.¹⁸²

The first sentence goes, “In the morning mail of January 8, 1962, the Supreme Court of the United States received a large envelope from Clarence Earl Gideon, prisoner No. 003826, Florida State Prison, P.O. Box 221, Raiford, Florida.”¹⁸³ Behind this simple prose is the elaborate vision that Lewis gained most profoundly from Henry M. Hart, Jr.¹⁸⁴

Knowing of Hart’s influence on Lewis, it is hard not to see how closely parts of *Gideon’s Trumpet* express the analytical premises of that course: about the Supreme Court as a great tribunal, but with limited jurisdiction imposed by the Constitution, federal statutes, and Court precedents;¹⁸⁵ about the divergent powers of federal and state courts, with state courts deciding vastly more cases yet with federal courts resolving disputes of national significance;

174. Paul Freund, *Justice Was Done for One and All*, N.Y. TIMES (June 21, 1964), http://www.nytimes.com/1964/06/21/justice-was-done-for-one-and-all.html?module=search&mabreward=relbias%3Aw%2C%7B%22%22%3A%22RI%3A16%22%7D&_r=0.

175. *Gideon*, 372 U.S. at 345.

176. *Betts v. Brady*, 316 U.S. 455, 461-62 (1942), *overruled by Gideon*, 372 U.S. 335.

177. *Gideon*, 372 U.S. at 340 (quoting *Betts*, 316 U.S. at 465) (internal quotation marks omitted).

178. *Id.* at 344.

179. *Court and Constitution: A Talk with Anthony Lewis*, HARVARD CRIMSON (Oct. 10, 1991), <http://www.thecrimson.com/article/1991/10/10/court-and-constitution-a-talk-with/>.

180. Liptak, *supra* note 23.

181. ANTHONY LEWIS, *GIDEON’S TRUMPET* (1964).

182. Liptak, *supra* note 23.

183. LEWIS, *supra* note 181, at 3.

184. See Notes by Anthony Lewis, *supra* note 41.

185. Notes by Anthony Lewis, Student, Harvard Law Sch., Cambridge, Mass. (Oct. 17, 1956) (on file with Margaret H. Marshall) (“Basic scheme of Const looks to Fed cts as supplementary, leaving basic protection to State Cts. *”).

about “a curious and vital aspect of the American legal system”¹⁸⁶ – “that many issues of federal law arise in the state courts”;¹⁸⁷ about the requirement that the Supreme Court harmonize “jarring and discordant”¹⁸⁸ interpretations in federal and state courts of the Constitution and federal laws; and about the American system’s premise that the Court will decide only real cases and controversies, yet when it does, it has the power to enlarge the Constitution’s safeguards.¹⁸⁹ The Court expanded those safeguards in *Gideon* to ensure “fair trials before impartial tribunals in which every defendant stands equal before the law.”¹⁹⁰

The Court did that again a year later, in *New York Times v. Sullivan*, a ruling of even greater consequence in reshaping American law and the American system.¹⁹¹ The Court addressed “for the first time the extent to which the constitutional protections for speech and press limit a State’s power to award damages in a libel action brought by a public official against critics of his official conduct.”¹⁹² It decided that they are extensive, “to provide the safeguards”¹⁹³ for those freedoms.

The Court overturned a libel judgment against *The New York Times* by an Alabama trial court, which had found the paper liable for publishing, on a single day in March of 1960,¹⁹⁴ minor errors in a *Times* advertisement bought by supporters of the civil rights movement.¹⁹⁵ The trial court held the paper liable for failing to prove the truth of alleged accusations in the ad about L.B. Sullivan, a county commissioner in Montgomery, Alabama.¹⁹⁶ Sullivan was never mentioned in the ad, but the ad said that the civil rights movement’s leader, Reverend Martin Luther King, had been arrested seven times in an effort to intimidate him (in fact, it was four) and the supposed connection between the ad and Sullivan was that he supervised the police.¹⁹⁷

The judgment for Sullivan was \$500,000, the largest for libel in Alabama history.¹⁹⁸ With four other cases brought by Alabama officials pending, the *Times* anticipated it would be held liable for the ad for a total of \$3 million unless it got the judgment reversed on appeal.¹⁹⁹ James Goodale, who later became the paper’s general counsel, said, “Without a reversal of those verdicts there was a reasonable question of whether the *Times*, then wracked

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

191. *See* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 292 (1964).

192. *Id.* at 256.

193. *Id.* at 264.

194. *Id.* at 292.

195. *See id.* at 287-91.

196. *Id.* at 262-64.

197. *Id.* at 257-59.

198. *Id.* at 256; *see also* LEWIS, *supra* note 18, at 35.

199. LEWIS, *supra* note 18, at 35.

by strikes and small profits, could survive.”²⁰⁰ The application of Alabama libel law in the *Sullivan* case made it almost impossible to report and write truthfully about racial segregation and Southern racism, for the *Times* or any other news organization with even a tiny circulation in the state.

The Supreme Court held that a public official cannot win libel damages for criticism of his performance as an official unless he proves that the critic knew or suspected that what he wrote was false.²⁰¹ Regarding the factual errors in the ad, the Court wrote that an “erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”²⁰² About the alleged libel of Sullivan, the Court said, “Injury to official reputation error affords no more warrant for repressing speech that would otherwise be free than does factual error.”²⁰³

The Court concluded in now-famous language that there is “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”²⁰⁴ This defense of “attacks on government and public officials” was a rejection of what Lewis in his account for the *Times* about the ruling called “the hated Sedition Act of 1798, which punished ‘false, scandalous, and malicious’ statements about Federal officials.”²⁰⁵

The Court’s analysis in *Sullivan* rested on this rejection, which the *Times* had advocated in its brief in the case.²⁰⁶ As the lead lawyer for the paper argued before the Supreme Court, the *Times* was making “the same argument that James Madison made and that Thomas Jefferson made with respect to the validity of this Sedition Act of 1798”:²⁰⁷ the Act directly violated the First Amendment’s protection of the freedoms of expression and press, because under the Constitution, the people have the authority to say whatever they want about their representatives.²⁰⁸ Democracy entails such risk.²⁰⁹

200. *Id.*

201. *N.Y. Times Co.*, 376 U.S. at 279-80.

202. *Id.* at 271-72.

203. *Id.* at 272.

204. *Id.* at 270.

205. Anthony Lewis, *High Court Curbs Public Officials in Libel Actions*, N.Y. TIMES (Mar. 10, 1964), <http://www.nytimes.com/1964/03/10/high-court-curbs-public-officials-in-libel-actions.html>.

206. Brief for the Petitioner at 30, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (No. 39).

207. Transcript of Oral Argument, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (No. 39), available at http://www.oyez.org/cases/1960-1969/1963/1963_39.

208. *See id.*

209. *See* LEWIS, *supra* note 18, at 46-55.

Herbert Wechsler was that lawyer, who wrote the brief and made the oral argument.²¹⁰ Almost three decades later, Lewis recounted Wechsler's extraordinary role in the *Times*' victory in *Make No Law: The Sullivan Case and the First Amendment*.²¹¹ "For the job of persuading the Supreme Court, the *Times* chose a scholar," Lewis wrote, "a man of formidable intellect and formidable presence. There was a gravity about him, a sense of sureness about the law, an unwillingness to compromise with what he regarded as false doctrine."²¹²

Critical to the choice, Lewis went on, "Wechsler was known as an expert on a subject relevant to the *Sullivan* libel case: federalism, the relationship between state and federal law in our complex system."²¹³ *Make No Law* is the definitive account of how Wechsler – employing the careful reasoning of Hart & Wechsler (Lewis called it "the most profound and original American legal casebook")²¹⁴ – persuaded the Supreme Court to turn an Alabama libel case, where the First Amendment had been judged irrelevant, into the most important ruling ever on the First Amendment and the role of the press in the American constitutional system.²¹⁵

"Ours is a country not only of a constitution, but of constitutionalism."

Lewis' books about *Gideon* and *Sullivan* are the best-known legacies of his career. In tone and detail, they convey his belief that the Warren Court shaped majestic law in those landmark cases, so Lewis is often remembered as an enthusiast about that Court – a romantic about its greatness, a liberal whose outlook aligned with its liberalism.

Instead, his view was more measured – more in sync with the moderation at the heart of Hart & Wechsler. In January of 1965, after he moved from Washington, D.C. to London for the *Times*, Lewis published a valedictory piece about his perspective on the Court soon after he stopped covering it. He wrote:

A major concern of one who watches the Court these days is that it seems in too much of a hurry to solve all the world's problems. There are instances of the Court reaching out to decide issues that could have been avoided, or of laying out new constitutional doctrines more broadly than required to resolve a particular case. The greatest of Justices, Louis Brandeis, warned against these practices as likely to lead the Court into false solutions that could have been avoided by narrowing and postponing constitutional decisions and thus allowing time for

210. Brief for the Petitioner, *supra* note 206; Transcript of Oral Argument, *supra* note 207.

211. See LEWIS, *supra* note 18.

212. *Id.* at 103-04.

213. *Id.* at 104.

214. *Id.*

215. See *id.* at 106-112.

experience and reflection. There is also the danger that reaching out to decide too much at once may give the public the impression of the exercise of naked power. To be effective, Supreme Court decisions must in the long run win public acceptance, and they are more likely to do so if they are made to seem the careful product of legal reasoning than if they look like mere fiat.²¹⁶

There was also the perception that he covered the Court as a peer rather than as a reporter. At a Harvard memorial service for Lewis in 2013, the *Times*' former Executive Editor, Joseph Lelyveld, who presided at the paper for the last seven years Lewis was a columnist²¹⁷ and was a decade younger,²¹⁸ bolstered that view with this story:

The first time we spoke I was a novice on night rewrite, taking his dictation over the phone on deadline. Tony was a star reporter, someone who lived his life in a more rarefied sphere than ordinary working stiffs. My problem on rewrite was I couldn't type as fast as Tony could dictate. It was dinnertime and his impatience fairly crackled over the phone. "Hurry up, Joe," he said, "I've got the Chief Justice waiting in the next room."²¹⁹

Yet the more important lesson about Lewis' stance in relation to the Supreme Court came from his *Harvard Law Review* article and was the opposite: though he had great respect for Justice Felix Frankfurter and was grateful for the Justice's part in his getting the chance to study at Harvard Law and cover the Supreme Court, Lewis directly attacked a legal position the Justice held fiercely because Lewis was convinced Frankfurter was expressing a myopic view about the Court's role in the American constitutional system.²²⁰

When Lewis returned to the United States at the age of forty-six after his eight-year stint in London, he chose to live in Cambridge, Massachusetts, rather than Washington, D.C.²²¹ He did that partly because he wanted to re-join the university community; for many years, Lewis taught about the press and the Constitution at Harvard Law School and about the First Amendment

216. Anthony Lewis, *Nine Very Human Men*, N.Y. TIMES MAGAZINE, Jan. 17, 1965.

217. *Joseph Lelyveld*, THOMSON REUTERS, <http://thomsonreuters.com/about-us/trust-principles/trustee-directors/joseph-lelyveld/> (last visited Nov. 16, 2014).

218. *Joseph Lelyveld*, WIKIPEDIA, http://en.wikipedia.org/wiki/Joseph_Lelyveld (last visited Nov. 16, 2014); *Anthony Lewis*, WIKIPEDIA, http://en.wikipedia.org/wiki/Anthony_Lewis (last visited Nov. 16, 2014).

219. Joseph Lelyveld, Former Executive Editor, N.Y. Times, Remarks at the Harvard Memorial Service for Anthony Lewis (May 23, 2013) (transcript available from the Harvard Law School Communications Office).

220. Lewis, *supra* note 114, at 1058.

221. He was based in London from 1965 to 1973. E-mail from Danielle Rhoades Ha, *supra* note 130; E-mail from David Lewis, Anthony Lewis's son, to author (Jan. 6, 2015).

at Columbia School of Journalism.²²² But he also did that to avoid the challenge of writing critically about the public officials he ran into at cocktail and dinner parties.²²³

In 1987, in *The New York Times Magazine*, to commemorate the 200th anniversary of the drafting of the Constitution, the sixty-year-old Lewis called attention to the name he had given the vision of law to which Harvard Law School had opened his eyes:

The United States has been shaped by arguments over the Constitution, as it has been by the Constitution itself. The search for meaning in a written document is lawyers' work, and by looking to the Constitution for answers to fundamental political questions we have given lawyers and judges an extraordinary role in our democracy. That has spilled over into a general reliance on law to solve problems. Ours is a country not only of a constitution, but of constitutionalism.²²⁴

Constitutionalism calls for the Supreme Court to protect the freedom of Americans from the “prodigious increase”²²⁵ in executive and legislative powers in the federal government, from lawlessness in state and local governance that threatens to damage America’s “divided governmental powers,”²²⁶ and from incursions that result from the politics of fear when the nation’s security is tested.²²⁷ Constitutionalism calls for government to heed history and change the law to right moral wrongs, as happened with racial justice and equal rights for women, and for judges to initiate “great advances in the quality – the decency – of American society” when politics is against them.²²⁸

To Lewis, journalists play an essential role in constitutionalism – theirs is a form of public service. That is because of the First Amendment and “the vast body of law that judges have built up over the years . . .” safeguarding freedom of speech and press.²²⁹ That is because what he called “the Madi-

222. Nicholas P. Fandos, *Anthony Lewis '48, Pulitzer Winner and Crimson Mentor, Dies at 85*, HARVARD CRIMSON (Mar. 26, 2013), <http://www.thecrimson.com/article/2013/3/26/Lewis-Reporter-Dies-Journalist/>.

223. Interview with Margaret H. Marshall (Mar. 6, 2014).

224. Anthony Lewis, *An Introduction; An Ingenious Structure*, N.Y. TIMES (Sept. 13, 1987), <http://www.nytimes.com/1987/09/13/magazine/an-introduction-an-ingenious-structure.html>.

225. Anthony Lewis, *Preserving the System: The Role of Judges*, 14 HASTINGS CONST. L.Q. 1, 19 (1986) (quoting Charles E. Wyzanski, *Introduction to LEARNED HAND, THE BILL OF RIGHTS*, at xii-xiii (1958)) (internal quotation marks omitted).

226. LEWIS & N.Y. TIMES, *supra* note 170, at 295.

227. See sources cited *supra* notes 224-226 and accompanying text.

228. LEWIS, *supra* note 19, at 187.

229. *Id.* at xi.

sonian premise²³⁰ – in James Madison’s words, “the right of freely examining public characters and measures”²³¹ – is “the premise of the American political system.”²³²

Yet Lewis’ belief in constitutionalism brooked no exceptions in adhering to it. Even the press, with its quasi-constitutional function, “should not give even the appearance of claiming superiority to the law,” he told the Massachusetts Historical Society: that “would breed arrogance, a state of mind as unbecoming in journalists as in politicians.”²³³ The essential modesty of that position contrasts strikingly with today’s idealized adversarial stance.

In practical terms, Lewis wrote that journalists should not get blanket immunity from subpoenas in criminal cases, even though he believed they must rely on confidential sources in vital stories that hold the government accountable.²³⁴ To resolve a stand-off between the government and a journalist who has published a leak, he favored weighing the harm done by the leak against the public interest in its disclosure: when a leak reflects an effort to harm a critic of a policy,²³⁵ for example, rather than to hold the government accountable, his view was that the journalist must identify the leaker doing the hatchet job.

Lewis also believed that while the “guarantees of freedom of speech and of the press are fundamentals of freedom,” they are “not the only essentials of a healthy society” and that if they “succeed in totally overriding the interest of privacy, it would be a terrible victory.”²³⁶ Courts were the places to resolve such basic conflicts, to strike the right balance between competing interests, or to experiment with different balances until the balance is right.

Beginning in 2000, when the Supreme Court resolved the presidential election in *Bush v. Gore*²³⁷ and made George W. Bush president, Lewis could be mistaken for a liberal who had lost patience with a Supreme Court turned partisan and decidedly conservative. From then until *Citizens United v. Federal Elections Commission*²³⁸ a decade later, when the Supreme Court ruled that the government cannot ban political spending by corporations in elec-

230. Anthony Lewis, *The Critical Role of the Press: Issues of Democracy*, NIEMAN REPORTS, Spring 1984, at 10.

231. *Id.*

232. LEWIS, *supra* note 18, at 61.

233. Anthony Lewis, *Rights and Responsibilities of the Newsman*, in RIGHTS AND RESPONSIBILITIES: INTERNATIONAL, SOCIAL, AND INDIVIDUAL DIMENSIONS 231, 244 (Joyce J. Bartell ed. 1980).

234. *See id.* at 239-45.

235. *See id.* at 239.

236. LEWIS, *supra* note 18, at 80.

237. *See Bush v. Gore*, 531 U.S. 98, 110-11 (2000) (per curiam).

238. *See Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 372 (2010).

tions, Lewis regularly thundered against decisions brought about by the Court's conservative majority.²³⁹

He wrote in 2011, "Today's conservatives act again and again on behalf of a narrow, powerful interest: the rich. The apotheosis was the *Citizens United* case, overruling a hundred years of constitutional law to give corporations unlimited power to contribute to election campaigns."²⁴⁰

But Lewis' criticism of the conservative Court was pure Hart & Wechsler – it relied on what he described as "faith not in men but in law: the law of the Constitution."²⁴¹ Whether he was criticizing the Court or extolling its use of power for the public good, he remained an advocate for the American system and a believer in its legal foundation. The best way to bridge the sometimes irreconcilable ideological divide between the five conservative justices appointed by Republican presidents and the four moderate liberal justices appointed by Democrats was not to replace result-oriented conservatives with result-oriented liberals.

Lewis was beside himself with frustration about the Supreme Court taking *Bush v. Gore* – a politically charged case that, by principles of the federal system as he had learned them from the masters, the Florida Supreme Court should have been allowed to resolve.²⁴² The Supreme Court ruled that the state court's method for recounting ballots violated the Fourteenth Amendment's Equal Protection Clause and that no alternative method could be established within the time limits set by Florida.²⁴³

In the *Times*, Lewis wrote, "So the country is left with the impression that five justices acted as they did because they cared more about the result – ending the recount – than they did about the reasoning that would compel it."²⁴⁴ He went on, "Deciding a case of this magnitude with such disregard for reason invites people to treat the court's aura of reason as an illusion. That would be a terrible price to pay. The Supreme Court must have the last word in our system because its role is essential to our structure of freedom. Preservation of the public respect on which the institution depends is far more important than who becomes president."²⁴⁵

In his final column, he cautioned, "In the end I believe that faith in reason will prevail. But it will not happen automatically. Freedom under law is hard work."²⁴⁶

239. See, e.g., Anthony Lewis, *A Supreme Difference*, N.Y. REV. BOOKS (June 10, 2010), <http://www.nybooks.com/articles/archives/2010/jun/10/supreme-difference/?pagination=false>.

240. Lewis, *supra* note 133.

241. Lewis, *supra* note 3.

242. *Id.*

243. *Bush v. Gore*, 531 U.S. 98, 109-11 (2000) (per curiam).

244. Anthony Lewis, *Abroad at Home; A Failure of Reason*, N.Y. TIMES (Dec. 16, 2000), <http://www.nytimes.com/2000/12/16/opinion/abroad-at-home-a-failure-of-reason.html>.

245. *Id.*

246. *Id.*