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ALEXANDER M. BICKEL AND THE POST-REALIST CONSTITUTION

*Edward A. Purcell, Jr.**

While Alexander Bickel's premature death at the age of forty-nine was a personal tragedy for his family and friends, it was an intellectual loss of almost equal proportion for his wide and varied audience.** Cogent, honest, humane, and always independent, Bickel's published writings form a coherent body of political commentary, legal analysis, constitutional history, and political philosophy. At its best his work has a range and subtlety that will give it perennial value. Bickel focused on institutional conflicts that he conceived of as "enduring," rejecting easy formulas and probing into complexities. "It is the tension that interests me,"[1] he once wrote, and indeed it was his perception and exploration of fundamental institutional tensions that gave his work its own enduring quality.

There was tension, too, in Bickel's own mind: tension between his admiration for the Supreme Court as an institution and his commitment to the politics of democracy; between his philosophical acceptance of ethical relativism and his personal sense of fundamental moral values; between his recognition of the subjective element in judicial decision and his demand for "neutral" principles of law; between his belief in the necessity for a fundamentally just politics and his sense of the essential need for compromise and accommodation; between his espousal of certain forms of civil disobedience and his fear about the fragility of a democratic social order; and, finally, between his life-long faith in the possibilities and achievements of reason and his recognition that reason itself was ulti-

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**Tributes to Alexander Bickel's character have already become legion. I had the opportunity to meet him only once, when I was asking for his scholarly aid. To the request of an unknown student he responded immediately, generously, and with great personal kindness.

[1] A. BICKEL, POLITICS AND THE WARREN COURT x (1973) [hereinafter cited as THE WARREN COURT].

mately nondeterminative. The real strength of Bickel's work, its moral seriousness and intellectual tenacity, resides not just in the institutional complexities that he explored, but in the intellectual tensions that he himself tried constantly to master and then to transform into insight. The tensions gave his thought a sophistication and a dynamism, but never ennervated his judgment. Alexander Bickel could always make up his mind.

Indeed, his readiness to render judgments on important and controversial issues made him a natural polemicist and contributed to his provocative and brilliant classroom style. His scholarship was never aimed solely at scholars, for the thrust of his work always reached beyond the specific subject to comment on immmediately relevant problems of law and politics. His prose could glitter and slash. From the early critics of *Brown v. Board of Education*[2] to the later defenders of the Warren Court, judges, scholars, politicians, and reformers all suffered his discomforting attention. In the classroom he was equally forceful, challenging a generation of Yale Law School students. His style and fervor could convert or alienate, but it hardly failed to stimulate. Bickel's course in constitutional law was like "a brisk cold shower in that early morning of our law careers," declared the editors of the *Yale Law Journal*.[3] "He inspired us with a vision of the law as the highest and most careful application of our powers of reason."

I

In spite of internal tensions and, on occasion, doubts, Bickel consistently held several cardinal principles over the course of his twenty-five year career. Perhaps foremost was his faith in reason, whatever its limitations, and his total rejection of anything that smacked of nihilism. He chose the reasoned life for himself, suggested its desirability to others, and insisted on it in the institutions of the law. Further, he emphasized that American government was based on a paradox, for it was "principled *self*-government."[4] Self-government meant that the elective branches should ordinarily carry the burdens of policy decision and, in case of irreconcilable conflict with the courts, ultimately prevail. "Principled" meant that the government should honor certain fundamental values, and that the Supreme Court's special role was to elaborate and,

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[2] 347 U.S. 483 (1954).

[3] *In Memory of Alexander M. Bickel* (1924-1974), 84 YALE L.J. 197 (1974).

[4] THE WARREN COURT, *supra* note 1, at ix.

if necessary, defend them. Before the Court could authoritatively pronounce such principles, however, it had to be as certain as possible that they were clear, practical, culturally warranted, and "neutral." "The Court is to reason, not feel, to explain and justify principles it pronounces to the last possible rational decimal point."[5] Such a demanding requirement of rationality was to ensure as much objectivity as possible, to limit severely the number and kind of constitutional decisions the Court could enter, and to provide the broadest scope and responsibility to the elective branches of government. Finally, Bickel believed that all democratic institutions and all social tranquility rested on the broad and freely given consent of the governed. Disregard of the need for consent was not only morally wrong but practically disastrous, for without consent both the rule of law and democratic self-government were impossible.

Bickel's maturing thought developed out of a context marked by three major and closely interrelated influences. Politically, he was old enough to share in the acute memory of the "old" Supreme Court with all its excesses, while young enough to give himself wholeheartedly to the emerging civil rights movement. Intellectually, he came of age in the immediate post-war years and was caught up in the cross currents generated by the legal realists and their opponents. And personally, he was deeply influenced not only by the Harvard Law School tradition, perhaps best exemplified in his day by Professor Henry M. Hart, Jr., but also more directly by his growing personal friendship with Justice Felix Frankfurter, whom Bickel would come to see as "in his time the single most influential figure in American constitutional law."[6]

By the late forties, when Bickel entered the Harvard Law School, the "old" pre-1937 Supreme Court had been widely condemned and repudiated. "The debris of 20 years or so of judicial wrongheadedness had to be swept away," he later commented.[7] The long struggle with the "old" Court had become legendary, and the "conservative" Justices were known as "the Four Horsemen" or, in Learned Hand's phrase, "the Battalion of Death."[8] The dissenting Holmes-Brandeis wing had

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[5] A. BICKEL, THE MORALITY OF CONSENT 26 (1975) [hereinafter cited as MORALITY OF CONSENT].

[6] Bickel, *Applied Politics and the Science of Law: Writings of the Harvard Period*, in FELIX FRANKFURTER: A TRIBUTE 164, 168 (W. Mendelson ed. 1964) [hereinafter cited as TRIBUTE].

[7] Bickel, *Justice Frankfurter at Seventy-Five*, 137 NEW REPUBLIC, Nov. 18, 1957, at 7, 9.

[8] Quoted in letter from Felix Frankfurter to Bickel, Feb. 13, 1958, FRANKFURTER PAPERS, Library of Congress, Box 65, folder 1265.

triumphed, and it seemed to have convinced most of the profession, at least in the law schools, that the fatal flaw before 1937 had been a willingness to read personal values into the Constitution. Some scholars argued that such subjective preferences unavoidably guided constitutional adjudication, but the more common view was that judicial disinterestedness and restraint could reduce the influence of personal values to an absolute minimum. When constitutional disagreements arose in the forties and early fifties, justices and legal scholars on both sides of questions came to charge each other with the ultimate transgression — giving constitutional sanction to personal prejudices. Committed to the ideal of judicial reason, and convinced that the disastrous history of the "old" Court stemmed from its subjectivism, Bickel became convinced of the importance of developing a theory and practice that would ensure as total a judicial neutrality as was humanly possible.

While Bickel was convinced of the absolute importance of distinguishing personal values from constitutional principles, he was equally caught up in the enthusiasm of the civil rights movement of the fifties. He was convinced of its rightness, and convinced too that the general line of *Brown v. Board of Education*[9] and its early progeny was proper constitutional law. "The court in this instance was right," he wrote to Justice Frankfurter, "deeply, morally right, in tune with the finest thought and feeling that our tradition offers, and in tune with the world that is abuilding."[10] His commitment led him to support constitutional innovation, political demonstrations, and even some forms of civil disobedience. It led also to an important side career as a political essayist for the *New Republic* which helped bring him national attention and influence. That position toughened his thought by drawing him into problems of practically implementing politically controversial Court decisions. And, more importantly, it forced him to try to distinguish the acknowledged constitutional innovation and moral assumptions in *Brown* from the "wrongheadedness" and judicial subjectivism that he condemned in the "old" Court.

The continuing, though often disguised, debate over legal realism equally helped to channel Bickel's thought. On the surface he rejected the realists, scorned such extremists as Thurman Arnold, and dismissed them both as "now a small and somewhat forlorn number of individuals."[11]

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[9] 347 U.S. 483 (1954).

[10] Letter from Bickel to Felix Frankfurter, Sept. 10, 1958 (apparent date), FRANKFURTER PAPERS, Library of Congress, Box 24, folder 357.

[11] Bickel, *Philosophy of a Legal Realist*, 144 NEW REPUBLIC, Apr. 24, 1961, at 30.

Bickel recognized that realism had made positive contributions to American jurisprudence, especially in exposing the simplicities of constitutional literalism, but he preferred to dismiss it as merely "a first wisdom."[12] He emphasized instead its failures, primarily the unrealistic conclusion "that behind all judicial dialectic there was personal preference and personal power and nothing else."[13] Realism, Bickel believed, tended toward nihilism and cynicism. Such charges were understandable and, in part, fair. They were the common staple of the anti-realist reaction of the late thirties and forties, caused by the excesses of the realists themselves, by the desperate need in the face of Nazism and Stalinism for a belief in the "rationality" of law, and by the maturation of the New Deal Court which forced scholars to ask different and more challenging questions about the nature of law.

Bickel entered the legal profession when the anti-realist reaction was losing the vituperative quality that had characterized its early phase and was beginning to coalesce around a more positive and sophisticated approach, the theory of "reasoned elaboration." Developed by a number of prominent scholars, and dominating the Forewords to the *Harvard Law Review's* annual appraisals of the past Supreme Court term, the theory of reasoned elaboration maintained that the Supreme Court ought to be and could be "a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles of constitutional law."[14] Sufficient time, careful analysis, adequate craftsmanship, sensitivity to the nuances of cultural values and social changes, and faith in the capacity of reason itself, declared Henry Hart, one of the theory's leading formulators, could bring about "the maturing of collective thought" among the Justices and generate general agreement on the existence and applicability of valid and neutral principles.[15] Hart, Herbert Wechsler and the other scholars who helped refine the idea of reasoned elaboration sustained Bickel's commitment to reason, and he drew on their work repeatedly. Maturing collective thought, neutral and enduring constitutional principles, and rationally persuasive opinions, he believed, were all possible and neces-

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[12] TRIBUTE, *supra* note 6, at 171.

[13] A. BICKEL, THE LEAST DANGEROUS BRANCH 80 (1962) [hereinafter cited as LEAST DANGEROUS BRANCH].

[14] Hart, *The Supreme Court, 1958 Term — Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99 (1959). For a general survey of the development of reasoned elaboration see White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973).

[15] Hart, *supra* note 14, at 100.

sary. In one of his first essays, Bickel joined the growing chorus of critics who deplored logical flaws in recent Court decisions. Some opinions, he maintained, did "not attempt to gain reasoned acceptance for the result," and hence failed to "make law in the sense which the term 'law' must have in a democratic society."[16]

While Bickel's standards were clearly stated, however, major problems remained, for he was also a child, or perhaps grandchild, of realism itself. In fact, much of Bickel's intellectual achievement came from the fact that, despite his rejection of realism as a whole, he did not ignore its contributions but rather accepted them and tried to make them parts of a broader and more complete legal theory. Bickel concurred with the realists' rejection of the notions that judges "found" law or that their decisions were mechanical or logically compelled. He accepted the contention that judges in fact "made" law, that they often had a range of choices open to them, and that individual, personal factors influenced their decisions. He emphasized, too, the need for complete candor in dealing with such non-ideal realities.

Like Justice Frankfurter before him, Bickel used this theory of the judicial process derived from realism to support his argument for judicial restraint. Since judicial decisions, and especially constitutional decisions, were often in some significant part the result of value judgments, the Supreme Court could seldom justify opposition to Congressional or executive policies on the ground that the "law" of the Constitution was clear or simple. Instead, the law was a pragmatic process, an instrument of social order. It was a changing phenomenon, based on social needs, subject to empirical study, and ultimately to be judged only in terms of its practical consequences. Viewing law as an institutional process, Bickel consistently emphasized "its inextricable involvement in politics."[17] Steadily probing for the social consequences of judicial decisions, he rested his fierce assault on the Warren Court in the late sixties on the proposition that its major decisions were producing contradictory and self-defeating consequences. Since satisfactory historical consequences could validate almost anything, however, in *The Supreme Court and the Idea of Progress* he was forced to concede "the future may yet belong to

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[16] Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 5, (1957). Bickel's concern with the development of reasoned rules showed itself in his very first essay published the year after he had graduated from law school. *See* Bickel, *The Doctrine of* Forum Non Conveniens *as Applied in the Federal Courts in Matters of Admirality*, 35 CORNELL L.Q. 12 (1949).

[17] THE WARREN COURT, *supra* note 1, at 133.

the Warren Court," in the unlikely event that its majority had guessed right when "they bet on the future."[18]

Bickel accepted two additional, and perhaps intellectually more challenging, assumptions that underlay realism: ethical relativism and an instrumentalist concept of reason. Although Bickel would sometimes talk of moral values that were simply "right," the most he could logically admit in theory were "organizing ideas of universal validity in the given universe of a culture and a place."[19] This was a rather misleading statement because the latter phrase totally altered the normal significance of "universal validity." "It was obvious," he commented in a different context, "that a moral judgment as Justice Holmes noted cannot be said to be correct or incorrect."[20] That observation was characteristic of Bickel, and logically necessary for him because of his belief in the instrumentalist nature of reason. Human reason, he assumed, could deduce formal corollaries from given axioms, or it could empirically examine consequences of given experiments, but it could not "demonstrate" moral truth. A value judgment was not rational "in the sense that reason compels it," he admitted. "It is a choice, and perhaps it would be as well to call it arational."[21] Hence, reason, Bickel's chosen standard, was not itself ultimate, and though he rejected realism as a sufficient legal theory, Bickel lived in the intellectual world it had helped create.

II

After graduation from law school in 1949 Bickel clerked for Judge Calvert Magruder, served in the State Department, and then in 1952 began his term as law clerk to Mr. Justice Frankfurter. Bickel admired and respected the Justice, and was quite sympathetic to his well known views on the role and function of the Supreme Court. The respect was soon returned, and the two men became close friends. Frankfurter quickly came to appreciate Bickel's outstanding abilities, as well as his "high discretion, old-style courtesy, appreciation, and loyalty," and he placed him among the foremost of the "extraordinary lot of able fellows" who had served him.[22] For his part, Bickel came to see the Justice as

[18] A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 13, 173 (1970) [hereinafter cited as IDEA OF PROGRESS].

[19] LEAST DANGEROUS BRANCH, *supra* note 13, at 199.

[20] *Id.* at 42.

[21] *Id.* at 226.

[22] Letters from Felix Frankfurter to Erwin Griswold, Apr. 13, 1956 and Apr. 10, 1956, FRANKFURTER PAPERS, Box 24, folder 356 (copies).

embodying a "splendid and a rare career" which had been pursued "without compromise of principle, indeed with an utter inability to so much as modulate moral and intellectual integrity."[23]

Neither of them could have failed to note the striking similarity in their backgrounds: both were eastern European Jews who had immigrated with their families to the United States as young boys, settled in New York, attended City College, and graduated from the Harvard Law School. Frankfurter had gone on, not to clerk for, but nevertheless to become a friend, confidant, and near-disciple of Holmes and Brandeis, two of the most important and renowned Justices in the history of the Supreme Court. Both of these men were graduates of the Harvard Law School as well, and one was also the descendant of a Jewish immigrant family from central Europe. The parallel obviously suggested itself that Bickel might enjoy a similar relationship with an important and renowned Justice.

Frankfurter loved to collect friends and enjoyed the role of teacher. He had, too, as one scholar has noted, "a yearning for disciples."[24] Frankfurter moved to make the connection official, first by encouraging Bickel's participation with professor Paul A. Freund, himself an ex-clerk of Justice Brandeis and an intimate friend of Frankfurter's, in the scholarly mining of the rich Brandeis papers, and second by trying as forcefully as possible within the bounds of discretion to secure for Bickel a permanent position on the Harvard Law School faculty in 1956.[25] The latter effort, made without Bickel's knowledge, was unsuccessful, and Bickel subsequently accepted a position at the Yale Law School, which he held until his death. The Justice and the young scholar became increasingly identified and, Frankfurter thought, some of Bickel's later work drew critical fire that was really aimed at him. "I'll tell the world," Bickel wrote the Justice in late 1957, "I have received so much of pleasure and of lasting good from you that I can easily stand to take a little punishment in your behalf."[26]

The writing in question was Bickel's first book, *The Unpublished Opinions of Mr. Justice Brandeis*, in which he acknowledged Frankfurter

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[23] Bickel, *supra* note 7, at 7.

[24] Lash, *A Brahmin of the Law*, in FROM THE DIARIES OF FELIX FRANKFURTER 75 (1975).

[25] Letter from Frankfurter to Paul A. Freund, Jan. 10, 1955, FRANKFURTER PAPERS, Box 56, folder 1066; letters from Frankfurter to Griswold, *supra* note 22.

[26] Letter from Bickel to Frankfurter, Sept. 10, 1957, FRANKFURTER PAPERS, Box 24, folder 357.

as an "inspiration." "My intellectual debt to him is immense."[27] To say that the book was a collection of ten memoranda and drafts that Brandeis had decided not to hand down is scarcely to suggest the richness of the documents or the brilliance of Bickel's accompanying analysis. The book is, in brief, one of the most illuminating works of Supreme Court scholarship in existence. Perhaps its major flaw was its utterly dull title, one guaranteed to minimize general interest and provoke unconcerned yawns. Bickel had originally planned to call it *A Climate of Dissent*, but Frankfurter insisted that such a title misrepresented the significance of Brandeis' work. He suggested, instead, that Bickel choose something "completely bland," proving in that instance to be a less than wholly felicitous inspiration.[28]

The book itself was a triumph of scholarship. Much of the success was due, of course, to the materials with which Bickel worked. Brandeis had been an extraordinary judge, and the papers he left behind were, in Frankfurter's words, "absolutely unparalleled."[29] Additionally, the main issues involved were the constitutional problems of social and economic regulation paramount during Brandeis' tenure, issues which had been basically settled by the fifties and about which there was a general political consensus. Hence Bickel could assume an audience sympathetic to Brandeis and in agreement on the moral contour of the period.

Bickel made the most of these considerable initial advantages. The strength of the *Unpublished Opinions* comes not just from the materials, but from the way the editor elaborated them and used them to illuminate Brandeis' judicial mind, the inner workings of theSupreme Court as a human institution, and, above all, the elusive but real process of "reason" at work in the law. The book's historical contributions were many, tracing the evolution of particular Supreme Court decisions through the often conflicting tangle of personalities, precedents, and politics that energized the Court. Beyond the history and beyond the detail, however, loomed the real theoretical burden of the book. Bickel's consistent argument, supported by the weight of many of the cases, was that the process of constitutional adjudication, though one of subtle human and

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[27] A. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDIES ix (1957) [hereinafter cited as UNPUBLISHED OPINIONS].

[28] Letter from Frankfurter to Bickel, Aug. 29, 1956, FRANKFURTER PAPERS, Box 24, folder 356.

[29] Letter from Frankfurter to Griswold, Apr. 13, 1956, FRANKFURTER PAPERS, Box 24, folder 356 (copy).

institutional demands, nevertheless could be and often was a process of disinterested and open-minded rational analysis guided by evidence and existing legal rules. To show that this was true in general about Brandeis proved that the ideal of reason was possible; to show that it was true in significant part even on the "old" court proved that the ideal had an institutional embodiment.

Bickel focused on the personal and intellectual qualities that gave Brandeis his special "effectiveness as an advocate within the Court."[30] Because of the Justice's tact and craftsmanship he helped save state workmen's compensation statutes from Court disapproval; because of his forcefulness in analyzing social and economic consequences, he pushed the Court to adopt a more realistic approach to state taxation of goods in interstate commerce; because of his insistence upon the disinterested application of Court doctrine he helped induce a majority to relieve the United Mine Workers of liability, and limit the reach of the federal courts, in the first *Coronado* case.[31] And, of course, because at least some of the Justices, who for various reasons, preferred the opposite results, could be reached by Brandeis' arguments, his ideas proved that there was something substantial to the ideal of disinterested reason in the development of constitutional law.[32]

Bickel found three additional qualities in Brandeis that he especially admired and would consistently draw on in his later writings. First, he appreciated the way the Justice strove to give judicial effect to the underlying policy of legislative efforts by examining the practical purpose of statutes rather than by measuring them by abstract judicial principle.[33] Second, he was drawn to Brandeis' sense of jurisdictional integrity, his sense that procedural restrictions on judicial power were fundamental to a reasoned process of adjudication. Third, and closely related to the second, he was deeply impressed with Brandeis' sense of constitutional restraint, his "conviction that the Court must take the utmost pains to avoid precipitate decision of constitutional issues.[34] He pointed to the Justice's concurrence in *Ashwander v. T.V.A.*,[35] which enumerated a variety of techniques for disposing of cases without reaching a constitu-

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[30] UNPUBLISHED OPINIONS, *supra* note 27, at 101.

[31] United Mineworkers v. Coronado Coal Co., 259 U.S. 344 (1922).

[32] UNPUBLISHED OPINIONS, *supra* note 27, at chs. 4, 5, 6. *See also* Bickel, *The Battle Over Brandeis*, 151 NEW REPUBLIC, Aug. 8, 1964, at 25-26.

[33] UNPUBLISHED OPINIONS, *supra* note 27, ch. 8.

[34] *Id.* at 2, 3.

[35] 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

tional principle, as the "crowning statement of one of the truly major themes in Brandeis' judicial work."[36]

Bickel's handling of the jurisdictional theme was undoubtedly influenced by Frankfurter's continual insistence on a fastidious adherence to procedural limitations. In the same year that the *Unpublished Opinions* appeared, Frankfurter maintained in a dissenting opinion that the Brandeis legacy was being increasingly distorted.[37] Brandeis' well-known concern for the development of law "appropriate for an evolving society has more and more prevailed," Frankfurter declared, while his equally important arguments for wise technicalities and limitations "have often been neglected."[38] To redress the balance Frankfurter emphasized the latter half of the Brandeis legacy throughout his years on the Court. Bickel absorbed that emphasis from him, and later called it "the really constructive part" of Frankfurter's judicial career.[39]

Purposely, therefore, Bickel chose for his first chapter a case[40] in which Brandeis, persuaded that a suit was jurisdictionally improper, prevented the formation of a majority which might have used the appeal to uphold the second federal child labor law. The case was powerful evidence "of the rigid integrity with which Brandeis adhered to his jurisdictional scruples, no matter if to do so was to oppose a substantive result he himself desired."[41] That episode came to stand in Bickel's mind not only for Brandeis' integrity but more importantly for the idea that procedural restrictions, though often denigrated or ignored, were in fact the essence of a reasoned legal process. For procedure, in the long run at least, had a sense of neutrality about it, an aura of institutional disinterestedness, that alone could restrain devisive conflict over substantive issues and serve as a social unifier. "Mr. Frankfurter shared with Brandeis the conviction," Bickel wrote, "that 'the history of liberty is to a large extent the history of procedural observances.' "[42] More immediately, given his instrumentalist view of reason, he saw proceduralism as the most fruitful guarantee of judicial rationality. For procedure was institutional method, and method was the one thing that instrumental reason could "objectively" and persuasively evaluate. Procedure could be steadily made and kept

[36] UNPUBLISHED OPINIONS, *supra* note 27, at 2.

[37] Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 524-25 (1957) (Frankfurter, J., dissenting).

[38] *Id. See also* TRIBUTE, *supra* note 6, at 188.

[39] *Quoted in* Lash, *supra* note 24, at 82.

[40] Atherton Mills v. Johnston, 259 U.S. 13 (1922).

[41] UNPUBLISHED OPINIONS, *supra* note 27, at 17.

[42] TRIBUTE, *supra* note 6, at 188.

"rational" in a way that substantive law could not, and hence procedure was, in long-range and systematic terms, the most fundamental and promising area of the law. The equation between reason, procedure, judicial disinterestedness, and, ultimately, social cohesion ran through all of Bickel's thought and it too may surely be called a "truly major theme." In his last book Bickel would insist on the same idea. "Legal technicalities are the stuff of the law," he declared, "and piercing through a particular substance to get to procedures suitable to many substances is in fact what the task of law most often is."[43] That was also the task of reason, and it was the one task that instrumental reason could properly fulfill.

III

While Bickel was finishing the *Unpublished Opinions*, he found himself increasingly involved in the civil rights movement that had accelerated after *Brown*. Though always aware of the limits and danger of judicial innovation in constitutional law, Bickel gave himself actively and fervently to the cause of racial equality and to the defense of the desegregation cases. While achieving intergration would be a long and slow process, he believed the nation had to pursue the goal relentlessly. Counsels of "moderation," he maintained, are "so often in our day the last refuge of the totally fatuous."[44] In November, 1955 he published a long analysis of the "Original Understanding" of the Fourteenth Amendment intended to give *Brown* scholarly support. [45] He argued persuasively that the Framers did not expect the amendment to apply in their immediate historical context to segration and many other forms of racial discrimination, but that they had purposely chosen language that would lend itself to proper constitutional growth when and where necessary. "The record of history, properly understood," he concluded, "left the way open to, in fact invited, a decision based on the moral and material state of the Union in 1954, not 1866."[46] The historical materials did seem to show that the way had been left open, but the stronger phrase "in fact invited" was Alexander Bickel speaking. The next year he publicly repudiated ex-Justice James F. Byrnes' attempt to misrepresent his essay as criticizing

[43] MORALITY OF CONSENT, *supra* note 5, at 121.

[44] Bickel, *Integration: The Second Year in Perspective*, 135 NEW REPUBLIC, Oct. 8, 1956, at 12. *See* also Bickel, *Correspondence: Paths to Desegregation*, 137 NEW REPUBLIC, Nov. 4, 1957, at 3, 22-23.

[45] THE WARREN COURT, *supra* note 1, at 261. This chapter was originally published as *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

[46] *Id.* at 65.

Brown and forcefully insisted that "the evidence was precisely as the Court had held."[47]

The significance of the civil rights movement for Bickel's constitutional thought was, of course, that it created a sharp tension between his Frankfurterian ideas of restraint and the moral demands of desegregation which seemed to necessitate at least some degree of judicial "activism." "For many years we have been paralyzed in two of the institutions of government which give us national expression: the Congress and the Executive," he declared in 1956. "It remained for the third, the only one in which a matter can be pressed to unavoidable decision by private parties, the Supreme Court, to quicken the conscience of the nation." [48] Praising the Court's initiative, he urged his readers to join the struggle. "In the grip of a moral dilemma," he proclaimed, "can we do better than to take refuge in the Court's law?"[49]

His "Original Understanding" essay had been based on three interrelated presuppositions that lent themselves readily to judicial activism: the validity of the judicial application of the vague phrases of the Fourteenth Amendment, the capacity of those phrases for growth and change in meaning, and the acceptance of the Supreme Court as the ultimate constitutional arbiter of that meaning. Though a theory of judicial restraint was still possible with such assumptions, they made the problem more complicated. Brandeis himself, in the days of the "old" Court, had privately approved the idea of repealing the whole Fourteenth Amendment, while Frankfurter had equally strong doubts, more so about the "due process" than the "equal protection" clause.[50] In the late fifties Frankfurter still confessed to wishing "that when the Amendment first came before the Court it had concluded that it was too vague, too much open to subjective interpretation for judicial enforceability."[51] In the face of Frankfurter's continuing doubts, as well as the more extreme doubts of the widely respected Judge Learned Hand, Bickel remained firm. "I am persuaded the function of judicial review under the Fourteenth Amendment and under the Bill of Rights is necessary in our society," he wrote

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[47] Bickel, *Frankfurter's Former Clerk Disputes Byrnes's Statement*, 40 U.S. NEWS & WORLD REPORT, June 15, 1956, at 132.

[48] Bickel, *Integration: The Second Year in Perspective*, 135 NEW REPUBLIC, Oct. 8, 1956, at 12.

[49] *Id.*

[50] *See* Lash, *supra* note 24, at 35.

[51] Letter from Bickel to Frankfurter, July 31, 1958 (apparent date), FRANKFURTER PAPERS, Box 24, folder 357; letter from Frankfurter to Learned Hand, Feb. 13, 1958, FRANKFURTER PAPERS, Box 65, folder 1255. *See also* TRIBUTE, *supra* note 6, at 175-76.

the Justice. In spite of the challenging problems it created, "I am so persuaded on principle."[52]

In defense of the Court and the desegregation cases Bickel used the pages of the *New Republic* to attack the "Southern Manifesto" of 1956 and the 1958 report of the Conference of State Chief Justices, terming the latter both "inexplicable" and "inexcusable." [53] Both were based on the idea that the Constitution was a "clear" and relatively unchanging document, and both used that idea to charge the Court with legislating values rather than applying law. Bickel rejected their claim bluntly. "Laws are made, interpreted and applied by men," he declared, "and at no stage is the process a mechanical one."[54] Frankfurter expressed qualified agreement with the latter attack but worried about the activist implications of stressing the range and necessity of judicial discretion. "Of course one does not want to give aid and comfort to the [segregationist] enemy," the Justice wrote him, "but neither does one want unwittingly to withdraw whatever influences one may have for curbing judicial wilfulness and partisanship."[55]

Acutely aware of the potential for conflict between his enthusiasm for the desegregation cases and his broader belief in judicial limitation, Bickel turned to the task of theoretical reconciliation. He was undoubtedly spurred by Frankfurter's continuing complaints about the subjective considerations that some of his colleagues were allowing to guide their votes [56] and he noted, too, signs of a more aggressive approach by the Court, especially in the area of electoral reapportionment. [57] Herbert Wechsler's refined version of "reasoned elaboration," published in 1959, which attempted to clarify the nature of "neutral principles" of constitutional law, helped suggest a valid criterion with which to distinguish legitimate from illegitimate Court decisions. [58] From another direc-

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[52] Letter from Bickel to Frankfurter, July 31, 1958 (apparent date), FRANKFURTER PAPERS, Box 24, Folder 357. *See* L. HAND, THE BILL OF RIGHTS (1958).

[53] Bickel, *An Inexplicable Document*, 139 NEW REPUBLIC, Sept. 29, 1958, at 9, 11. *See also* Bickel, *Ninety-Six Congressmen Versus the Nine Justices*, 134 NEW REPUBLIC, Apr. 23, 1956, at 11-13.

[54] Bickel, *An Inexplicable Document*, 139 NEW REPUBLIC, Sept. 29, 1958, at 11.

[55] Letter from Frankfurter to Bickel, Sept. 29, 1958, FRANKFURTER PAPERS, Box 24, folder 357.

[56] See for example the variety of criticism in the following: Frankfurter to Bickel, Feb. 21, 1956, and Frankfurter to Bickel, Dec. 28, 1956, FRANKFURTER PAPERS, Box 24, folder 357.

[57] LEAST DANGEROUS BRANCH, *supra* note 13.

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

tion Learned Hand's sweeping challenge to the very idea of judicial review, also published in 1959, threatened to undermine Court decisions that Bickel viewed as necessary. [59] Hand's lectures were used by politicians anxious to curb the Court, and they seemed to Bickel to demand an answer. Finally, the election of 1960, in which both presidential candidates had promised to enforce the *Brown* principle, suggested to Bickel that at last the more effective and representative executive branch was ready to take the lead in the desegregation battle. Hence the earlier activism of the Court might no longer be so crucial. With those considerations in mind, Bickel turned back to Justice Brandeis and his "crowning statement" in *Ashwander v. T. V. A.* [60] The result, as might be expected given the problems he strove to synthesize, was his most elaborate and challenging theoretical work. [61]

Bickel cast the inquiry of *The Least Dangerous Branch* in terms of the fundamental tension between the necessity of maintaining social consent and majority rule on the one hand and the practice of constitutional judicial review on the other. By treating the problem so broadly he hoped to illuminate a "muted, constant, and timeless" tension within American political institutions.[62] Though the book was marred slightly by his inclination to try to weave together selected pieces of earlier writings, a practice that often gave his work an episodic quality, Bickel nevertheless succeeded in elaborating an ingenious theory of the nature and limits of judicial review.

Although to summarize *The Least Dangerous Branch* is to do injustice to its greatest strength, its subtlety and sensitivity, the main argument was clear. Bickel began by rejecting the "found law" theory of *Marbury v. Madison* as the basis of judicial review and emphasizing the "root difficulty" that "judicial review is a deviant institution in the American democracy." [63] Judical review not only contradicted majority electoral politics, the "distinguishing characteristic" of American government,[64] but could also become a dangerous and destructive political force, as it was under the "old" Court, if not confined to a relatively narrow sphere. The true theoretical justification for judicial review, which also served to indicate its limits, lay in the fact that American government was also

[59] L. HAND, THE BILL OF RIGHTS (1958); L. HAND, THE SPIRIT OF LIBERTY 225-27 (1952).

[60] 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

[61] LEAST DANGEROUS BRANCH, *supra* note 13.

[62] *Id.* at 46.

[63] *Id.* at 16, 18.

[64] *Id.*

based on "the creative establishment and renewal of a coherent body of principled rules." [65] And, in practice, Bickel maintained, "courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess."[66] Hence judicial review by the Supreme Court was valid and necessary, but limited to deciding a constitutional issue "only on the basis of general principle."[67] Yet there was then a further practical difficulty that a proper theory must encompass for "no viable society can be principle ridden."[68] There must be leeway — constitutional leeway — for compromise, expediency, and accommodation.

For Bickel the solution lay in the fact that, when faced with a constitutional problem, the Court need not either legitimate or invalidate a principle. "It may do neither and therein lies the secret of its ability to maintain itself in the tension between principle and expediency."[69] The "passive virtues," as Bickel called them, techniques inspired by Brandeis' *Ashwander* concurrence and by Frankfurter's whole career, presented the Court with valid ways to dispose of cases without invoking principle.[70] Thus, when the issue was one that demanded expediency, when there was no "neutral" principle to invoke, or when the Court sensed some significant social change underway, the passive virtues allowed leeway for desirable practical action while preserving the broader rule of principle. The passive virtues gave the democratic process a wide berth, while retaining the checking power if some action transgressed a truly valid and neutral constitional principle. Given the requirement of such constitutional principles, however, that ultimate checking power would be seldom justified.

The immediate upshot was that Bickel had produced a general theory of judicial restraint that was capable of explaining the legitimacy of *Brown*, a decision based on a neutral constitutional principle rooted in authentic American ideals and enjoying majority political support. It was "at last quite clear," he wrote, "that the issue is settled, the principle

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[65] *Id.* at 25.

[66] *Id.*

[67] *Id.* at 247.

[68] *Id.* at 64.

[69] *Id.* at 69.

[70] *Id.* at ch. 4. His thesis was originally published as Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). Shortly before his death Bickel summed up Frankfurter's judicial career in terms of his refinement and use of the "passive virtues." "He devised all these jurisdictional ways of withdrawing from problems that were insoluble or that were overly difficult." *Quoted in* Lash, *supra* note 24, at 82.

established and immutable." [71] Indeed, *Plessy v. Ferguson*, [72] the case *Brown* had overruled, simply rested on "an operating principle that was wrong." [73] In practical terms, too, Bickel's theory provided leeway for the use of constitutionally questionable "benevolent" quotas, a technique of reducing racial inequality that was increasingly advocated by civil rights groups. If the principle of *Brown* was the invalidity of race as a legislative criterion, as Bickel believed, then laws that established quotas for blacks in such areas as employment and housing would have been unconstitutional. But the passive virtues offered an escape. "Unless and until experience should belie the hope that may animate benevolent quota proposals or demonstrate that, rather than a possibly progressive expedient, they are a retrogressive one," he argued, "benevolent quotas should be allowed their season of leeway, without offense to principle." That did not call for the Court to give such quotas constitutional sanction, but demanded "only that it should leave their constitutionality undecided." [74]

In spite of its intricate and finely-honed arguments, *The Least Dangerous Branch* was riven by serious problems. The treatment of Supreme Court "deviance" seemed exaggerated and ultimately unconvincing. Bickel himself acknowledged that American government was not "majoritarian." Indeed, in referring to a norm by which to judge the deviance, he wavered between an unspecified abstract "democratic theory" and the less pristine realities of actual American politics. Not only could one defend judicial review in the simple but nevertheless meaningful terms of institutionalized checks and balances, but in fact there was also evidence available to show that judicial review almost never served as an obstacle to electoral majorities for more than a few years.[75] Perhaps even more curious, however, given the "undemocratic" deviance "that Bickel emphasized, was his concurrent belief in the Supreme Court as the "pronouncer and guardian" of the "enduring values" of American society. The deviant institution was "a great and highly effective educational institution" entrusted with the ultimate and authoritative statement of values.[76] "One point is, in any event, of tran-

[71] LEAST DANGEROUS BRANCH, *supra* note 13, at 268.

[72] 163 U.S. 537 (1896).

[73] LEAST DANGEROUS BRANCH, *supra* note 13, at 194.

[74] *Id.* at 71-72.

[75] Bickel was well acquainted with the work of the political scientist Robert A. Dahl. *See* Bickel, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

[76] LEAST DANGEROUS BRANCH, *supra* note 13, at 24, 26.

scendent importance," he declared. "The role of the Court and its *raison d'etre* are to evolve 'to preserve, protect and defend' principle."[77]

Bickel made it clear that the principles he referred to were, or at least could be, substantive moral principles. While he would later come to emphasize the more Frankfurterian idea that constitutionality and morality were almost wholly distinct, Bickel in the early sixties still saw them as significantly related. In fact, it was precisely its moral vacuum that marked the limits of James Bradley Thayer's "rule of the clear mistake," which limited judicial declaration of unconstitutionality to actions that were not rationally, i.e. instrumentally, suited to carry out legitimate purposes.[78] "It has not always been possible to be satisfied that what is rational is constitutional," Bickel explained, for the instrumentally rational might conflict with other values and ideals; "the real question may be whether it is good."[79] Hence constitutional principles must ultimately be judged by moral principles, "a process in which reason is an indispensable aid, but which it cannot carry through unaided,"[80] and though the Constitution itself provided some guides, moral judgment was forced to become increasingly independent. "Our problems have grown radically different from those known to the Framers," he insisted, "and we have had to make value choices that are effectively new."[81]

The Court was therefore called upon to create as well as pronounce moral principles and to give them constitutional stature. "The constitutional function of the Court," he insisted, "is to define values and proclaim principles."[82] To make the Court not just a formulator of necessary legal rules but rather the "pronouncer" of enduring values, to define its "transcendent" function as the evolution of constitutional moral principles, was to erect an edifice of judicial restraint on the deep foundation of moral activism. One can imagine Holmes, Hand, and even Frankfurter blinking. Surely Bickel's own political and moral stance took away almost as much from the idea of judicial restraint as his overt theory prescribed.

Bickel's treatment of moral principles was marred by a revealing inconsistency. Because of his relativism as well as his desire to limit court activism, Bickel confined admissible moral principles to those that grew out of American ideals and rested on "an unquestioned, shared choice of

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[77] *Id.* at 188.

[78] *Id.* at 37-45. *See* Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

[79] *Id.* at 39.

[80] *Id.*

[81] LEAST DANGEROUS BRANCH, *supra* note 13, at 39.

[82] *Id.* at 68.

values."[83] And yet, since he did not wish to force on the court a rigid adherence to any moral status quo, he proceeded to unlimber his prescription. "What is meant, rather," he declared, "is that the Court should declare as law only such principles as will — in time, but in a rather immediate forseeable future — gain general assent."[84] The Court was actually to be "at once shaper and prophet of the opinion that will prevail."[85] Bickel, in an elaborate prescriptive theory of Supreme Court behavior, chose to base decision ultimately on a shrewd political judgment of expediency. "The Court is a leader of opinion, not a mere register of it," he summarized, "but it must lead opinion, not merely impose its own; and — the short of it is — it labors under the obligation to succeed."[86]

Additionally, in spite of his relativistic conception of value, Bickel could not resist placing the ideal of racial equality on an absolute basis. He declared the principle of *Brown* to be "immutable," and insisted that *Plessy* had been morally "wrong."[87] But on his own pragmatic criteria, one could readily argue that *Plessy* had been morally proper. In reason, Plessy met the "conventional wisdom" standard[88]: it had been based presumably on the shared moral values of a large majority;[89] it had won the approval both of its time and of a half-century of the future.[90] One could also readily argue that the "separate but equal" doctrine was itself a neutral principle. Bickel in arguing the tenative and transitory nature of principles, had himself claimed that "what one means by the ultimate, final judgment of the Court is quite frequently a judgment ultimate and final for a generation or two."[91] He simply made an exception to his relativism for the moral principle of *Brown*, without logically justifying the exception.

In addition to their fundamental morality, Bickel maintained, proper

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[83] *Id.* at 43.

[84] *Id.* at 239.

[85] *Id.*

[86] *Id.* The episodic and discursive structure of THE LEAST DANGEROUS BRANCH created its own problems. It was often unclear whether Bickel was speaking in prescriptive or descriptive terms, whether in this case he was urging the Court to function as a "shaper and prophet" or merely describing its de facto impact. Though the book as a whole is clearly a conscious prescription for proper Supreme Court behavior, Bickel at times suggested that he was only summarizing how the Court operated. *See, e.g., id.* at 240. This was an ambiguity that he probably had not fully resolved in his own mind.

[87] *Id.* at 71, 194, 268.

[88] *Id.* at 53.

[89] *Id.* at 43.

[90] *Id.* at 239.

[91] *Id.* at 244.

constitutional principles must also be "neutral." His concept of "neutrality," drawn largely from Herbert Wechsler's formulation, meant that a principle must be a coherent statement and general proposition, transcending the particular result of any case, and capable by its form of wide and consistent application. Bickel criticized *Shelton v. Tucker*, [92] for example, in which the Court struck down an Arkansas statute requiring all public school teachers to submit affadavits listing their organizational affiliations, as representing an unjustified substitution of judicial for legislative judgment because the Court's opinion lacked "intellectual coherence" and "was decided without reference to any standard that could be stated in terms one whit more general than its own result."[93]

Bickel intended the requirement of neutrality to serve as a powerful limitation upon the Court's pronouncement of principles: an intellectual limitation in its demand for coherence and generality, and a practical limitation in its demand for consistent applicability. "Given the nature of a free society and the ultimate consensual basis of all its effective law," he pointed out, "there can be but very few such principles."[94] Yet when these principles existed, they justified active judicial intervention to uphold them; Bickel's basic formulation rested on a kind of circularity for the theory of "neutral principles" could justify either activism or restaint. More importantly, the choice between the two in any given context was to be made on the grounds of practical "applicability," that is, of expediency. In other words, a theory originally intended to distinguish those issues on which the Court could properly invalidate the acts of representative political institutions came to rest in large part on the question of the practical wisdom of so acting.[95] Neutral principles, which seemed at

[92] 364 U.S. 479 (1960).

[93] LEAST DANGEROUS BRANCH, *supra* note 13, at 53, 59. Wechsler's formulation of the doctrine of "neutral" principles created some misunderstandings. To neither Wechsler nor Bickel did "neutral" carry the connotation of "value-free." Both men, and especially Bickel, emphasized that all legal rules and principles implied some type of value judgment. "Neutral" referred then not to the substance of a principle but to its form: clear, general, self-consistent, and fairly applicable to a reasonable class of actions. The idea of neutral principles is sensible and even quite traditional. Its utility is broad, but, like Thayer's rule of the clear mistake, not unlimited. It is questionable whether an institution such as the Supreme Court can in practice consistently achieve such "neutrality"; it is also questionable whether "neutrality" as a formal procedural requirement does not contain substantive political and moral implications that demand careful analysis. The latter comment is not to suggest the desirability of a "non-neutral" Supreme Court, but merely to suggest the need for an examination of how the concept of neutrality in fact functions in any given situation and in what precise sense it is operating as a "neutral" formal process.

[94] *Id.* at 59.

[95] *Id.* at 71.

times to demand "absolute application" in all like cases "whether or not it is immediately agreeable or expedient,"[96] were in practice to be applied only insofar as the application would be expedient. Since the existence of a valid neutral principle logically governing a given case did not automatically command its application, the theoretical grounds for choice between intervention and non-intervention which Bickel had originally set out to clarify ultimately eluded his formulation.

Bickel did not believe the judicial process could be "automated," and he was not seeking a logically complete or closed system. He was presenting a prescription for the proper limits of Supreme Court adjudication. The theory assumed the clear distinction between principle and expedience, between moral values and practical politics, yet it was that very distinction that Bickel himself continually blurred. What gave *The Least Dangerous Branch* its surface appearance of consistency was not its logical argument but Bickel's own moral stance. As admirable as that was, it could make his theory neither logically precise nor consistently applicable. As advice, as suggestion, as provocation, it was powerful and weighty. As prescriptive theory, however, it was ultimately amorphous.

Much of Bickel's book focused on the "passive virtues," such concepts as standing, ripeness, and "case or controversy," that allowed the Supreme Court to avoid unwise or precipitate constitutional judgment. They were "devices" of expediency and "[could not] themselves be principled in the sense in which we have a right to expect adjudications on the merits to be principled."[97] Bickel's discussion of the "passive virtues" and his comments on recent cases were thoughtful, and they had the virtue of rounding out his general theory of "principled" adjudication. "These are the techniques that allow leeway to expediency without abandoning principle," he explained. "Therefore they make possible a principled government."[98]

His explanation of the "passive virtues," however, created its own problems. The first related to the fact that they were often "passive" only in name, for Bickel's "virtues" served as aggressive instruments for his chosen values. "The role of principle, when it cannot be the immutable governing rule," he had argued, "is to affect the tendency of policies of expediency."[99] The passive virtues, then, were techniques not merely of avoidance but of "non-principled" but morally purposeful judicial policy making. Bickel, for example, argued that the Court should have dis-

[96] *Id.* at 59.
[97] *Id.* at 132.
[98] *Id.* at 71.
[99] *Id.* at 64.

missed for lack of ripeness *Times Film Corp v. City of Chicago*,[100] a case in which a city ordinance requiring prior approval of motion pictures was challenged. "Only one outcome on the merits was open to the Court on principle — legitimation; and this was unwise in its tendency."[101] Though Bickel referred to the specific "intellectual content and intrinsic significance"[102] of the passive virtues, his suggestions for their use were based primarily on his view of the proper social values they could be used to support. And he treated those values, even when they were unable to meet his standards of proper neutral principles, as being important enough to warrant, as in *Times Film*, a different disposition than the one he himself acknowledged to be appropriate on principle.

The second problem, the opposite of the first, was that the "passive virtues" could occasionally be so amoral as to allow the abandonment of principle, and of Bickel's own values, in the service of a judgment of expedience. Though admitting that antimiscegenation statutes "would surely seem to be governed by the principle of the *Segregation Cases*," Bickel approved the Court's dismissal of proper challenges as "wise."[103] If even the *Brown* principle could be compromised in such an obvious case, and by Alexander Bickel, what principle would not be subject to practical erosion by the argument of expedience working with the "passive virtues?" And by what logically coherent or empirically verifiable criteria could such "expedience" be judged? If such a "valid" principle were judged inexpedient in three or four cases, certainly the precedential basis would be established for a "reformulated" principle. Surely the root problem lay with the very range of discretion that Bickel opened up with his "passive virtues" and was unable in his theory to logically restrict.

Ultimately it is the paradoxical nature of *The Least Dangerous Branch* that is its most striking quality. It heralded "immutable" ethical principles along with an instrumentalist ethical relativism; it based a theory of judicial restraint on a rationale of moral activism; it called for principled government and then made expedience dominant; it sought to prescribe limits of judicial decision-making and then refined elaborate tools of purposeful judicial discretion. There was a further irony, too, in that Bickel, who sought to repudiate legal realism, ended by embracing most of its assumptions. "The judicial process cannot be automated," he conceded willingly.[104] His "passive virtues" were truly "devices," that

[100] 365 U.S. 43 (1961).

[101] LEAST DANGEROUS BRANCH, *supra* note 13, at 143.

[102] *Id.* at 170.

[103] *Id.* at 71, 174. *See* Naim v. Naim, 350 U.S. 985 (1956).

[104] LEAST DANGEROUS BRANCH, *supra* note 13, at 207.

is, tools of instrumental reason that required a previous practical and moral judgment, independent of the "intrinsic significance" of the devices themselves, that would decide upon and manipulate their use. And as "principle" was in fact a most uncertain and nondeterminative guide, it would be pragmatic discretion, and "personal" judicial values, that would determine their application. To reject the activists, with their assumption of constitutional "clarity," he emphasized the lack of clarity. To reject the opponents of *Brown*, who decried the Court's interventionism, he emphasized the necessity of the Court's moral leadership. And in seeking to protect the Court and the democratic process from one another, he forced upon the Court the most immediate political judgments. "It is unreal to think that by putting such matters out of view the Court keeps itself out of politics," he declared. "Actually, it merely abandons control of the direction in which, inevitably, its decisions on the merits do influence public opinion and the political institutions."[105] Bickel finished by prescribing to the Court the most careful and continuous political judgments and making it a conscious orchestrator of social change.

It was no wonder that "tension" was the central metaphor of the book, and Bickel was probably right that "no attempt to lift the Court out of the Lincolnian tension can be successful.[106] His incisive mind illuminated the kinds of problems the Court faced, and his analysis suggested at innumerable points a sensitive understanding of "timeless" issues. In many areas, his discussion of the sources of ultimate Supreme Court judgment, his analysis of the nature of "neutral" principles, and his emphasis on narrowing and identifying the proper form and place for moral judgment, he probably described aspects of the judicial process as well as they can be put in words. It was because the book was deeply serious, morally responsible, and intellectually weighty, that it will continue to deserve extended and recurring considerations. It was a profoundly unsatisfying book, but its difficulties were the result of ambitious and far-reaching intellectual endeavor that must command admiration.

IV

Given the pragmatic emphasis that marked *The Least Dangerous Branch*, it was logical that Bickel increasingly turned his attention in the

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[105] *Id.* at 140. For a similar and more extensive critique see Gunther, *The Subtle Vices of the 'Passive Virtues' — A Comment on Principle and Expediency in Judicial Review*, 64 COL. L. REV. 1 (1964). In his review Mark DeWolfe Howe pointed out the paradox of moral activism and judicial restraint that suffused THE LEAST DANGEROUS BRANCH. Howe, Book Review, 77 HARV. L. REV. 579 (1964).

[106] LEAST DANGEROUS BRANCH, *supra* note 13, at 131.

early sixties to the immediate problems the Court and the nation faced. Contributing regularly to the *New Republic*, he established a reputation as one of the country's most thoughtful and independent political commentators. Though his main focus remained the civil rights movement, he touched broadly on most contemporary political issues that involved the Court or the legal system. In 1965 he wove together many of his shorter pieces from the previous ten years and published them under the title *Politics and the Warren Court.*[107]

In retrospect a transitional work, Bickel's third book echoed his earlier writings but introduced some new variations. The familiar emphasis on the tension between the Court and the politics of democracy was present, together with Bickel's insistence that the Court provide both principled and pragmatic leadership. Though he again urged a recognition of the limits of effective legal action, and especially of judge-made law, he continued to support persistent judicial enforcement of the *Brown* principle. Benevolent quotas still appeared useful and pragmatically legitimate in spite of the fact that they presented "a difficulty of constitutional logic."[108] Bickel had expressed disapproval of large-scale court ordered busing, but he continued to encourage wide ranging civil rights litigation and even suggested that the Court could order local officials to levy taxes for the support of integrated schools.[109] The moral quality of the civil rights movement "makes all the difference," he reiterated. "The cause of the Negro protest movement — the underlying cause, seen in the large — is just, and that is a decisive judgment we are required to make."[110]

In the reforming flush of the mid-sixties Bickel's optimism remained high. The efforts of the Kennedy administration, though limited, had brought a new spirit and determination to the civil rights cause, and the national legislation of 1964 and 1965 altered most favorably the whole balance of forces. "The essence of the 1965 act, and the source of its great promise," Bickel happily pointed out, "is that it makes an end run around the judicial process, and confronts recalcitrant Southern officials with the real locus of continuously effective federal power, which is the executive rather than the judiciary."[111] The proper tools were finally at hand; and, in spite of the vast difficulties that remained, their proper use

[107] THE WARREN COURT, *supra* note 1.

[108] *Id.* at 37.

[109] Bickel, *Beyond Tokenism: The Civil Rights Task That Looms Ahead,* 150 NEW REPUBLIC, Jan. 4, 1964, at 11, 14; THE WARREN COURT, *supra* note 1, at 13, 42, note 17.

[110] THE WARREN COURT, *supra* note 1, at 90-91.

[111] *Id.* at 126.

seemed to guarantee final victory. "Given good faith, or a court order, or both, desegregation is, after all, a skill, a professional task."[112]

Along with the familiar ideas, and an added ground for optimism, however, newly emphasized caveats crept into the essays. Although Justice Frankfurter had retired from the Court in August, 1962, he had continued during the remaining two and a half years of his life to encourage Bickel in his criticism of certain "reprehensible decisions" the Court handed down. Roosevelt's "court-packing" plan of 1937 "was exactly the consequenee of the kind of behavior by the old Court which you are now criticizing in the new Court," the Justice insisted. "You law professors really should sharpen your pens so that there is no mistaking as to what the trouble is and where the blame lies."[113] Justice Frankfurter's retirement, Bickel declared in *Politics and the Warren Court*, "does more than merely change a vote; it alters the entire judicial landscape."[114] Although in 1965 he still saw some hope that the post-Frankfurter Court might exhibit a tone of restraint, he was also disturbed that an activist "Hugo Black majority" might well be in the process of coalescing.[115]

Bickel warned against the Court's growing tendency to "exaggerate the requirements of uniformity inhering in national policy" and suggested that perhaps too much was being changed too quickly.[116] "The Court needs some respite, and so does the country."[117] There was simply too much active opposition to recent Court rulings to dismiss it as unimportant or wholly unfounded.[118] The rise of a new militancy among civil rights and liberal groups, the emergence of Black Nationalism, and "the affinity to nihilism"[119] he detected in many of the younger leaders made him look more warily at the reform tide of the mid-sixties. More importantly, Bickel began to see in the sharpening political agitation overtones of "stark ideological struggle," and believed that the Court was getting involved in "too much forcing of choices between mutually exclusive ideological ultimates."[120] Specifically, Bickel was increasingly dis-

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[112] *Id.* at 63.

[113] Letters from Frankfurter to Bickel, Mar. 18, 1963, and Oct. 8, 1964, FRANKFURTER PAPERS, Box 24, folder 359.

[114] THE WARREN COURT, *supra* note 1, at 162.

[115] *Id.* at 163-67, 168.

[116] *Id.* at 161.

[117] *Id.* at 164.

[118] *Id.* at 159-60.

[119] *Id.* at 85.

[120] *Id.* at 164.

turbed by the series of reapportionment cases after *Baker v. Carr*[121] which laid down the "one person, one vote" standard. He believed that judicial application of such a principle was impractical and unwise, and would constantly draw the courts into areas where they had no business.[122] "The judges are plunged into second-guessing the expedient, empirical, political judgments of fifty state legislatures decade after decade," he maintained. "This they are unfitted to do," and the frustrating attempt could only bring them into "disrepute."[123] Bickel could not resist suggesting, as Frankfurter had argued to him, the analogy with the "old" Court. Such judicial intervention "was not satisfactory then and it will not prove satisfactory now."[124]

The more critical tone that marked *Politics and the Warren Court* became increasingly characteristic in the next few years.[125] Bickel was undoubtedly moved by Justice Frankfurter's death in early 1965, a great personal and intellectual loss for him. In his eulogy Bickel had proclaimed Frankfurter one of the three unquestionably "great" modern Justices, ranking with Holmes and Brandeis.[126] "Above all there never was such a friend." Frankfurter "will influence political thought," Bickel declared in a prophecy he would work to fulfill, "so long as there is a Supreme Court and so long as men are concerned to make their actions fit the American constitutional tradition."[127]

That the Court was now dominated by a "Hugo Black majority" was a constant spur. Frankfurter's retirement had helped make a difference, and in the middle and late sixties there was a "second" Warren Court, more activist, more innovative, and more sweeping in its decisions. Bickel was particularly distressed by the "vagaries of the subjective individual judgments" he saw in the *Mishkin* and *Ginsburg* obscenity cases, by the "arbitrary" nature of the retroactivity rule adopted for applying *Miranda* and by the ever-widening and rigid application of the "one person, one vote" rule.[128]

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[121] *Id.* at 99. 369 U.S. 186 (1962).

[122] THE WARREN COURT, *supra* note 1, at 191-98.

[123] *Id.* at 197.

[124] *Id.* at 198.

[125] *See, e.g.*, Bickel, *Close of the Warren Era*, 161 NEW REPUBLIC, July 12, 1969, at 13, and Bickel, *Is the Warren Court Too 'Political'?*, N.Y. Times (Magazine), Sept. 25, 1966, at 30.

[126] Bickel, *Felix Frankfurter, 1882-1965*, 152 NEW REPUBLIC, Mar. 6, 1965, at 7.

[127] *Id.*

[128] Bickel, *Is the Warren Court Too 'Political'?*, N.Y. Times (Magazine), Sept. 25, 1966, at 30, and Bickel, *Obscenity Cases*, 156 NEW REPUBLIC, May 27, 1967, at 15.

The reapportionment cases seemed to him not only rigid and mistaken, but also symbolic of a doctrinaire mentality that was hardening among the Court's "liberal" Justices. In fact, Bickel came to believe, "liberals" throughout the nation were growing more rigid and "ideological" in their politics. They were insisting on the immediate fulfillment of their ideals, and the ideals were becoming absolutes, chanted but not analyzed. The result was a politics of abstractions which would prove disruptive and self-defeating. Though he identified himself in 1965 as a "confirmed liberal and instinctive Democrat,"[129] he began to warn against the simplistic commitment to egalitarianism and majoritarianism which he would ultimately see as "a tide flowing with the swiftness of a slogan."[130] Liberals had begun to attack the electoral college, for example, on abstract majoritarian grounds, yet a clear analysis of the institution's function revealed that it was in fact "the only effective hold on power in the federal government that the urban population centers have."[131] The doctrinaire mentality was endangering liberal goals everywhere.

More importantly, Bickel's optimism about desegregation began to wane in the late sixties. While he noted the growing white suburban opposition to comprehensive desegregation plans, he was more concerned about the fact that the whole civil rights movement had reached a fundamental turning point. For the challenge had shifted "from the legal structure of discrimination in the South, which could be dismantled by law, to conditions of disadvantage in the North, which will not answer to statutes declaring and enforcing rights."[132] Resolving the problems created by de facto segregation and discrimination was "infinitely more difficult" and could be accomplished only by massive and long term social reordering. If that were the case, then the courts, which had been only partly effective in destroying legal discrimination, would be wholly ineffective in dealing with de facto problems. Bickel feared, too, that the courts would refuse to recognize their inability and simply make everything worse. He saw his apprehension confirmed in 1967 when Judge J. Skelly Wright, a well known judicial "liberal" sitting on the United States Court of Appeals for the District of Columbia, handed down a decision condemning the District's whole educational system and de-

[129] Bickel, *Liberals and John Lindsay*, 153 NEW REPUBLIC, July 3, 1965, at 16.

[130] IDEA OF PROGRESS, *supra* note 18, at 111.

[131] Bickel, *The Case for the Electoral College*, 156 NEW REPUBLIC, Jan. 28, 1967, at 15, 16.

[132] Bickel, *The Belated Civil Rights Legislation of 1968*, 158 NEW REPUBLIC, Mar. 30, 1968, at 11.

manding a major restructuring that would significantly increase school integration.[133] Declaring de facto segregation unconstitutional, Bickel maintained, would discredit the courts without solving any social problems. There was no possible judicial remedy, and the decision was unwise, unconvincing and futile. As an indication of the way the courts might begin to move, it worried Bickel deeply and pushed him to reconsider the whole problem of court ordered desegregation.[134]

Finally, the late sixties challenged Bickel's optimism in areas beyond the issue of desegregation. The social turmoil created by the war in Viet Nam was sufficiently violent to shake the faith of many, and Bickel was hardly alone in seeing "a gathering of crisis of allegiance to the very system by which we govern ourselves."[135] Identifying Robert F. Kennedy with the moral tradition of Brandeis, Bickel gave himself to Kennedy's presidential campaign of 1968 "heart and mind," a commitment that meant "more than any prior political commitment, or than any conceivable new one."[136] "I believed," Bickel wrote after Kennedy's death, "that he above all other public men would . . . stop war and heal suffering" because he "had the trust of those whose trust we desperately need." The assassination was a profound and personal shock. Though he counselled against despair, he seemed almost to succumb himself. Kennedy had been an "irreplaceable" leader, for he had come "to know better and more deeply than anyone how dangerously we are nearing a dead end."[137] The whole experience left its mark, and Bickel sensed ever more keenly the fragility of the social order and the paramount necessity of preserving it. In the aftermath of the November elections he had the time to reflect on the events of the preceding years, and he felt the necessity of doing so.

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Fortune provided Bickel a suitable platform from which to announce his sober reconsiderations. He was invited by the Harvard Law School to give the annual Oliver Wendell Holmes, Jr. Lectures, a prestigious forum which a number of prominent legal thinkers had used in the past to

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[133] Hobson v. Hansen, 269 F. Supp. 401 (1967).

[134] Bickel, *Skelly Wright's Sweeping Decision*, 157 NEW REPUBLIC, July 8, 1967, at 11.

[135] Bickel, *A Communication : The Kennedy Cause*, 159 NEW REPUBLIC, July 20, 1968, at 42.

[136] *Id.*

[137] *Id.*

present major statements. Bickel seized the opportunity. By the fall of 1969 he was ready to launch a sweeping attack on both the goals and methods of the Warren Court. Hailed by one Harvard Law professor as "blockbuster,"[138] the lectures were published in an expanded version the next year as *The Supreme Court and the Idea of Progress.*[139]

In many of its specifics the book was familiar, but its tone and orientation were profoundly different. The insistence on reason and neutral principles, on judicial restraint and democratic primary all remained, but Bickel was no longer primarily concerned with exploring their ramifications. Instead he was determined to build a devastating case against what he regarded as the intellectual and practical failures of the Warren Court. As a lawyer's brief the book was slashing and powerful. As the product of a first-rate, creative mind, it was disappointing. The immediately preceding years had changed Bickel, and the intellectual tensions that had previously energized his thought, the elements that had given his work its depth and subtlety, were no longer coiled and taut. The resulting work was overdrawn and one-dimensional.

Abandoning his earlier denigration of the importance of legal realism, Bickel now argued that a group of "progressive realists," which included originally both Brandeis and Frankfurter, had begun to dominate American jurisprudence during the early twentieth century and "had come to power in the late 1930's."[140] Recognizing that judges indeed "made" law, they had been caught between their beliefs in democracy and judicial restraint on the one hand and their belief in their own "fundamentals" on the other. Even Frankfurter, who struggled conscientiously with the problem, "never achieved a rigorous general accord between judicial supremacy and democratic theory."[141] Heirs to part of the "progressive realist" legacy, the judges of the Warren Court saw themselves as statesmen making far-reaching policy decisions, whose ultimate validity would be judged only by their success in molding the desired liberal future. While in *The Least Dangerous Branch* Bickel himself had accepted a similar role for the Supreme Court and a similar standard for judging its success, by 1969, he had come to believe the role too aggressive and the standard too elusive. Following the ideal of "statesmanship informed by the judicial intuition of progress," he charged, the Warren

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[138] Quote as reported in Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court,* 84 HARV. L. REV. 769, 802-03 (1971).

[139] IDEA OF PROGRESS, *supra* note 18.

[140] *Id.* at 21.

[141] *Id.* at 34.

Court had sought to implement the ideological imperatives of majoritarianism and egalitarianism, which in turn led to excessive centralization and legalization.[142] Deeply flawed technique and failure to generate proper "neutral" principles led the Court into a "web of subjectivity" that discredited the law and disrupted democratic institutions. Bickel attempted to clinch his argument by pointing out that the desegregation and reapportionment cases were "heading toward obsolescence, and in large measure abandonment" because they had brought social results that were self-defeating and because they were proving to be mutually contradictory, not in the Court's imagined future but in the real future that was about to arrive.[143]

Though Bickel scored some forceful points, the overall analysis was unfair. He dealt only with a small number of cases, including some that were hardly of the greatest social significance. Many of his readings were at best arguable, and some were unconvincing. He cited *Katzenbach v. Morgan*,[144] for example, to demonstrate the Court's centralizing and majoritarian tendencies, yet in that case the Court had *upheld* Congressional legislation intended to guarantee Fourteenth Amendment rights. Indeed, he might just as easily have cited the case as an example of admirable self-restraint by the "deviant" branch in a democratic system. *Morgan* only demonstrated once again that judicial passivity could be as politically significant as judicial activism, a principle which Bickel had previously recognized as fundamental. Moreover, major occasions of Warren Court activism which Bickel endorsed, including the early desegregation decisions and the criminal procedure and free speech cases, were either downplayed or ignored. *Miranda v. Arizona*,[145] for example, one of the most widely condemned decisions in the history of the Court, merited Bickel's approval as "a radical, if justifiable, departure."[146] The method of his criticism, stretching some cases out to their logical limits and narrowing others sharply, had an element of the arbitrary about it. Very likely any court at any time could have been convicted by the same techniques, and Bickel acknowledged that he was unsure whether the craftsmanship of the Warren Court was really below that of its predecessors. In any case, he maintained, such a comparison "really does not matter one way or the other, for intellectual incoherence is not excusable and is no more tolerable because it has occurred before."[147]

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[142] *Id.* at 40.

[143] *Id.* at 173.

[144] 384 U.S. 641 (1966); IDEA OF PROGRESS, *supra* note 18, at 113.

[145] 384 U.S. 436 (1966).

[146] IDEA OF PROGRESS, *supra* note 18, at 49.

[147] *Id.* at 47.

Though Bickel was ready to condemn the Court for its "intellectual incoherence," his own standards of judgment were rather confusing. There was, in fact, an apparent paradox operating throughout *The Supreme Court and the Idea of Progress,* for Bickel retained the idea of "principle" as the justification for the Court's purpose at the very time he himself was losing faith in it. "The Court is the place for principled judgment," he reiterated, emphasizing that it was "the place *only* for that."[148] He charged the Warren Court with failing to develop adequately neutral principles on which to base its decisions, and at times seemed to assume that truly valid principles must be almost absolute and inflexible in their application as, for example, when he condemned the "one person, one vote" rule to ultimate obsolescence because it created absurdities when carried to its universal, unqualified extreme.[149]

Yet even as he held this standard of principled adjudication up to the Court, Bickel was beginning to doubt the utility and even the existence of actual principles. He urged the Court "to define principle in the narrowest possible compass," and to approach it "through a line-drawing process, case by case."[150] That was surely sage common law advice, but if it were followed very few cases would contain truly neutral principles. Elsewhere Bickel praised a series of free speech cases that were "made on thinly distinguishable sets of facts," which were "often narrow to the point of being virtually *ad hoc,*" and which "do not in the aggregate amount to a generalizable proposition."[151] But despite this lack of any discernible, let alone neutral, principle, Bickel defended them as "not analytically vulnerable" and "in contrast to the erratic and apparently inarticulate subjectivity of the Court's obscenity decisions."[152] If this were true of cases that lacked any "generalizable proposition," what had happened to the idea of principle as the touchstone of judicial propriety? As far as a justification for judicial review, at least, his answer was clear. "I have come to doubt in many instances the Court's capacity to develop 'durable principles', and to doubt, therefore, that judicial supremacy can work and is tolerable in broad areas of social policy."[153]

In his critique of the Warren Court the paradox of upholding the principled ideal but denying its practicability allowed him to attack from front and rear; on a deeper level, however, the paradox disappeared, for

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[148] *Id.* at 87 (emphasis added).
[149] *Id.* at 166-73.
[150] *Id.* at 95-6.
[151] *Id.* at 77.
[152] *Id.*
[153] *Id.* at 99.

Bickel was restricting the Court even more severely by limiting the permissible scope and number of valid constitutional principles. The real sin of the Warren Court was not its technical failure to elaborate principles, but rather its frequent invocation of the very name principle. Though Bickel cited *The Least Dangerous Branch* for its techniques of rationally avoiding principle,[154] he was, more significantly, undermining the foundation of moral activism that his earlier work had accepted.

Bickel was not only reconsidering the utility of neutral principles, but was also beginning to fear their very assertion. The Court had provoked only mild opposition with its narrow criminal procedure cases, he noted. "It headed into trouble after the strongly, and as one may think soundly, principled decision in *Miranda v. Arizona*."[155] He had thus come to doubt the advisability of the Court's asserting a principle which he accepted, in a case which he admired, in an area of law which he regarded as uniquely within the purview of the Supreme Court. While principle alone justified the Court's unique functions, it was principle itself that presented a special "source of danger to the survival of the institution."[156]

Bickel's newly deepened skepticism and distrust of principle grew from three sources. The first was his increasing belief in the sheer complexity of society and the consequent inability of men to manage it efficiently. The frustrating fifteen year effort to implement *Brown* discouraged him and seemed to confirm his general conviction, from which he had in part excepted desegregation, that judge-made law was ineffective in dealing with large social issues. "What the *Brown* opinion ultimately envisioned seems for the moment unattainable, and is becoming unwanted."[157] Social change could effectively come, he now believed, only from the evolution of a society's "full tradition, in all its contradictions" — a glacial process that could be neither fully directed nor significantly hastened.[158] Though Bickel had always given weight to the demands of tradition, he now saw it as much more intractable and rigidly determinative. No "principle-prone and principle-bound" judicial methodology could possibly direct such a process.[159] In addition, Bickel's faith in the vitality of an underlying structure of American ideals had withered in the heat of the social turmoil of the late sixties. There was

[154] *Id.* at 98.
[155] *Id.* at 96.
[156] *Id.*
[157] *Id.* at 150.
[158] *Id.* at 175.
[159] *Id.*

a fragmentation of groups and of values, Bickel maintained, and basic moral concepts no longer united most Americans. "The words are used in a different sense now because they are no longer rooted in a single, well-recognized ethical precept."[160] The public schools, for example, had become "rigorously devoid of any religious — or, as some would say, moral — content."[161] In fact, what he saw as social and moral fragmentation struck him so forcefully, that he even rejected the Brandeisian-Frankfurterian ideal of the secular, egalitarian public school as the generator of democratic, unifying values. "The ideal seems, as the public schools pursue it, increasingly illusory and myth-ridden," he charged.[162] In a society so fragmented that its major institutions for socialization and change had miserably failed, there seemed few if any moral principles for which the Court could gain broad acceptance.

Finally Bickel's growing skepticism about the utility of principles was rooted in his new suspicion that they could become "ideological." The kind of broad moral principles he had defended in *The Least Dangerous Branch* now seemed no longer rationally limitable, or possibly even defensible. Drawing on the Holmesian-Frankfurterian condemnation of absolutes,[163] and distressed by both the broad applications of doctrine by the Warren Court and the aggressive moral rhetoric of the late sixties, Bickel began to conceive of principles as absolutistic, moralistic imperatives that drove men to uncompromising social conflict. He could draw on a large body of social science literature that defined and condemned such "ideological" attitudes; when morally based constitutional principles came to seem "ideological," they became by definition dangerous and destructive. If principles were in practice "ideological," and if the justification for the Court remained the elaboration of principle, then the Court inevitably appeared even more suspect and potentially disruptive than it had earlier.

The only solution for the social and moral fragmentation he saw in America lay in the wholly non-"ideological" politics of pluralism. By accepting the variety of groups in America, each with its own interests and values, and by allowing them to reach their owm compromises with one another, a workable and tolerable form of self-government was possible. The United States enjoyed "a system in which all groups have access to political power," Bickel maintained, one which was free, open,

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[160] *Id.* at 84.
[161] *Id.* at 137.
[162] *Id.* at 138.
[163] *Id.* at 95.

and flexible.[164] The enforcement of black voting rights in the fifties and sixties seemed to have eliminated the one major imperfection in the system. "So long as the process is operational and both diffuses power and allows majorities to work their will," he concluded, "no group that is prepared to enter into the process and combine with others need remain permanently and completely out of power."[165] The existing system, pragmatic, largely unprincipled, and basically just, could thus preserve and even improve itself, but only if it were free from the frequent coercion of principle either from the Court or any other "ideological" force.

In *The Least Dangerous Branch*, Bickel had seen the courts as the special voice of reason, uniquely suited to elaborate proper principles; the political process had appeared erratic and given to excess. When principles became "ideological" in the late sixties and Bickel's primary goal shifted from achieving moral reform to ensuring social tranquility, the judgment had to be reversed. The judiciary became erratic, the political system rational. The democratic process scarcely needed the checking power of principles because it possessed its own checking power — the politics of balancing groups. Bickel's anti-ideological relativism combined with his altered political focus to transform the rigidity of the political system and the massive power of organized economic groups into great democratic goods. Instrumental reason, which constantly appealed to reality to justify its conclusions, once more concluded by conceiving of that reality as a reflexively validating rational structure. If the Warren Court imagined the past, Bickel imagined the present.

His sanguine view of pluralism, though necessary for his theory, was based on the most dubious of assumptions. It completely ignored the economic institutions that dominated policy decisions as well as the gross inequality among the "groups" that existed in American society. Bickel spoke of a new movement for a Brandeisian decentralization; yet, unlike Brandeis, he refused to confront the real loci of concentrated power in the United States and refused to demand the decentralization of economic institutions. He called for a realistic analysis of American politics, disregarding the fact that "pluralism" simply meant that the wealthier, more powerful, and better organized groups would continue to dominate government. And though he acknowledged the power of these elites, he attempted to overcome potential objections by asserting that elections always "influence" and "sometimes" even "determine" public policy anyway,[166] despite his own recognition in the course of his attack on the

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[164] *Id.* at 86.
[165] *Id.* at 37.
[166] *Id.* at 83.

"one person, one vote" rule that the "majoritarian" assumption that "legislative policy is really made in elections" was "hardly realistic."[167] In effect, Bickel, who continually emphasized the complexity of social problems, was willing to settle for a view of pluralism that was simplistic and mechanical.

This pluralist perspective, which played an increasingly crucial role in Bickel's thought, was the source of his attack on "majoritarianism". He mounted a substantial attack on the "one person, one vote" principle by showing the ways in which it could conflict with other important and valid political considerations. The attack was ultimately unconvincing, however, for in his determination to convict the Warren Court and its defenders of "uncompromising majoritarianism" he overdrew his indictment.[168] The "one person, one vote" rule was, after all, only a kind of minimal constitutional requirement and not an example of minute and detailed judicial control. It left wide flexibility for ensuring the representation of different groups; though it could not end gerrymandering, it could make grossly unfair districting more difficult. Again, the minimal "one person, one vote" requirement would hardly interfere with the "real" politics of pluralism, nor did it make American government "majoritarian" in any fundamental or radically new sense. In fact, to the extent that Bickel insisted that "our government is not, and ought not be, strictly majoritarian,"[169] his general case for the essentially undemocratic "deviance" of the Supreme Court's tradition of judicial review was significantly weakened.

The Supreme Court and the Idea of Progress marked a significant change in Bickel's work. No longer did he emphasize the centrality of broad and generally accepted principles, but rather the conflict between a variety of diverging principles and the difficulties of their application. It was impossible to make a principled judgment between principles, and it was equally impossible to reduce such complex judgments to any kind of clear rule. As a result, he concluded, "we do not confine the judges, we caution them. That, after all, is the legacy of Felix Frankfurter's career."[170] Perhaps it was because he believed one could only "caution" judges that he came to caution them so forcefully. And though he retained his personal commitment to full racial equality, he seriously doubted it would be achieved in the forseeable future. The social problems of the day seemed more and more intractable, and he accepted C. Vann Wood-

[167] *Id.* at nn. 168-69.
[168] *Id.* at 112.
[169] *Id.* at 83.
[170] *Id.* at 177.

ward's suggestion that the "Second Reconstruction" was coming to an end. He no longer believed, as he had in 1956, that time "in the long run works for integration, and what is more, for integration under optimum conditions."[171] He was increasingly concerned about disruptiveness of change and major criticisms of American society now seemed primarily "ideological". The necessity for stability and compromise moved to the center of his thought, and he was soon speaking of the nation's future in terms of "the mystery of survival."[172]

During his last few years Bickel remained politically "liberal" on many issues. He continued to oppose the war in Viet Nam, criticized the Nixon administration's crime and anti-busing bills, supported attempts to reform the Democratic party, and argued for the assertion of Congressional authority over foreign policy issues.[173] Much of his ardor had waned, though, and his writings were frequently filled with cautions and caveats. On racial issues he continued to encourage the attack on the vestiges of legally supported segregation, but emphasized more and more the crucial difference between ending segregation and achieving actual integration. Busing, for example, often led to white "flight" and helped foster a *de facto* resegregation that was impossible for the law to prevent. Increasing black demands for community control of the schools convinced him that an uncompromising drive toward integration would be a disservice to both races. The most workable solution for the immediate future, he came to believe, would be to emphasize decentralization and community control of schools, to provide large-scale federal aid to improve general educational quality, and to encourage the voluntary transfer of students to schools in which their race was in a minority.[174] He now

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[171] Bickel, *supra* note 132, at 11; Bickel, *supra* note 44, at 14.

[172] A. BICKEL, REFORM AND CONTINUITY 91 (1971). For an extended critique of THE SUPREME COURT AND THE IDEA OF PROGRESS that emphasizes Bickel's political conservatism, *see* Wright, *supra* note 138. *See also* Krislov, Book Review, 56 CORNELL L. REV. 1031 (1971).

[173] *See, e.g.*, Bickel, *How to Beat Crime*, 161 NEW REPUBLIC, Aug. 30, 1969, at 10; Bickel, *Sharing Responsibility for War*, 165 NEW REPUBLIC, Sept. 25, 1971, at 15; Bickel, *The Need for a War-Powers Bill*, 166 NEW REPUBLIC, Jan. 22, 1972, at 17; Bickel, *Will the Democrats Survive Miami?*, 167 NEW REPUBLIC, July 15, 1972, at 17.

[174] *See, e.g.*, Bickel, *Where Do We Go From Here*, 162 NEW REPUBLIC, Feb. 7, 1970, at 20; Bickel, *The Debate Over School Desegregation: A Reply*, 162 NEW REPUBLIC, Mar. 21, 1970, at 28; Bickel, *What's Wrong with Nixon's Busing Bills?*, 166 NEW REPUBLIC, Apr. 22, 1972, at 19; Bickel, *Untangling the Busing Snarl*, 167 NEW REPUBLIC, Sept 23, 1972, at 21; Bickel, *Busing: What's to be Done?*, 167 NEW REPUBLIC, Sept. 30, 1972, at 21.

reversed his earlier position on "benevolent" quotas, too, and condemned them as socially inefficient and morally wrong.[175]

More and more Bickel came to base his judgments, as Frankfurter had, on the primary need for protecting the independence and integrity of the judicial process. He attacked the Nixon administration's crime bill not just because it ignored underlying social causes of crime but because it unfairly and opportunistically blamed the courts and proposed limiting their authority.[176] Similarly, he rejected the administration's anti-busing bill because it deprived the federal courts of substantial elements of their constitutional power. "Much as I agree that the courts have gone substantially wrong of late in administering the rule of *Brown v. Board of Education* by tending to view mass integration as the be-all and end-all of school policy," he wrote in 1972, "I deplore as more destructive than the worst of busing the attempt to work such a reallocation of powers between Congress and the Supreme Court."[177]

Bickel's central concern with preserving the integrity of the judicial process manifested itself equally in his work on The Study Group on the Caseload of the Supreme Court. One of seven prominent lawyers appointed by Chief Justice Warren Burger in 1972 to investigate ways to cope with the steadily increasing number of appeals filed with the Court, Bickel supported several recommendations including the controversial proposal to establish a new National Court of Appeals which would screen all cases carried to the Supreme Court and render judgment on a significant number.[178] In dealing with the problem of the burgeoning case load, Bickel believed, the real threat to judicial integrity came from Court activists and those cynical realists who believed that "the task of decision is more an individual administrative or executive event than a collective scholarly and deliberative process."[179] Emphasizing the propriety of the latter view, as he had done in *The Unpublished Opinions*, Bickel insisted that the Court's workload must be cut drastically so that the reflective process of "collegial deliberation" would be given time to

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[175] Bickel, *More on Quotas*, 167 NEW REPUBLIC, Oct. 28, 1972, at 8. *See also* MORALITY OF CONSENT, *supra* note 5, at 131-34. Bickel argued in support of prohibiting racial quotas on constitutional grounds before the Supreme Court in 1974. He was co-counsel with Philip Kurland for the Anti-Defamation League of B'nai B'rith, on its amicus curiae brief in DeFunis v. Odegaard, 416 U.S. 312 (1974).

[176] Bickel, *How to Beat Crime*, 161 NEW REPUBLIC, Aug. 30, 1969, at 10.

[177] Bickel, *What's Wrong with Nixon's Busing Bills?*, 166 NEW REPUBLIC, Apr. 22, 1972, at 19.

[178] A. BICKEL, THE CASELOAD OF THE SUPREME COURT (1973).

[179] *Id.* at 27.

operate. That process alone justified judicial review, and was the very essence of the ideal of a rational legal system. "If we should let it reach the point of breakdown or, taking the term 'machinery' seriously, let it transform itself into a high-speed, high-volume enterprise," he declared, "we would mock the idea of justice and mock the substantive reforms of a generation."[180] Whatever the admitted drawbacks to limiting more rigorously the number of cases the Court would hear, they did not outweigh the primary good of ensuring the conditions that would allow the process of reason, Henry Hart's "maturing of collective thought," to function in the formation of constitutional law.

Bickel's commitment to, and near equation of, reason and procedural regularity served as the foundation for the attempt he made in his last years to elaborate a broader political philosophy. He recognized the institutional failures involved in the government's Viet Nam policy and in the Watergate episodes, and feared that the succeeding waves of social protest and disobedience "carried the clear and present danger of anarchy."[181] His essays increasingly pleaded for reason and restraint in social affairs, and his method for achieving them was adherence to a procedural regularity that would bind the while society. When he supported meaningful Congressional involvement in foreign policy, for example, he did so not because he thought Congress would necessarily prove wiser than the Executive but because he believed new legislation could establish procedures that would ensure a greater scope to rational discussion. "The only assurance there is lies in process," he argued, "in the duty to explain, justify and persuade, to define the national interest by evoking it, and thus to act by consent."[182]

As the Watergate prosecutions unfolded, Bickel continued to insist on procedural rigor and pointed to the possible dangers involved in questionable legal moves designed to facilitate prosecution. Though he came to believe in the President's probable culpability, he maintained that the politically representative Congress should carry the burden of an orderly impeachment effort and that the Courts should become involved only on such clearly and technically "legal" issues as determining the specific relevance of subpoenaed material to alleged criminal acts.[183]

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[180] *Id.* at 27, 37.

[181] MORALITY OF CONSENT, *supra* note 5, at 119.

[182] Bickel, *The Need for a War-Powers Bill*, 166 NEW REPUBLIC, Jan. 22, 1972, at 18.

[183] *See* Bickel, *The Tapes, Cox, Nixon*, 169 NEW REPUBLIC, Sept. 29, 1973, at 13; Bickel, *What Now?*, 169 NEW REPUBLIC, Nov. 3, 1973, at 13; Bickel, *Impeachment*, 169 NEW REPUBLIC, Nov. 10, 1973, at 9; Bickel, *How Might Mr. Nixon Defend Himself?*, 170 NEW REPUBLIC, June 1, 1974, at 11.

Fully aware of his declining health and impending death, Bickel devoted his last months to completing his final book, a conscious summing up of his political philosophy of procedure. He put the finishing touches on *The Morality of Consent* only a week before he died. Though the tragic haste of preparation revealed itself in the book's unevenness, Bickel succeeded in producing a humane and worthy last testament.

The Morality of Consent focused on the paramount necessity of preserving an open, democratic political process in the face of institutional and ideological pressures to close it down. He had earlier criticized the Warren Court for its lack of "pragmatic skepticism" and now he extended the charge broadly.[184] America was experiencing a period of social chaos, he argued, because "the moral element in countless political issues is singled out as decisive so often by so many."[185] The Supreme Court and much of American society were infected with the ideology of "liberal contractarian moralism," a conviction "that society must bend to a catechism of principles, hence a moralism not a little infected with authoritarianism."[186] A politics of moralistic absolutism or of "ideological" imperatives led not only to coercion and disruption, but also to the ultimate destruction of any real "politics." "Our problem," he declared, "is the totalitarian tendency of the democratic faith."[187] The only solution for such chaos, the only way to restore an effective and peaceful democratic politics, was to embrace pragmatic skepticism, moral relativism, group "pluralism," and the method of compromise and accommodation. Values and ideals were still essential, but their full realization was doubtful and could only come through the gradual evolution of a society's whole cultural tradition. Politics must be guided by the "computing principle," the careful calculation of the proper balance to be drawn between culturally authenticated moral considerations and the demands of expedience determined by existing groups and institutions. The pursuit of any kind of absolute was foolish and dangerous. "Better to recognize from the first," he maintained, "that the computing principle is all there is, ought to be, or can be."[188]

In elaborating his relativistic theory of democracy Bickel drew on the intellectual skepticism of Frankfurter and especially of Holmes for support. Revealingly, Brandeis, whom Bickel continued to admire, had no real place in his last book, for Brandeis was too much identified in

[184] Bickel, *Close of the Warren Era*, 161 NEW REPUBLIC, July 12, 1969, at 13, 16; MORALITY OF CONSENT, *supra* note 5, at 8.

[185] MORALITY OF CONSENT, *supra* note 5, at 95.

[186] *Id.* at 7.

[187] *Id.* at 12.

[188] *Id.* at 88. *See also id.* at 11-25.

Bickel's mind with morally based reform. Instead, Bickel turned to Edmund Burke as an authority testifying against the evils of moralistic absolutism. His extended appeal to Burke's authority was grounded in a conventional view of the Englishman as the far-sighted father of modern philosophical conservatism, the spokesman for pragmatic change when change became unavoidable. Bickel's newly announced reverence was based, however, not on a comprehensive historical understanding, but rather on the utility of some of Burke's writings for reinforcing the views that Bickel himself had independently decided to promote. Occasionally his effort to invoke Burke's traditionalism led him to preciosity, as when he approved Burke's concern for organic local units and the individual's sense of the "glory of belonging to the Chequer No. 71."[189] Not only was such a view simply irrelevant to most problems of contemporary electoral districting, but it revealed the distance Bickel had travelled in ten years. "Any given neighborhood," he had declared in *Politics and the Warren Court*, "is, after all, an arbitrary construct, the trace at some time of somebody's pencil on a map."[190]

Bickel's self-conscious "conservatism" was actually rooted, not in Burke, but in his pragmatic skepticism and full acceptance of the theory of political "pluralism" which had come to dominate American social theory in the forties and fifties. At the foundation of "pluralism" were the beliefs that all absolutes were dangerous (thus transforming the old pragmatic hostility to metaphysics into an attack on all "ideology"); that American society was a morally relativistic society functioning through decentralized groups; and that the existing social order was basically flexible and just. Bickel accepted all those beliefs, and they came to dominate his thinking in the late sixties at precisely the time "pluralism" was coming under heavy attack as an ideology of the status quo that ignored the de facto injustices and concentrations of power that existed in America. *The Morality of Consent* represented a restatement of 'pluralism" wholly self-conscious of its function as a support for an endangered status quo.

Bickel was not, however, simply a defender of the status quo. The argument of *The Morality of Consent* was more complex. Although his focus was on preservation and he accepted the existing cultural tradition as the basis of moral good, Bickel was not seeking a repressive, changeless, or closed society. He was , in fact, seeking ways to guarantee the

[189] *Id.* at 17.

[190] THE WARREN COURT, *supra* note 1, at 35. In his 1965 book Bickel had been much less concerned with the problem of social stability: "The condition of the Negro, cruelly neglected for so long, cannot be remedied all at once. Until it is, we deserve no peace." *Id.* at 90.

greatest possible political openness within a firmly established set of institutions. The tragic haste with which the book was finished undoubtedly prevented him from reconciling his ideas more fully, but once again Bickel was exploring institutional tensions, and hence the book frequently sparkled with his characteristic insights.

His discussion of civil disobedience, partially adapted from earlier essays, is one example. Bickel there encouraged considerable leeway for forces of social protest and defended a variety of forms of civil disobedience, while maintaining that the legal system's "fundamental premise is that its own stability is itself a high moral value, in most circumstances the highest."[191] The ground for distinguishing legitimate from illegitimate civil disobedience was the extent to which each instance was an appeal directed somewhere within the system — to its laws, its judicial hierarchies, its accepted principles — and the extent to which it was an appeal against, or wholly independent of, the system itself. "Therefore, the use of civil disobedience, not to redress grievances on the assumption of the continued operation of the system and by plausible appeal to its own principles, but against it," he declared, "ought not be tolerated."[192] Bickel was trying to institutionalize a wide range of social protest, to protect dissent by channelling it, to strengthen institutions by keeping them flexible.

The underlying irony of *The Morality of Consent* lay in the fact that Bickel had obviously failed, as he admitted Frankfurter had failed, in achieving any "rigorous general accord between judicial supremacy and democratic theory."[193] Bickel, reacting to the threat of social disorder, now accepted a greater activism on the part of the Court as the guardian of the democratic political process. He placed a new emphasis on the Court's duty "to make the political process work" by guaranteeing First Amendment rights[194] which differed in tone from much of his earlier work in two ways. First, he treated the Court's role in preserving rights as more crucial in practice than he had earlier. Second, by accepting the criterion of making the political process work which he had rejected as a justification for some Warren Court decisions, he embraced a test that was as indeterminate in application as it was sensible in principle.[195] It did not, in other words, "rigorously" delimit any proper area of Court intervention.

Even more revealing, Bickel attacked the occasional practice of

[191] MORALITY OF CONSENT, *supra* note 5, at 120.

[192] *Id.* at 117-18.

[193] IDEA OF PROGRESS, *supra* note 18, at 34.

[194] MORALITY OF CONSENT, *supra* note 5, at 62.

[195] *Id.* at 62-63.

using "citizenship" as a substantive constitutional concept on the grounds that it was "metaphysical" and capable, therefore, of being used to deprive "persons" of their constitutional rights. Protection of "persons," not "citizens," he maintained, was the "authentic voice" of the Constitution.[196] As a consequence he urged the courts to strike down legislative attempts to violate that "authentic voice." He was primarily attacking the Warren Court and its supporters who had occasionally emphasized the importance of citizenship, but his emphasis was on the Court as a more active protector of individual rights.[197]

The book was filled with shrewd as well as questionable judgments on individual questions. His discussion of civil disobedience, the doctrine of citizenship, and the role of a free press were forceful and persuasive. His analyses of "liberal contractarianism" and of the role of the Warren Court's activisim in setting the stage for the lawlessness of Watergate were not.[198] Perhaps the central intellectual failing of the book, however, was Bickel's unwillingness to deal with the intellectual challenge the nineteen sixties presented and his consequent readiness to embrace more fully an outmoded theory of pluralism. In his quite legitimate and warranted concern with social disruption and turmoil he ignored the fact that the sixties had been exciting and crucial not just because of the political activism but also because the activism had been related to and, in some indirect part, had grown out of new ideas. The sixties had witnessed the exposure of the complicated and profound institutional interrelationships between government, the universities, the military, and the business community, an exposure that could no longer be ignored if one wanted to discuss the "realities" of American politics. The sixties witnessed the culmination of a broad and powerful philosophical critique of the idea of "objectivity," not only in the social sciences but also in the "hardest" of the physical sciences as well. The sixties witnessed a concomitant challenge to the idea of a neutral, professional administrative elite that could

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[196] *Id.* at 47.

[197] *Id.* at ch. 2. Bickel was criticizing such Warren Court opinions as Perez v. Brownell, 356 U.S. 44, 62 (1957) (Warren, J., dissenting), where the doctrine of the substantive nature of citizenship was expressed by the Chief Justice, and Afroyim v. Rusk, 387 U.S. 253 (1967), in which the earlier dissent "became the prevailing view." MORALITY OF CONSENT, *supra* note 5, at 52. Bickel also undoubtedly had in mind the broad interpretation of the Warren Court written by his colleague Professor Charles L. Black, Jr., which made the substantive concept of citizenship central to the Constitution. *See* Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3 (1970).

[198] For the unpersuasive and disappointing attempt to argue this relationship, see MORALITY OF CONSENT, *supra* note 5, at 121-22.

be entrusted with the "efficient" and "value-free" administration of the public business. Ultimately the sixties witnessed the spread of new ideas that challenged the very concept of "reason" itself, not ideas that denied "reason" as something distinct from "subjectivism" or "instinctivism" but ideas that nevertheless called for a reconsideration of the nature and scope of that distinction. While many aspects of the decade represented trivial faddism, personal self-indulgence, and even sterile solipsism, there were also serious developments that called for a profound rethinking. Those Bickel ignored. He was still willing, for example, to contrast "neutral" standards with "political" ones and to equate "anti-professional" with "anti-intellectual" as though those distinctions had never been meaningfully challenged.[199]

Had Bickel enjoyed a longer life he would undoubtedly have turned to the intellectual challenges the sixties offered and considered them with his usual thoughtfulness. Certainly his analysis would have been insightful and his judgments independent. His wide and varied audience will miss that reconsideration acutely.

VI

Alexander Bickel was not a seminal figure, nor did he offer any large or exciting visions. He chose rather to operate within an already established tradition and to refine and adapt its assumptions to changing conditions. Further, the tradition he chose confined his speculative range even more by its consciously narrow professional technique and its conscientiously rigorous self-limitation. His analytical powers and forceful style guaranteed him an audience, but the tradition he accepted and the theoretical refinements he emphasized limited his appeal. Bickel made too many unpopular assumptions. He experienced a kind of sterile prominence, therefore, always looming as a powerful figure not to be ignored but seldom fully persuading or inspiring his audience to follow him. He did, however, splendidly fill the role of the committed and independent intellectual, the professional and social critic who continually stimulated others and challenged their easy judgments. His opinions were always worth considering, and it is more than likely that in future times his work will be profitably and forcefully revived.

In a field where it is so much easier to attack than defend, Bickel formulated through his lifetime one of the most sophisticated and fully considered theories of constitutional adjudication ever produced. He had

[199] *Id.* at 128, 134.

the tenacity to constantly test his ideas against changing social reality and the courage to change or modify them when he thought it necessary. He frequently succeeded in illuminating enduring problems in a way that will itself prove enduring. His commitment to the ideal of reason, and the broad humanity that lay behind it, will continue to inspire his successors, whether they specifically accept or reject the substance of his analysis. One might hazard the guess that in the long run his reputation as a legal theorist will rest on his problematic but fascinating *The Least Dangerous Branch* rather than on the broader but more conventional final effort, *The Morality of Consent*, and that his reputation as a constitutional historian will rest on the masterful *Unpublished Opinions of Mr. Justice Brandeis* rather than on the more spectacular but thinner *Supreme Court and the the Idea of Progress*. Such judgments must remain tentative, however, for the incisive and perennially relevant quality of Bickel's work will attract and merit serous reconsiderations as long as the process of judicial review remains a part of the structure of American government.