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Article 6

Supreme Court and the Idea of Progress

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BOOK REVIEW

The Supreme Court and the Idea of Progress. ALEXANDER M. BICKEL. New York, Evanston, and London: Harper & Row. 1970. Pp. xii, 210. $6.50.

The first wave of review of this volume was extravagantly favorable.[1] Not only those who agreed with Bickel's intellectual and ideological position, but also those who have different views of the art and craft of judging, heaped lavish praise upon both the author and his work.[2] They suggested it was in some sense a definitive exposition of the principles of Supreme Court self-restraint and a searing indictment of the Warren Court for indifference to legal niceties, especially its commitment to change in social policy regardless of the absence of authority or competence to deal with a matter at hand. Bickel, a former law clerk to Justice Frankfurter, has distinguished himself as an advocate of the "passive virtues" for judges. This thought seems to mean that judges should bear in mind the fragile nature of their institutional power, recognize the limits of their moral authority, and so far as possible work within highly circumscribed boundaries of action. This volume, so these early reviews suggested, was the capstone of Bickel's efforts, of an intellectual vigor and grace fully the equal of Learned Hand's *The Bill of Rights*.[3]

More recently, a new wave of less favorable assessments has appeared, for example, in *The New York Review of Books*[4] and in *Trans-Action*.[5] These reviewers primarily emphasize their disagreement with Bickel's assumptions on the judicial role. They indicate that seminal differences account for their criticism, which is a form of accepting the book at face value, a compliment in avoidance as it were.

My own view is rather more muddied, though, I would hope, clearer-visioned. I cannot see how one can gainsay Bickel's basic proposition. All institutions have effective limits. To permit the debate to continue to center upon this type of question seems rather self-indul-

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1 Antippas, Book Review, 45 TUL. L. REV. 218 (1970); Hamilton, Book Review, 56 A.B.A.J. 1195 (1970); Henkin, Book Review, 70 COLUM. L. REV. 1494 (1970); Isenbergh, Book Review, 30 MD. L. REV. 295 (1970); Miller, Book Review, 39 GEO. WASH. L. REV. 166 (1970); Wiecek, Book Review, SATURDAY REV., April 4, 1970, at 37; HARPER'S MAGAZINE, April 1970, at 108.

2 *See, e.g.*, Packer, Book Review, N.Y. Times, March 1, 1970, § 7, at 3.

3 L. HAND, THE BILL OF RIGHTS (1958).

4 Wasserstrom, Book Review, N.Y. REV. OF BOOKS, Jan. 7, 1971, at 16.

5 Carter, Book Review, TRANS-ACTION, Jan. 1971, at 56.

gent.[6] As an extended argument Bickel's effort does not advance the debate; except by negative enumeration it does not specify the conditions for Court action or inaction. The argument for judicial self-control is neither adequately developed nor made sufficiently self-executing, so that one can see the relationship between the fundamental approach to judicial craftsmanship and the specific policy stands taken. In short, although I disagree with his assessments of specific policies, the real problem seems to me not one of Bickel's wrong-headedness on basic questions, but his failures of execution.

Much of this, it would appear, is a consequence of a glaring editorial and intellectual miscalculation in publishing "an expanded and documented version of the 1969 Oliver Wendell Holmes lectures."[7] Throughout the volume the lectures seem distinguishable from the additions both in tone and manner of development. The lectures seem to have been in the nature of a *tour de force*, a sketch in limn, leaving much to the imagination. The additional material interrupts the flow of argument and overdevelops points without really establishing them. Important assertions are undocumented in a way quite acceptable with a genre such as lectures, while small points are elaborately overdocumented in the unique fashion of law review articles. The overlay of new material creates obvious disproportions, with the thin lecture series constantly threatening to break out from the imprisonment of the middling-fat book. Piling weight on a butterfly does not turn it into a bird; it squashes it. The volume should have issued much as given or sharply recast, with drastically altered emphasis and more even-handed elaboration of the empirical evidence where appropriate, rather than in occasional hit-and-miss style.

I

The basic fabric of *The Supreme Court and the Idea of Progress* is woven in imitation of Carl Becker's great, enriching, and ebullient lectures, *The Heavenly City of the Eighteenth-Century Philosophers*.[8] Bickel specifically compares some Justices—the ambiguity is Bickel's, not mine—with Becker's view of the *philosophes*, in that they were at least nominally rationalists coming after an age of faith, but deep down unconsciously unable to free themselves from much the same sort of

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6 *Cf.* Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

7 P. xi.

8 C. BECKER, THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS (1932).

controlling beliefs as their predecessors. Bickel is unrelenting in his attribution of an unconscious, lingering, naive faith to the Warren Court majority (excepting only Justice Black whom he sees as an overt man of faith, having beliefs with a different content but not structure from the previous tradition).

This argument is not completely satisfactory; some of the post-lecture tinkering may have been an effort to make his notions more parallel to Becker's. Bickel explicitly deals with "the heavenly city of the twentieth-century justices" encompassing them all as successors to "men of faith" like Brewer who were, he asserts on the basis of various scraps of quotations assembled by Ralph Gabriel, Constitution worshippers. Although it is not vital to the rest of the book, only to Bickel's schema, I will record my feeling that Miller, Field, Gray, Bradley, and many other of the previous Justices do not fit his mold in any way. It is, however, important to note that his "twentieth-century justices" seem to include Holmes, Brandeis, the Warren Court, and a few culls from the Roosevelt Court—and no one else. Taft, Bickel seems to say, was a man of the old faith pretending to other values to keep with the times; Hughes was suspect to those of the old faith; Murphy (and perhaps Rutledge) on the other hand, are not, it would appear, twentieth-century Justices. In short, we have a classification system that does not classify. More importantly, perhaps, it mingles style and substance in an unsatisfactory manner. Llewellyn's analysis of nineteenth- and twentieth-century styles,[9] which may well have been Bickel's stimulus, seems to me both more clearly defined and more consistently applicable.

To a large extent then, Bickel merely rewarms the old chestnut of the Holmes-Brandeis legacy and reasserts his mentor, Frankfurter's, originality. The progressive realists like Holmes and Brandeis could not and did not abandon faith at all, he suggests. They clung to the due process clause and Court protection of human rights, without resolving the dilemma of contradiction with democratic theory. Holmes was largely spared the need by his judicial aloofness and the luck that cases squarely facing these problems did not arise. Brandeis believed so firmly in all his tenets that he could not see contradictions of the same sort that Bickel suggests the Warren Court must have seen but blandly ignored. Only Frankfurter was merciless with himself intellectually; history and self-discipline forced him to make choices.

Frankfurter does not emerge as perfect, though he has precious few

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9 K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

blemishes. Bickel suggests Frankfurter's flag salute decision[10] may have been the product of an extra-constitutional image of "the public schools as secular, nationalizing agencies,"[11] an image Bickel finds old-fashioned and dispensible. More significantly Frankfurter, though successful in differentiating between judicial roles and the developing of techniques for handling them, succeeded more in defining his dilemmas than solving them.

> [H]e never successfully identified sources from which this judgment was to be drawn that would securely limit as well as nourish it, he never achieved a rigorous general accord between judicial supremacy and democratic theory, so that the boundaries of the one could be described with some precision in terms of the other, and he was thus unable to ensure that the teaching of a duty of judgment would be received as subordinate to the teaching of abstention . . . .[12]

It is strange to think of Frankfurter's legacy as one of judicial activism; Bickel's Frankfurter is not precisely the judge who filed an opinion labeled *dubitante*[13]—surely one of the most self-indulgent acts of Supreme Court history—or who held that alien cannery workers who were considering work in Alaska had to risk being denied readmittance to the country before the case could be adjudicated.[14] But this portrait of the over-assertive Frankfurter is the necessary backdrop for Bickel's implicit claim that he is perfecting the Frankfurter approach by embellishing and honing the grounds for withholding judgment.

It is curious that after several published volumes,[15] Bickel has yet to present us with a coherent view of judging. His contribution thus far is a series of negative injunctions. Typically he darts in on a subject, starting in its middle and arguing with a developed proposition advanced by another writer. Gerald Gunther has argued in his brilliant article[16] that Bickel's ideal court is—the simile is my own—rather like the spinster saving herself for a destined husband, iguorant of the fact that she is training herself never to find him. Bickel's injunctions, derived from his criticism of cases, seem by a process of negations to add up to the following: the process of judging is one of formulating "neu-

10 Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

11 P. 33. *See also* p. 123.

12 P. 34.

13 Radio Corp. of America v. United States, 341 U.S. 412 (1951).

14 ILWU v. Boyd, 347 U.S. 222 (1954).

15 *See, e.g.*, THE NEW AGE OF POLITICAL REFORM (1968); POLITICS AND THE WARREN COURT (1965); THE LEAST DANGEROUS BRANCH (1962).

16 Gunther, *supra* note 6.

tral principles" that can resolve practical problems—craftsmanship joined with statesmanship. Clearly the former is the preeminent skill. Heavily endorsing Herbert Wechsler's notion that good judging requires such neutral principles,[17] Bickel adds little to the concreteness of that intriguing phrase. Wechsler's thrust seems to be that rules should apply to all cases, and that a case should be decided in such a way that the rule will in fact be applied to all cases falling within its domain. Where such results are not feasible, Bickel argues, the Court should if at all possible avoid decision. The Court is particularly culpable if it takes a case on certiorari and then botches it, less so if it is forced upon the Court on direct appeal. The Justices should be deeply cognizant of their paradoxical anti-democratic position in society, and be meticulously reluctant to intrude into local matters. The Court must avoid taking on more burdens than it can handle and convincingly justify in terms of legal principles and political theory.

There is throughout the volume a mystifying assumption that these principles are self-defining. Bickel thereby avoids the problems of ordering them. When in conflict he moves airily back and forth with easy victories over the Justices, creating for them something like an analytic Catch-22. In the apportionment decisions for example, the Justices are faulted for not taking into account local conditions, that is, for inadequate statesmanship. Of course, had they done so Bickel would have found them guilty of inadequate craftsmanship.

His failure to apply the principles systematically is revealed by his unwillinguess to give the Court credit for arriving at a precise neutral principle in the apportionment cases. This is handled through the device of quoting dissents of Justices who find themselves in disagreement in one case and then impeaching the dissenter for his participation with the majority in another. Bickel gives us ironic confirmation of his own capriciousness, even as he chides the Court for the same sin. Piously he finds the key to the apportionment decisions in the Court's *sic volo, sic jubeo* ingeniousness in a said-to-be revealing sentence or word: "Said Justice Douglas: 'The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.' "[18] "The key word," Bickel informs, "is *can*," presumably because Douglas is being arbitrary about an ambiguous matter.[19] But amusingly enough Bickel parallels

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

18 P. 13, *quoting* Gray v. Sanders, 372 U.S. 368, 381 (1963).

19 P. 13.

this by telling us, in commenting on *Fortson v. Morris*,[20] that "the apportionment decisions *could* not have been as 'merely much ado about form.' "[21] The key word is *could*.

Bickel tries to escape crediting the Court with arriving at a neutral principle of rather precise import in the apportionment cases by telling us they *must* have embraced a global, self-defeating one—absolute majoritarianism. He easily has the better of the argument when he gets into the odd history of how the Court backed into its stand, but prefers to attack by his own version of what the "one-man, one-vote rule" *must* mean. If the Warren majority do not understand their own rule, it is they who are at fault! Surely this is a prime example of what Bickel calls leaning on "the crutch that wasn't there."[22]

Both Wechsler and Bickel have no use for the decision that is inchoate, that puts forward a theory without embracing it, the judicial trial balloon. Clearly such means belong to the realm of statesmanship, even if the rule suggested may in fact be the purest gold of craftsmanship. The shadowy process of incorporation of rights under the fourteenth amendment, the *Carolene Products* footnote,[23] even the invisible irradiations from *Gomillion v. Lightfoot*[24] that led to *Baker v. Carr*,[25] indicate the prevalence of such ambiguous lines of development. There is something surely to be said for judicial craftsmanship of the type of Charles Evans Hughes, who was said to construct every sentence with an escape hatch for the judges. This is no doubt cautionary overkill, but it has always been regarded as one of the virtues of the common law that its principles are pragmatically unravelled rather than revealed in a whirligig of instant articulation. One senses in Bickel a desire for a curious phenomenon: code law legislated by judges.

Thus, Bickel has no patience with *Flast v. Cohen*,[26] which expanded the standing of taxpayers to sue in the federal courts, because the Justices had not the courage to embrace a clear rule.[27] It would be useless to suggest that the decision represents their finest hour, but he must be aware that the Vinson Court's decisions in this area were no cleaner, even when Frankfurter wrote the opinions. The fear of opening the floodgates of litigation leads to backing and filling. What is essentially a rule on access to the Court presents special problems

20 385 U.S. 231 (1966).
21 P. 111 (emphasis added).
22 P. 47.
23 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).
24 364 U.S. 339 (1960).
25 369 U.S. 186 (1962).
26 392 U.S. 83 (1968).
27 Pp. 63-65.

not necessarily on all fours with Court decisions enunciated as a legal resolution of a social problem.

There are other standards of judging and standards of success. Can we not all share the admiration for Harlan's *Yates*[28] decision which defused the communist control issue without antagonizing Congress, or for the skill of Van Devanter who supposedly could write decisions creating no precedents? *Flast*, as Bickel notes, can be read by the Court as a unique event or an expansible rule in the light of circumstances.[29] Why this is always worse than ducking the issue on even fictitious grounds is not made clear. Bickel's attitude here is similar to his odd indignation that the prospective nature of the *Miranda*[30] rule was modified by the Court's exception for the plaintiff.[31] It is as if a consistently arbitrary and far-reaching rule based upon necessity is purer than one with a single exception, based upon a clear principle of its own, and one that recognizes the fact that plaintiffs are more likely to carry up cases if self-interest is involved than as a public service.

Bickel does indicate an awareness that some areas are less susceptible than others to generalization, some where ad hoc decisions are suddenly defensible. The area so described is, perhaps unexpectedly, that of free speech, an exception mentioned in a subordinate clause and never elaborated upon.[32] Why this area should be so abstracted is not explained. Great care is taken, however, to indicate that only where there is overt restriction on free speech or direct discrimination against a group is there a violation of the Constitution or a justification for Court intervention. His reasoning is, in process terms, that virtually all legislation by majorities potentially impedes in some indirect way minority rights; and therefore, so he suggests, there is no analytic difference in "chilling effect" arguments justifying a more aggressive role by the judges. How he reconciles these paradoxical, if not contradictory, positions is not clear. Surely freedom of speech and press is not merely a formal notion, the Court being enjoined to invalidate only laws that expressly curtail those freedoms. It seems clear the Frankfurter-Bickel first amendment position is kept murky to avoid collision of incompatible propositions.

At any rate he rejects the Warren Court approach on such questions at a level of political theory appropriate for constitution-makers,

28 Yates v. United States, 354 U.S. 298 (1957).

29 P. 76.

30 Miranda v. Arizona, 384 U.S. 436 (1966).

31 Pp. 54-57.

32 P. 77.

not judges, in a manner not warranted by the materials from which decision may appropriately be constructed. The argument of the Justices who are "majoritarians," as Bickel labels them, is actually less philosophical, more technical, and on a level of generalization much lower than that on which Bickel chooses to criticize or Frankfurter chose to operate. The way is then open to attribute motives and philosophies to Justices who have chosen not to express themselves and so win phony victories. The statement of the Warren Court position on apportionment and free speech does not seem to me an adequate representation of the many arguments that might underlie its decisions and the refutation attempted by Bickel is therefore largely irrelevant.

In a larger sense the entire evaluation of the Warren Court is out of focus. There is no effort to evaluate its contributions to defusing McCarthyism in free speech cases, although some labor is expended to redeem Frankfurter's unfortunate and now quaint concurrence in *Dennis*[33] by juxtaposing the more libertarian *Sweezey v. New Hampshire*.[34] The corpus of decision on the status of films under the first amendment, the important and powerful decisions on libel and "chilling effects," the right of association decision[35] are as if never enunciated. Is it really sufficient to treat the *Ginzburg*[36] case, arguably a major error, as standing for the entire Court's product in the obscenity area, much as the relatively minor question of retrospective application of *Miranda* is the sole discussion of criminal law efforts? It is incredible to analyze the Warren Court without exploration of the domain of their achievements, with the admitted incidence of possible error, not just as a parade of sins. The fact that Bickel misreads the *Ginzburg* pandering language and suggests the magazine covers involved in *Redrup v. New York*[37] would be pandering under *Ginzburg* is incidental to the fact that only two of the half-dozen or so major areas of Warren Court achievement are even assessed.

In fact Bickel's specific quarrels with the Court are surprisingly few, rather more limited than his vehement language suggests. *In toto* only fifty-two cases are discussed sufficiently to warrant indexing. Twenty of these are pre-Warren. Two cases—Frankfurter's, of course—draw only praise. Of the remaining thirty, five are lower court decisions (though Bickel seems to hold the Warren majority culpable) and five others are discussed without any criticism. Bickel's criticism of the

33 Dennis v. United States, 341 U.S. 494, 517 (1951).
34 354 U.S. 234 (1957).
35 Keyishian v. Board of Regents, 385 U.S. 589 (1967).
36 Ginzburg v. United States, 383 U.S. 463 (1966).
37 386 U.S. 767 (1967).

entire Warren era rests upon a discussion of only twenty decisions; disagreement with his characterization of even one case is disagreement with a substantial part of his entire argument. And many of Bickel's characterizations strike me as doubtful and others as just plain wrong.

Bickel chides the majority for not answering Harlan's argument in the poll tax case[38] that the legislature could rationally exclude those who did not care enough to pay $1.50.[39] But an examination of the case clearly shows the majority thought the improper exclusion to be those who *could* not pay, while Harlan justifies only those who *would* not. Perhaps Harlan (and Bickel) would argue there are no such absolutely impecunious persons in practical terms, but no such argument is in fact made. Harlan therefore is not responsive to the Court's problem, and the majority was justified in ignoring his point.

Similarly, Bickel's cavalier rejection of the Court's historical argument on the enforcement clause of the fourteenth amendment is remarkable for one who is contemptuous of others' casual use of proof. To snort "history it is not"[40] of the Court's view and to *ipse dixit* a precise intent without reference to a single source is also not history; it is soothsaying. Bickel's track record for saying sooths, prospective or retrospective, is not so high that automatic acquiescence is required. At least the Court had the decency to cite sources for their view—including Frantz's meticulous and intriguing work.[41] Bickel, who has the time and space to elaborately footnote cognate cases, law-journal style, should at a minimum have dealt with the Court's cited sources and at least hinted at his own evidence.

Considering the narrow range of issues covered and the lack of direction of many criticisms, not to say outright errors, it is difficult to hail this, in the words of the flyjacket, as "[t]he most important bill of particulars against the Warren Court yet published." Kurland's is more consistent in tone and approach and is simply more fun. Wechsler's is more subtle and McCloskey's more rooted in social and political realities.[42]

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38 Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

39 P. 59.

40 P. 48.

41 *Compare* Katzenbach v. Morgan, 384 U.S. 641, 648 nn.7 & 8 (1966), *with* pp. 47-48 as to historical methodology.

42 Kurland, *Foreword* to *The Supreme Court, 1963 Term*, 78 HARV. L. REV. 143 (1964); McCloskey, *Reflections on the Warren Court*, 51 VA. L. REV. 1229 (1965); Wechsler, *supra* note 17.

II

By far the most interesting part of the volume is Lecture IV in which Bickel projects what he calls an "alternative scenario" to what he asserts is the Supreme Court dream of integrated, racially homogenized, secularized America. For all of his protestations on analytics, Bickel's concern and his touch seem more firm and true when policy concerns are involved. He proceeds to the domain of the practical, reluctantly, he explains, in acknowledgment of the Warren Court's preoccupation with the future, and its apparent willingness to be judged by the unfolding of events. In a larger sense, he acknowledges, this occurs anyway; an institution is judged by its results and the effects of its actions.

The Court's effort at reapportionment seems to him of disappointing quality in terms of the end product, and certainly not worth the price of what he sees as traumatic change for American society. The reformed legislatures he notes have not been superior in performance to their gerrymandered predecessors, and Bickel effectively marshals the numerous studies which indicate no real change even with respect to policy direction measured in terms of fiscal expenditures.[43] Desegregation also was born of good will, of the vision of progress, of faith in the heavenly city. But it, too, is seen as irrelevant, the Court having seen the future with its heart and dreamed the wrong dream.

Quite simply Bickel sees decentralized, black, community power as at least the immediate solution. Therefore, the "one-man, one-vote" rule is seen as a needless and unfortunate impediment to flexible, variegated arrangements which could be negotiated between the black and white communities. It also is an impediment to combining present school districts into socially integrated systems or suburbs and core city into a metropolitan government, since functional integration under the "one-man, one-vote" rule means control by one side or another.

Going beyond these principles he suggests the need for emphasis on diversity of schools over the notion of the secularized, common school operating as an integrator and homogenizer of values. To achieve this end he would undo Warren Court and earlier assertions of strict separation of church and state. Parochial schools, for example, should be state subsidized to encourage pluralism in an era when pluralism is declining.

In the course of the lectures Bickel proffers an aside that political

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[43] Pp. 165-73.

scientists all too often discover what lawyers already know. As a member of the aforementioned group, I hesitate to comment, lest harsher rebuke be provided. But it does seem to me that part of the problem is that Bickel, like Perry Mason, knows things he logically and on evidence could not really be sure of; he writes, in Beard's phrase, "without fear and without research." His notions of proof and verification are surprisingly diffuse and ill-formed. And like all of us when we rely upon internalized unexplored knowledge, he knows a lot that just is not so.

It is hardly self-evident that virtually the entire black community is wedded to decentralization, that the ideas of Brandeis are due for a revival, and that on net the future will see less government rather than more. To press further for interpretation of all this as a trend toward greater self-identification of the citizenry as members of groups rather than individuals seems to me positively willful.

To characterize the black population as core city dwellers for the foreseeable future is to succumb to the easy stereotype. As the census reports indicate, the black population has grown dramatically in the suburbs in the past decade. There are indications this is largely a shift from core city ghettos to suburban ghettos, but even that means the governmental problem, though not the social problem, has been drastically altered.

The assertion that legislators can, in practice as opposed to obvious theoretical possibilities, effectively gerrymander toward desired ends is easily refuted by experiences everywhere. It is easy to produce a single result of malapportionment, but any attempt to produce something like maximum party advantage involves risks and uncertainties that have defied the legislatures. Bickel cites with glee a Republican claim that a court order to redistrict in New York would gain the party six to eight congressional seats in 1970;[44] we now know, as he could not, that their gain was of two seats, in an election in which the Democratic party was drastically rebuffed at the gubernatorial and senatorial level.

Bickel seems prone to assert that the emergence of problems in an area indicates the basic invalidity of the major decisional premise under which the Court has intervened. It is not at all clear that the emphasis on neutral principles is not a disguised faith in judicial automaticity and the notion that general principles *will* decide concrete cases. In any event it is hard to find that the anomalies he points to create greater difficulties than similar issues in virtually every area of

[44] P. 152.

the law. The myth of the perfect area of the law is as false as the dream of the perfect, no-need-to-ever-repair house. A lot of improvised day-to-day tinkering goes on all the time.

The dream of progress as Bickel suggests is open to every man. Why one should choose a particular dream remains an interesting question. As predictors of the future, dreams are of course subject precisely to the test of time. The Warren Court's dreams have, even by Bickel's admission, sometimes in avoidance, been translated into realities in a rather surprising number of instances. The Court's record in performance seems as effective as Bickel's in criticism. And the future is seldom as even the wisest and most analytic calls it.

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