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Beyond Legitimacy

STEVEN WISOTSKY*

The author analyzes the scholarly debate over the legitimacy of the institution of judicial review. He suggests that, as a reaction to unjustified criticism of the institution, defenders of judicial review have articulated propositions which advance constitutional jurisprudence beyond the issue of legitimacy. He argues that the time has come for courts to de-emphasize prudential considerations and to concentrate on the substantive correctness of their decisions and on the standards of review which the courts employ.

I. INTRODUCTION

The Third Annual Baron de Hirsch Meyer Lecture Series focused on one of the most compelling issues of contemporary jurisprudence—the legitimacy of policymaking by a nonelected judiciary in a representative democracy. Although the speakers approached the subject from different avenues, their remarks present an array of opinion spanning the spectrum of attitudes towards the legitimacy of judicial policymaking, from the relative antipathy of

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Justice Rehnquist, to the cautious pragmatism of Judge Friendly, to the enthusiastic endorsement of Professor Tribe.

This article traces the contours of the historical debate over the legitimacy of judicial review, emphasizing the evolution of critical thought on the subject matter in the last twenty years. In addition, the author suggests that the time has come to move beyond the issue of legitimacy to a concentration on the substantive results of constitutional adjudication.

A. *The Significance of the Debate Over Judicial Review*

The legitimacy of constitutional adjudication is a matter of fundamental importance, because it concerns the meaning and function of law in our society.[1] In a representative democracy predicated on majority rule, it is understandable that countermajoritarian lawmaking by a nonelected and life-tenured judiciary should be called into question.[2] Doubts about the legitimacy of courts as a source of such lawmaking bear directly on the matter of popular compliance with judicial interpretations of the Constitution. The impact of legitimacy on the role of law and its efficacy was illuminated by Archibald Cox:

> The most important quality of law in a free society is the power to command acceptance and support from the community so as to render force unnecessary, or necessary only upon a small scale against a few recalcitrants. I call this quality the "power of legitimacy" because it appears to attach to those commands of established organs of government which are seen to result from their performance in an authorized fashion of the functions assigned to them. Such commands, and only such, are legitimate.
>
> The Judicial Branch is uniquely dependent upon the power of legitimacy when engaged in constitutional adjudication; and belief in the legitimacy of its constitutional decisions is therefore a matter of prime importance. The rulings thwart powerful interests. The issues arouse the deepest political emotions. Although the courts control neither the purse nor the sword, their decrees often run against the Executive, set aside the will of the Congress, and dictate to a State. Compliance results from the belief that in such cases the courts are legitimately performing the function assigned to them . . . .[3]

Because legitimacy is an essential quality of law, it is crucial that the Supreme Court be accepted as a legitimate source of law-

1. *See* text accompanying notes 169-71 *infra*.
2. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 48 (1978).
3. A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 103-04 (1976).

making authority. For this reason, the subject has occupied considerable energy of the legal scholars. Indeed, "in the late 1950's and early 1960's, many of the most prominent, and most skillful, constitutional theorists treated the question of the legitimacy of judicial review as itself the central problem of constitutional law."[4]

B. *Viewpoints on the Legitimacy of Judicial Review*

1. JUSTICE REHNQUIST

Justice Rehnquist addressed the judiciary's role in achieving social reform not from a constitutional, statutory or case law analysis, but from what Judge Friendly called, "a novel and thoughtful angle."[5] Justice Rehnquist viewed the adversary system in a purely jurisprudential way—viewing it in terms of its usefulness as a tool for the maintenance of a good society or the building of a better society.[6] Accordingly, his lecture was presented on a rather high level of abstraction.

The focus of Justice Rehnquist's concern was the harm that might be done to "a continuing and valuable institutional relationship"[7] if an individual is permitted to litigate grievances against such private sector institutions as his family, church or labor union. His twofold fear was that the very process of crystallization of the parties' differences in the adversary system would have a detrimental impact on their future relationship and would also "hamper the ability of the institution to serve its designated societal function."[8] Accordingly, he advocated a policy of restricting the role of resolving these disputes to the societal institutions.[9]

In advancing his thesis that an individual's claim for redress of wrong is best not vindicated by the judiciary in such situations, Justice Rehnquist concentrated on the societal mission of private institutions such as the family. Thus, his justification for attaching special weight to the institutional decision is that the social utility

4. TRIBE, *supra* note 2, at 47. Professor Tribe thinks that "problems of judicial legitimacy have become increasingly acute." *Id.* at 12.

5. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 21 (1978).

6. Rehnquist, *The Adversary Society: Keynote Address of the Third Annual Baron de Hirsch Meyer Lecture Series*, 33 U. MIAMI L. REV. 1, 2 (1978).

7. *Id.*

8. *Id.*

9. It is important to distinguish the cases chosen by Justice Rehnquist to illustrate his thesis from the paradigm of the classic civil liberties violation in which the government is the wrongdoer. In the cases chosen by Justice Rehnquist, the government was not involved in the conduct which gave rise to the claim and was asked to intervene only as a referee of a dispute in the private sector. *See id.* at 4-7.

of an adversary hearing is outweighed by the harm to the continued usefulness of the challenged institution.[10] All the examples adduced by Justice Rehnquist were united by this common thread of denying review because of an "overriding public policy."[11]

Justice Rehnquist did not directly confront the issue of legitimacy, but by attaching special weight to the decisions of certain institutions, he narrowed the legitimate scope of judicial review and minimized the judiciary as a forum of social change. Elsewhere, he has written that "judicial review has basically antidemocratic and antimajoritarian facets that require some justification in this Nation which prides itself on being a self-governing representative democracy."[12]

2. JUDGE FRIENDLY

Judge Friendly addressed the symposium subject in conventional terms: "Should courts decide issues of social policy? If they do so, are some modifications of the adversary system desirable?"[13] His answer was rather equivocal: "The courts must address themselves in some instances to issues of social policy, not because this is particularly desirable, but because often there is no feasible alternative."[14]

Judge Friendly's ambivalence toward the adjudication of matters of social policy has two components: one is procedural in nature, and the other is more substantive. His comments regarding the procedural component focused primarily on the institutional limitations inherent in judicial decisionmaking.[15] With respect to the substantive component, Judge Friendly quoted from Justice Frankfurter, the foremost apostle of judicial restraint: "Courts are not

10. *Id.* at 2, 3.

11. Justice Rehnquist used syllogistic reasoning to justify this balancing of competing interests. His major premise was that the writ of habeas corpus is "undoubtedly *the* most basic example of the adversary system in action." *Id.* at 4. His minor premise was that even the right to the writ is not absolute but may be suspended entirely under article I, section 9 of the Constitution. He concluded, therefore, that if the physical deprivation of liberty may sometimes be immune from judicial review, then a fortiori there must be grounds for denying review in other, less compelling contexts. *Id.*

12. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 695-96 (1976). *See generally* Munzer & Nickel, *Does the Constitution Mean What it Always Meant*, 77 COLUM. L. REV. 1029 (1977).

13. Friendly, *supra* note 5, at 21.

14. *Id.*

15. For example, courts are often said to be intellectually weak because they are often dependent on mismatched adversaries for the flow of information which is necessary to render a decision. In addition, judges are often generalists, with no special expertise in the matter(s) under litigation. *See id.* at 23.

representative bodies."[16] Thus, Judge Friendly immediately confronted the issue of the legitimacy of judicial review: "In deciding questions of social policy . . . [judges] lack the important qualities of legitimacy and also, at least in the case of judges appointed for life, of accountability to the electorate."[17]

Although Judge Friendly questioned the legitimacy of judicial review,[18] he did not attempt to delineate its limits. Instead, he simply conceded that courts "have been doing so for a long time."[19] In Judge Friendly's formulation, judicial review, as an instrument of social reform, can be subdivided into two types of review: (1) that which merely requires interpretation of an elastic phrase, such as the eighth amendment's "cruel and unusual punishment" clause,[20] and (2) that which results in new lawmaking, such as the abortion decisions.[21]

The interpretive exercises of judicial review, and others that are interstitial in nature, did not trouble Judge Friendly. What concerned him was that "courts are increasingly deciding such questions . . . differently from the way in which the questions had been decided by other branches of government having a greater claim to legitimacy."[22] Judge Friendly's fear was that the lack of legitimacy and the lack of a clear statement of principle as the *ratio decidendi* will deprive such a decision of the public and critical acceptance necessary for its efficacy.

3. PROFESSOR TRIBE

Professor Tribe began his presentation by reformulating the issue: "[W]hether the virtues and vices of [a pluralist] democracy are consistent with assigning a large and active role to the adversary process, as opposed to a minor or passive one."[23] Thus, for Professor Tribe the ultimate question is "whether we should assume a welcoming or a hostile attitude toward . . . judicial activism."[24]

Professor Tribe's answer to this question was in the affirmative. The answer was premised on two assumptions about the operation

16. Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring).

17. Friendly, *supra* note 5, at 22.

18. *Id.* at 22-24.

19. *Id.* at 24. Similarly, he observed that courts have been deciding questions of social policy "throughout the history of the common law." *Id.* at 42.

20. *See id.* at 27.

21. *See, e.g.*, Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973). *See also* Friendly, *supra* note 5, at 32-39.

22. Friendly, *supra* note 5, at 42.

23. Tribe, *Seven Pluralist Fallacies: In Defense of the Adversary Process—A Reply to Justice Rehnquist*, 33 U. MIAMI L. REV. 43, 43 (1978).

24. *Id.*

of our political process. The first was that the byplay of interest groups operates to produce inequities for the "perennial outsiders"[25] —"groups not yet assimiliated into the governing coalitions."[26] The second assumption was that "democratic pluralism is inherently incapable of addressing certain basic questions that underlie the division of burdens and benefits among society's various groups."[27] He continued by stating the basic questions: "[W]hat values should be ranked as fundamental in our society? What rights deserve special protection against all political bargains, however structured? Who has a right to take part in what kind of choice? What are to be the starting points from which bargaining will proceed? [Those are questions which] are logically and morally prior to the struggles of pluralistic politics."[28] Professor Tribe concluded that "processes far more subtle than those of pluralistic politics are required to legitimate a pluralist democracy,"[29] processes that include litigation. Accordingly, Professor Tribe argued that "the legitimacy of our system of government *requires* relatively unimpeded access to litigation to do two distinct things."[30] The first is the articulation of fundamental societal values, "the underlying framework of rights within which pluralist bargaining is to occur."[31] The second function of litigation is to open the political process to the outsider-underdogs, to provide "an avenue of participation for those individuals and groups that have not yet been effectively absorbed into the mainstream coalitions of pluralist politics."[32]

Having articulated his view of the deficiencies of the political process, Professor Tribe sought to support the legitimacy of judicial review by systematically raising and rebutting the common counter-arguments, which he collectively labeled the "pluralist's fallacies."[33] The pluralist's fallacies consist of seven errors that "have induced exaggerated fears of adjudication and an understated appreciation of what it can contribute to the legitimacy of our system of government."[34] These seven fallacies help explain what Professor Tribe believes is an "undue reluctance to embrace a large role for the judiciary."[35] Professor Tribe concluded that "a welcoming attitude

25. *Id.* at 44.
26. *Id.*
27. *Id.*
28. *Id.* at 44-45.
29. *Id.* at 45.
30. *Id.* (emphasis added).
31. *Id.* at 45-46.
32. *Id.* at 46.
33. *Id.*
34. *Id.*
35. Address by Professor Laurence Tribe, Third Annual Baron de Hirsch Meyer Lecture Series at 56 (Feb: 2, 1978) (transcript on file at the *University of Miami Law Review*).

toward adjudication is not a threat to the integrity of our form of goverment. In fact, such an attitude, properly understood, is *indispensable* to its legitimacy."[36]

II. THE COUNTER-MAJORITARIAN IMPACT OF JUDICIAL REVIEW

Professor Tribe argued the issue of legitimacy as part of his sixth pluralist fallacy, "that of *elitism*. . . . the error of supposing that change which is initiated through litigation is inherently less democratic than change in which legislative or administrative bodies take the dominant role."[37] Professor Tribe has thus neatly and succintly stated a charge that has a long and distinguished lineage. It is, in fact, the legacy of *Marbury v. Madison*.[38]

Ever since the Supreme Court rendered that historic decision, there has been continuing controversy over the Court's assumption of the power to nullify legislative acts or executive actions.[39] This power, which is not expressly conferred by the Constitution, has at various times in our constitutional history been denounced as a usurpation,[40] praised as a crucial bulwark of liberty,[41] and reluctantly accepted as a pragmatic necessity for the effective functioning of the political system.[42]

In recent times, the focus of criticism of judicial review has been its inconsistency with the conventional model of the democratic political process. This objection has been forcefully articulated by one of the most prominent figures in the legitimacy debate, the late Alexander Bickel.

In *The Least Dangerous Branch,* Alexander Bickel flatly declared that "the essential reality of judicial review is that it is a

36. Tribe, *supra* note 23, at 46 (emphasis added). Note that Professor Tribe's conclusion is an inversion of the usual way of stating the issue.

37. *Id.* at 53.

38. 5 U.S. (1 Cranch) 137 (1803).

39. Technically, the scope of judicial review which was established in *Marbury* extended no further than the power to declare an act of Congress unconstitutional. Because of the subsequent expansion of the judicial power, it has become commonplace to use the phrase "judicial review" in its broadest sense: the power to strike down laws generated by any branch of government, state or federal.

40. In 1804, Thomas Jefferson wrote to Abigail Adams that, "the opinion which gives to the judges the right to decide what laws are constitutional, and what not, . . . would make the judiciary a despotic branch." 1 THE ADAMS-JEFFERSON LETTERS 279 (L. Cappon ed. 1959).

41. "In practice, there can be no Constitution without judicial review. It provides the only adequate safeguard that has been invented against unconstitutional legislation." B. SCHWARTZ, CONSTITUTIONAL LAW 4 (1972).

42. It was necessary "for the Supreme Court to assume an authority to keep the states, Congress and the President within their prescribed powers. Otherwise the government could not proceed as planned." L. HAND, THE BILL OF RIGHTS 15 (1958).

deviant institution in the American democracy"[43] because of its inexorable conflict with majoritarian electoral politics:

> The root difficulty is that judicial review is a counter-majoritarian force in our system . . . . [W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it . . . . That . . . is the reason the charge can be made that judicial review is undemocratic.[44]

In other words, in a representative democracy, legitimacy is derived from popular sovereignty. The ultimate authority for legislative or executive policymaking depends upon the consent of the governed. There will not always be a perfect match between popular sentiment and legislative enactment, but if the will of the people is thwarted by unpopular social policies, pressure can be brought to bear for repeal of these laws or for the electoral defeat of those who advocated them.

Judges, on the other hand, are insulated from the political process (at least in the federal system). They are not elected to office in the first instance. After appointment they hold office "during good behavior,"[45] which as a practical matter is the functional equivalent of life tenure. The constitutional decisions that these judges render are immune from adjustments through the ordinary legislative process; only a constitutional amendment pursuant to article V can "reverse" a Supreme Court decision, a process that has been successfully utilized only four times in our history.[46]

It could be countered, of course, that the very idea of constitutional rights is counter-majoritarian insofar as it denies the prevailing majority the power to legislate on a given subject or in a certain

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43. A. BICKEL, THE LEAST DANGEROUS BRANCH 18 (1962). The title of the book is derived from Alexander Hamilton's, *The Federalist No. 78:* "[W]hoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution . . . ." THE FEDERALIST No. 78 (A. Hamilton) 522-23 (J. Cooke ed. 1961).

44. A. BICKEL, *supra* note 43, at 16-17.

45. The Constitution also protects federal judges against a reduction in compensation "during their continuance in office." U.S. CONST. art. III, § 2.

46. The eleventh amendment, which was ratified in 1795, reversed Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). The fourteenth amendment, which was ratified in 1868, reversed Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). The sixteenth amendment, which was ratified in 1913, reversed Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895). The twenty-sixth amendment, which was ratified in 1971, reversed Oregon v. Mitchell, 400 U.S. 112 (1970).

way. The existence of rights which serve as independent limitations on the will of a prevailing majority, however, is the essence of constitutionalism. Indeed, the Constitution itself is counter-majoritarian in the sense that it binds present generations to a political structure of powers and limitations adopted almost two centuries ago. Those ancient decisions are also immune from change by majority rule. The rebuttal to that objection is that the Constitution was submitted to and endorsed by the American people in the process of ratification. It may therefore be said to embody the consent of the governed.[47]

Judicial review, on the other hand, does not bear this popular imprimatur so long as there is no authorization for such review in the text of the Constitution. The lack of a clear popular endorsement of judicial review remains the fundamental political and theoretical defect of judicial review, the ultimate question left unanswered by *Marbury v. Madison.*

A. *The Legacy of* Marbury v. Madison

The central problem with the decision in *Marbury v. Madison* is that it simply assumes that the supremacy of the Constitution, as the paramount law, automatically confers upon the courts, as opposed to the other branches of government, the definitive power to interpret and to apply the Constitution. In short, constitutional supremacy is equated with judicial supremacy. Thus, as Professor Van Alstyne has demonstrated in an elegant essay, Chief Justice Marshall begged the "critical question" of *"who, according to the Constitution, is to make the determination as to whether any given law is in fact repugnant to the Constitution itself?"*[48] Although Chief Justice Marshall begged that crucial question, it is also true that there never has been, and, in the nature of the case, there never can be, a conclusive demonstration that judicial review of the validity of legislation is not authorized by the Constitution: the Constitution is silent on this point.[49] Chief Justice Marshall's decision in favor of

47. The notion of consent appears somewhat metaphysical in light of the political control which has been exerted by prior generations upon succeeding generations. For a discussion of the fascinating "parable of the pigeons," who "learned" the concept of delayed gratification and bound themselves in the short run in order to reap even greater rewards in the long run, see L. TRIBE, *supra* note 2, at 9-10. By analogy, the Constitution is a mechanism by which society binds its own freedom of choice for many generations in order to achieve stability.

48. Van Alstyne, *A Critical Guide to Marbury v. Madison,* 1969 DUKE L.J. 1, 22 (emphasis in original).

49. As Professor Tribe has indicated, no one has been able to make a conclusive refutation of Chief Justice Marshall's opinion or to make a stronger argument for legislative supremacy. *See* L. TRIBE, *supra* note 2, at 22.

the power of judicial review, therefore, must ultimately be seen as a choice among competing values. It cannot, however, go unnoticed that this interpretation is, itself, the exercise of judicial review.

Actually, the debate over the legitimacy of judicial review is older than the decision in *Marbury v. Madison.* The historical evidence indicates that the debate antedates the Constitution[50] and was the subject of discussion in several of the *Federalist Papers.*[51] The controversy has persisted, waxing and waning during different periods of our history.[52] Perhaps the principle of the gored ox controls here, for it is specific exercises of the Court's power that have excited public opinion on the issue of judicial review.

Two generations ago, the focal point of controversy was the Supreme Court's "Lochnerizing" during the heyday of economic substantive due process, which climaxed with President Roosevelt's Court-packing plan of 1937. More recently, in the early 1950's, the Warren Court became the object of widespread public condemnation and political attack, primarily because of the Court's decisions in the school segregation cases.[53] Subsequently, the attacks on the Court became even more vitriolic as the Warren Court extended the reach of its activism to school prayer,[54] political malapportionment[55] and other highly volatile issues.

B. *The Hand-Wechsler Debate*

The controversy over the legitimacy of judicial review was resumed with renewed vigor in 1958, when Judge Learned Hand delivered the Holmes lectures at Harvard. Judge Hand confessed that he could find no adequate justification for a doctrine of judicial review which was authorized by the text of the Constitution.[56]

The following year, Professor Herbert Wechsler of Columbia Law School delivered the next Holmes lectures and took issue with

50. There are many suggestive statements about the role of the judiciary in the records of the Constitutional Convention. *See, e.g.,* 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 424 (1937); M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 157 (1913).

51. *See* THE FEDERALIST Nos. 78-82 (A. Hamilton).

52. For a recent statistical account of the Supreme Court's exercise of the power to review federal legislation, see Handberg, *Judicial Review and the Supreme Court: An Accelerating Curve,* 2 NOVA L.J. 1 (1978).

53. *See* Pollak, *The Supreme Court Under Fire,* 6 J. PUB. L. 428, 431-33 (1957).

54. *See* School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

55. *See* Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

56. *See* L. HAND, *supra* note 42. He did, however, grant that there was a practical necessity for the Court to assume the power of review in order, "to prevent the defeat of the venture at hand." *Id.* at 15.

Judge Hand's position. In his famous essay on "neutral principles,"[57] Professor Wechsler attempted to construct a theory of judicial review rooted in the Constitution by inference from article III and from the supremacy clause. Professor Wechsler argued that judicial review was legitimate so long as the Court eschewed ad hoc or result-oriented adjudication and rendered principled decisions,[58] by a process of reasoned elaboration,[59] and did not operate as a naked power organ.

The Wechslerian position did not go unchallenged for long; almost immediately it engendered rather severe criticism. For example, Professors Miller and Howell attacked the very idea of neutral principles. They asserted that the

> [q]uest for neutrality is fruitless. In the interest balancing procedure of constitutional adjudication, neutrality has no place, objectivity is achievable only in part, and impartiality is more of an aspiration than a fact . . . . In making choices among competing values, the Justices of the Supreme Court are themselves guided by value preferences.[60]

Advocating a "purposive jurisprudence,"[61] one that makes explicit value choices, they concluded that "[t]he *judicial* arena is, thus, a *political* battleground . . . . And the Court *is* a power organ, which aids in the shaping of community values . . . ."[62]

At about the same time, Professor Charles L. Black, Jr. joined the affray with a strong defense of judicial review. Black's principal historical argument pointed to the Judiciary Act of 1789 as a persuasive evidence of the intent of the members of the First Congress. The evidence of history, he wrote, is that "the other departments of government, preeminently Congress, have operated under the assumption . . . that judicial review is an authentic part of our system of government."[63]

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57. *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). *See also* Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

58. "The main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching the judgment on analysis and reasons quite transcending the immediate result that is achieved." Wechsler, *supra* note 57, at 15.

59. *See* White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 288-89 (1973).

60. Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 671 (1960).

61. *Id.* at 683-93.

62. *Id.* at 689 (emphasis in original).

63. C. BLACK, THE PEOPLE AND THE COURT 23 (1960). In *The Least Dangerous Branch*, Professor Bickel agreed that, "it is as clear as such matters can be that the Framers of the

As the sixties progressed and as the Warren Court expanded the scope of its activism from racial segregation and reapportionment to other areas of the law, most notably criminal procedure,[64] the critics of judicial review became more vocal and the controversy more heated. As Judge J. Skelly Wright observed: "[T]he Warren years were marked not only by an increasingly activist Court but also by an increasingly dissatisfied and prolific group of legal scholars."[65] Paul Freund, Herbert Wechsler, Phillip Kurland and Alexander Bickel were "the most eminent and in many ways the most representative of the Court's commentators."[66]

C. *Alexander Bickel: The Passive Virtues*

Of these four men, the most prominent was Alexander Bickel. Not only was he an ardent critic of the activism of the Warren Court, but he "formulated through his lifetime one of the most sophisticated and fully considered theories of constitutional adjudication ever produced."[67] Because of the subtlety, complexity and, at times, inconsistency of Professor Bickel's work, it is impossible within the scope of this article to summarize it adequately.[68] Nevertheless, no review of the debate on legitimacy can be complete without some discussion of the Bickelian thesis.

The crux of Professor Bickel's concern with judicial review is its counter-majoritarian nature. In *The Least Dangerous Branch,* Bickel argued against excessive judicial activism because the essence of the democratic process is the use of the franchise to hold elected officials to account. Judicial review, by short-circuiting electoral politics and showing a distrust for the legislature, may have "a tendency over time seriously to weaken the democratic pro-

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Constitution specifically, if tacitly, expected that the federal courts would assume a power . . . to pass on the constitutionality of actions of the Congress and the President, as well as of the several states." A. BICKEL, *supra* note 43, at 15.

64. *See, e.g.,* Terry v. Ohio, 391 U.S. 1 (1968) (constitutional standards for stop and frisk); Duncan v. Louisiana, 391 U.S. 145 (1968) (right to jury trial on misdemeanor charge); Miranda v. Arizona, 384 U.S. 436 (1966) (necessity of warnings prior to taking a confession); Aguilar v. Texas, 378 U.S. 108 (1963) (requirement of reliable information from affiant in order to issue a search warrant); Wong Sun v. United States, 371 U.S. 471 (1962) ("fruit of the poisonous tree" doctrine); Robinson v. California, 370 U.S. 660 (1962) (states may not employ cruel and unusual punishments); Hamilton v. Alabama, 368 U.S. 52 (1961) (mandatory assistance of counsel for indigents at arraignment).

65. Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court,* 84 HARV. L. REV. 769, 770 (1971).

66. Silver, *The Warren Court Critics: Where Are They Now That We Need Them?* 3 HASTINGS CONST. L.Q. 373, 374 (1976).

67. Purcell, *Alexander M. Bickel and the Post-Realist Constitution,* 11 HARV. C.R.-C.L. L. REV. 521, 563 (1963).

68. For an excellent short critique of Bickel's career, see *id.*

cess."[69] Although Bickel freely conceded the necessity for judicial intervention in matters of basic principle,[70] he maintained that intervention should be confined to a relatively narrow sphere: "Given the nature of a free society and the ultimate consensual basis of all its effective law, there can be but very few such principles."[71]

Professor Bickel's position on judicial review was ambivalent. He thought that such power was inconsistent with majority rule, yet necessary for "the creative establishment and renewal of a coherent body of principled rules . . . [which] our legislatures have proven themselves ill equipped to give us."[72] Thus, Bickel thought that judicial review was justifiable "as a process for the injection into representative government of a system of enduring basic values."[73]

In this regard, Professor Bickel allied himself with the Wechslerian argument that the judicial process must be genuinely principled; the Court "must act rigorously on principle, else it undermines the justification for its power."[74] For Bickel this was a point "of transcendent importance. The role of the Court and its *raison d'etre* are . . . to preserve, protect and defend principle."[75]

At the same time, it would be dangerous to insist *always*, or too often, on the path of high principle:

> For the absolute rule of principle is also at war with a democratic system . . . .
>
> No society . . . can fail in time to explode if it is deprived of the acts of compromise, if it knows no way of muddling through. No good society can be unprincipled; and no viable society can be principle ridden.[76]

What should be done, therefore, when the Court is confronted with an unjust or unwise law that it cannot properly strike down? In such cases, insistence on the rule of the neutral principles "would require the Court to validate with overtones of principle most of what the political institutions do on grounds of expediency."[77] In order to

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69. A. BICKEL, *supra* note 43, at 21.

70. "The Constitutional function of the Court is to define values and proclaim principles." *Id.* at 68.

71. *Id.* at 59.

72. *Id.* at 25.

73. *Id.* at 51.

74. "Our point of departure, like Mr. Wechsler's, has been that judicial review is the principled process of enunciating and applying certain enduring values of our society." *Id.* at 58.

75. *Id.* at 188.

76. *Id.* at 64. Bickel's premise for this statement is that: "Our democratic system exists in this Lincolnian tension between principle and expediency, and within it judicial review must play its role." *Id.* at 68.

77. *Id.* at 69.

relieve the Court of the burden of legitimizing such political compromises while protecting the Court's role as the defender of principle, Bickel found a way to harmonize the imperatives of principle with the competing demands of expediency.

> The essentially important fact, so often missed, is that the Court wields a threefold power. It may strike down legislation as inconsistent with principle. It may validate, or, in Charles L. Black's better word, "legitimate" legislation as consistent with principle. *Or it may do neither.* It may do neither, and therein lies the secret of its ability to maintain itself in the tension between principle and expediency.[78]

The "do neither" approach, of course, embodies the "passive virtues,"[79] which are manifested in the judicial constructs of standing, ripeness, justiciability and case or controversy requirements. These concepts are primarily associated with Justices Brandeis[80] and Frankfurter.[81] The passive virtues are techniques to avoid, when expedience requires,[82] rendering a decision on the merits, thereby neither legitimating or invalidating the law under attack.

"These are the techniques that allow leeway to expediency without abandoning principle."[83] They would allow wide scope for the operation of the political process, while retaining a checking power over the other branches of government for those relatively infrequent situations in which the branches transgressed a valid, neutral, impersonal and durable constitutional principle.

On close examination, there is less to the passive virtues than meets the eye.[84] Several serious defects can be noted. First, as Pro-

78. *Id.* at 69 (emphasis in original).

79. Professor Bickel first advanced his thesis of the passive virtues in Bickel, *The Supreme Court, 1960 Term—Foreward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

80. *See* Ashwander v. TVA, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring).

81. *See* West Va. State Bd. of Educ. v. Barnett, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting).

82. A. BICKEL, *supra* note 43, at 174. Bickel approved of the Court's refusal to decide the constitutionality of Virginia's antimiscegenation statute in Naim v. Naim, 197 Va. 734, 90 S.E. 2d 849, *appeal dismissed*, 350 U.S. 985 (1956). A. BICKEL, *supra* note 43, at 70 n.30 & 174 n.103. In Professor Bickel's opinion, the Court clearly had jurisdiction over the appeal. Bickel, however, thought the Court had been wise to avoid the volatile racial issue which had arisen in a southern state shortly after the Court's desegregation rulings. The same miscegenation statute was invalidated by the Court 11 years later in Loving v. Virginia, 388 U.S. 1 (1967).

83. A. BICKEL, *supra* note 43, at 71. Professor Bickel accurately perceived that the integrity and efficacy of principle depends, in part, on the propitiousness of time, place and circumstance.

84. For a critical evaluation of Bickel's theory of passive virtues, see Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964). Professor Gunther wrote that Bickel's analysis is "vulnerable and dangerous," *id.* at 1, and that, "ultimately the effort is a failure." *Id.* at 10.

fessor Gunther said in his critique, Bickel "suffer[ed] from the neo-Brandeisian fallacy" and asserted "an amorphous authority to withhold adjudication altogether."[85] An unfettered discretion to decide or not to decide can hardly be called "passive." On the contrary, a broad discretion to exercise the power or to hold it in reserve is an aggressively manipulative and result-oriented power. As Professor Gunther put it: "[A] virulent variety of free-wheeling interventionism lies at the core of his devices of restraint."[86]

Second, and even more ironically, the avoidance techniques "cannot themselves be principled in the sense in which we have a right to expect adjudications on the merits to be principled;" they are merely means of mediating the way "between the ultimates of legitimation and invalidation."[87] Thus, it is paradoxical to posit that the Court must resort to unprincipled techniques in order to fulfill its function as the defender of principle.[88]

Finally, and perhaps most fundamentally, the operational premise that the passive virtues are avoidance techniques is open to serious question. The basic assumption underlying Professor Bickel's concept of legitimation is that upholding a challenged law is the equivalent of approving the law and carries with it the Supreme Court's prestige and moral authority.[89] The corollary of this proposition must be that *not* deciding a case on the merits has no legitimating impact.[90] As Professor Albert has argued, however, a decision not to decide on the merits because of putative "procedural" or "threshold" deficiencies of a case nevertheless creates a rule of actionability or entitlement to relief. Albert asserted that justiciability "rulings do entail adjudication of a component of

85. *Id.* at 10. Professor Wechsler argued that "the only proper judgment that may lead to an abstention is that the Constitution has committed the determination of the issue to another agency of government than the courts." Wechsler, *supra* note 57, at 9.

86. Gunther, *supra* note 84, at 25. Professor Gunther condemned "[t]he ultimately law-debasing effect of Bickel's prudential considerations." *Id.* at 13. Instead of Professor Bickel's prudential considerations, courts should look to "[j]urisdictional principles [which] are rooted in statutes and in the Constitution." *Id.* at 15.

87. A. BICKEL, *supra* note 43, at 132.

88. It is challenging to attempt to reconcile the unprincipled nature of the avoidance techniques with Professor Bickel's statement that "the integrity of the Court's principled process should remain unimpaired, since the Court does not involve itself in compromises and expedient actions." *Id.* at 95. As Professor Gunther has stated, principles "are no less so because they pertain to jurisdiction." Gunther, *supra* note 84, at 15.

89. Legitimation "is a necessary concomitant of a process of principled decision. Quite aside from the Court's mystic spell, how could it not make a difference in a society committed to principle . . . that a measure is authoritatively said not to conflict with principle?" A. BICKEL, *supra* note 43, at 130.

90. Professor Gunther argued that this corollary was false: "A Court 'staying its hand' is, after all, failing to invalidate . . . ." Gunther, *supra* note 84, at 7. Gunther did concede, however, that Bickel's "concept has a kernel of truth." *Id.*

the claim for relief" and "ultimately reflect a determination of whether substantive constitutional policies are best served by providing or denying relief."[91]

In the fall of 1969, Professor Bickel was invited by the Harvard Law School to give the annual Holmes Lectures, the same prestigious forum at which the Hand-Wechsler debate had germinated and taken root. His lectures were published in an expanded form the following year as *The Supreme Court and the Idea of Progress.*[92] In the seven years that elapsed since publication of *The Least Dangerous Branch,* amidst the activism of the Warren Court and the social turmoil of the sixties, his ideas about the proper role of the Court had changed significantly. His stance as a critic of the Warren Court and of its judicial technique became much more aggressive.

Although Professor Bickel maintained the emphasis on reason and principled judgment in his new book, his words revealed a growing skepticism about the feasibility of the Court evolving neutral principles in a society which had grown increasingly fragmented and ideological. This loss of faith in neutral principles caused him to shift emphasis to pluralist politics for the development of basic societal values. The implications for judicial review were 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."[93] He concluded, therefore, that the judicial process in a vast, complex and changeable society, is "a most unsuitable instrument for the formation of policy."[94]

Professor Bickel's increasingly negative view of judicial review, colored in part by a generally gloomy outlook on the direction of social change, was shared by other critics of the Court. Their attacks became increasingly strident and hostile.[95] In addition, there were political attacks on the Court. Legislative proposals were designed to curb its power[96] or strip it of jurisdiction on volatile issues such

91. Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship,* 50 S. CAL. L. REV. 1139, 1143 (1977).

92. *See* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970).

93. *Id.* at 99.

94. *Id.* at 175. For a rebuttal of this argument, see Barron, *The Ambiguity of Judicial Review: A Response to Professor Bickel,* 1970 DUKE L.J. 591.

95. *See, e.g.,* Kurland, *Toward a Political Supreme Court,* 37 U. CHI. L. REV. 19 (1969); Kurland, *The Supreme Court, 1963 Term—Foreward: Equal in Origin and Equal in Title to the Legislative and Executive Branches of Government,* 78 HARV. L. REV. 143 (1964). Recently, Raoul Berger attacked the Warren Court in retrospect for "glossing over the question of constitutional authority." Berger, *The Imperial Court,* N.Y. Times, Oct. 9, 1977 (Magazine), at 38.

96. For examples of the efforts to curb the Court's power, see G. GUNTHER & N. DOWLING,

as school busing, reapportionment and criminal procedure.[97]

D. *The Revisionist Defense of Judicial Review*

Parallel to these attacks on judicial review in general and the Warren Court in particular, there emerged a substantial body of legal criticism affirming the legitimacy of value-laden judicial review. These revisionist critics generally defended the institution of judicial review with two principal arguments: (1) that judicial review exists by the consent of the governed and is an accepted part of the American political system; and (2) that judicial review, although technically an extra-constitutional feature of American government, is not inconsistent with either the democratic spirit or the real world practices of representative government.

1. DE FACTO LEGITIMACY OF JUDICIAL REVIEW

With respect to the first argument, scholars have made the argument that, whatever the logical flaws in *Marbury v. Madison*, the institution of judicial review is a *fait accompli*, accepted by the American people and no longer open to serious question. Professor Charles Black, Jr., for example, stressed the fact that judicial review has survived repeated attacks throughout its history:

> One way of stating the strongest claim of judicial review to historically attested legitimacy would be to point to the fact that it has been under attack almost continuously since the beginning, but that the attacks have always failed. Public acquiescence in a practice not seriously challenged might be taken to evidence no more than indifference; public acquiescence in a practice continually questioned for its very life is a different and altogether more significant matter.[98]

Similarly, Archibald Cox, in recounting his experiences as Special Prosecutor of the Watergate affair, has written that "[i]t was the power of legitimacy that produced the public outcry which in turn compelled obedience when President Nixon announced his intention to disregard Judge Sirica's order to produce the Watergate tapes."[99] Cox asked the question: "In a nation dedicated to govern-

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CASES AND MATERIALS ON INDIVIDUAL RIGHTS AND CONSTITUTIONAL LAW 57-59 (1960).

97. For example, Congress attempted to reverse Miranda v. Arizona, 384 U.S. 436 (1966), by enacting the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968) (current version at 42 U.S.C. §§ 3701-3796(c) (1976)).

98. C. BLACK, *supra* note 63, at 183.

99. A. Cox, *supra* note 3, at 104. In a similar vein Cox observed:

> [C]ourts have no power to enforce their decrees against the executive. They possess neither the purse nor the sword. Constitutionalism as a constraint upon

ment by consent of the governed, how is it that the people acquiesce in the exercise of broad veto power over acts of their elected representatives by the vote of a majority of nine Justices who are almost completely insulated from electoral control?"[100] Cox's answer to this question invokes an historical imperative for a neutral referee or arbiter of governmental conflicts between the states and the federal government and among the coordinate branches of the national government. Cox elaborated:

> Without a supreme expositor upon the constitutional distribution of power and popular acceptance of its decisions, the enterprise upon which the American people launched themselves in the Constitution could hardly have survived. With the Court as expositor, the system worked so well that history legitimated the power, and then habit took over . . . .[101]

Leonard Levy makes essentially the same point about popular acceptance of and compliance with Supreme Court rulings:

> Judicial review would never have flourished had the people been opposed to it. *They have opposed only its exercise in particular cases, but not the power itself.* They have the sovereign power to abolish it . . . by constitutional amendment . . . . Judicial review, in fact, exists by the tacit consent of the governed.[102]

2. THE DEMOCRATIC CHARACTER OF JUDICIAL REVIEW[103]

The second argument advanced by the defenders of judicial review challenges the validity of the orthodox claim of a dichotomy between a democratic political process and an undemocratic-"elitist"[104] adjudicatory process. They deny, as Charles Black put it, "the false antithesis between judicial action and the impulses of the people."[105] This theme has two variations.

> government depends, in the first instance, upon the habit of voluntary compliance and, in the last resort, upon a people's realization that their freedom depends upon the observance of the rule of law.

Id. at 7.

100. *Id.* at 31.

101. *Id.* at 29-30.

102. L. LEVY, JUDICIAL REVIEW AND THE SUPREME COURT 12 (1967) (emphasis added). It has been stated that "judicial review is a people's institution, confirmed by the people through history." C. BLACK, *supra* note 63, at 117.

103. This heading is derived from Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1963).

104. *See* Tribe, *supra* note 23, at 53-54. The term has been used as a pejorative by critics of activist courts. *See, e.g.*, Kurland, *Towards a Political Supreme Court*, 37 U. CHI. L. REV. 19, 44 (1969).

105. C. BLACK, *supra* note 63, at 117.

The first variation attempts to show that judicial review is consistent with the spirit of democratic government because of the array of political controls over the federal judiciary. Political controls on the Court come from a variety of sources. The appointment process is, of course, political in nature. The turnover of the personnel on the Court, where a vacancy occurs on the average of every twenty-two months,[106] provides the opportunity to remold the Court to conform to basic change in the political consensus. The extraordinary success of Presidents Richard Nixon and Franklin Roosevelt in transforming the Court provide support for this argument. Moreover, as Leonard Levy has pointed out: "The President and Congress could bring the Court to heel even by ordinary legislation. The Court's membership, size, funds, staff, rules of procedure, and enforcement agencies are subject to the control of the 'political' branches."[107] Finally, there is congressional power,[108] however uncertain its scope,[109] to regulate the Court's appellate jurisdiction pursuant to article III of the Constitution.

There is a second component to the argument that judicial review is democratic in character: the Court is unable to make its judgments effective if those judgments seriously violate the *zeitgeist.* For example, Professor Tribe argues that "the Court's power to move beyond a current consensus is circumscribed by its institutional incapacity to lead where others are too reluctant to follow."[110] The limitations of milieu are also recognized by Judge Wright, who suggests that "if the Court is too far out of touch with the people, the Congress and the executive can annul its directives simply by refusing to execute them . . . . In sum, although the Court is not politically responsible, it is likely to be politically reponsive."[111]

106. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-maker,* 6 J. PUB. L. 279, 284 (1957).

107. L. LEVY, *supra* note 102, at 12.

108. *See Ex Parte* McCardle, 74 U.S. (7 Wall.) 506 (1868).

109. *See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,* 66 HARV. L. REV. 1362 (1953).

110. L. TRIBE, *supra* note 2, at 51. Although arguments of this kind are not amenable to empirical verification, they have an intuitive appeal. Commentators have suggested, for example, that the Court decided the abortion cases in the way that it did because of the Court's perception of public sentiment on the issue: "Perhaps Justice Blackmun and his colleagues . . . knew intuitively that 1973 was a propitious time" for those decisions, and that "[t]he intuitions of the Court probably reflected the views of the majority of the people at that time." Miller & Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry,* 61 VA. L. REV. 1187, 1216 (1975) (footnote omitted). *See also* Friendly, *supra* note 5, at 36.

111. Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint,* 54 CORNELL L. REV. 1, 11 (1968) (footnote omitted).

Finally, the most forceful expression of this idea is put forth by Professor Charles Black, who emphasizes that

> if public opinion had rejected it, the performance by the courts of the function of judicial review would have been impossible, not only because of the clear-cut political controls over the courts but also because such an institution, founded in the end only on moral authority, could never have had the strength to prevail in the face of resolute public repudiation of its legitimacy. Judicial review is thus the creation of the American people, as definitely as is any other of the institutions they have created.[112]

3. THE "DEMOCRATIC" CHARACTER OF THE POLITICAL PROCESS

There exists a third argument which is more radical than the other arguments because it denies the validity of the ultimate operational assumption of pluralist politics. This argument focuses on structural "defects" in the political process that prevent or delay the implementation of majority will. By exposing these undemocratic elements of the political system, it becomes easier to justify the counter-majoritarian impact of judicial review.

This mode of argument has become increasingly prevalent in recent years, perhaps as a reflection of a general decline of faith in the integrity and responsiveness of the political branches of government.[113] The observation has been made that "[i]f one analyzes the actual rules of behavior in the so-called democratic units of government, we find . . . the possibility—sometimes the actuality—of minority control. The power of the Rules Committee, the filibuster and the Senate are obvious shortcomings."[114] In a similar vein, Professor Martin Shapiro has forcefully argued "that there can be no automatic and blanket equation of Congress or the Executive with the voice of the people."[115] With more than a touch of cynicism he adds: "If some people find it undemocratic and irresponsible to allow the Supreme Court to decide constitutional questions, I fail to see how their desires will be satisfied by transferring that function to the Chairman of the Committee on Small Business or the Minority Whip."[116]

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112. C. BLACK, *supra* note 63, at 209.

113. Conversely, greater confidence may now be reposed in the courts in matters of public import. Charles Black has declared: "I cannot believe that anyone seriously thinks that, in fact rather than in fiction, the Congressman understands, better than the Justice, the history of our country, the theory and structure of its political, economic and social institutions . . . ." *Id.* at 176.

114. S. KRISLOV, THE SUPREME COURT AND POLITICAL FREEDOM 20 (1968).

115. M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 25 (1966).

116. *Id.* at 30. In an earlier book, Shapiro had taken what is probably the most extreme

Finally, an article by Professor Bishin undertakes a lengthy examination of the political structure in support of his thesis that American government is not democratic in theory or in actuality. "In fact, there are many conventions, practices, circumstances, and conditions surrounding the formal structure of government that prevent representative institutions from responding to popular majorities and that consequently allocate much, if not most, political power to minorities."[117] He concludes, relying on Robert Dahl, that "on matters of specific policy the majority rarely rules."[118]

To these revisionist arguments, Professor Bickel has a rejoinder:

> It is true, of course, that the process of reflecting the will of a popular majority in the legislature is deflected by various inequalities of representation and by all sorts of institutional habits and characteristics, which perhaps tend most often in favor of inertia . . . . Yet, impurities and imperfections, if such they be, in one part of the system are no argument for total departure from the desired norm in another part.[119]

Furthermore, with respect to the thesis of Robert A. Dahl that elections do not make for policymaking by majorities in any significant way and that our system is really one of "minorities rule,"[120] Bickel replies that:

> It remains true nevertheless that only those minorities rule which can command the votes of a majority of individuals in the legislature who can command the votes of a majority of individuals in the electorate. In one fashion or another, both in the legislative process and at elections, the minorities must coalesce into a majority.[121]

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position of all of the revisionist critics. In his theory of "political jurisprudence," he postulated that it was a normal state of affairs for the Court, in its function as a political agency, to create and support a constituency. An example of the type of group, which was cultivated as one of the Court's constituencies, is free speech advocates, who, as a group, were not adequately represented by the so-called "representative branches." M. SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT 8-9 (1964). For a critical evaluation of Shapiro's thesis, see Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968).

117. Bishin, *Judicial Review in Democratic Theory*, S. CAL. L. REV. 1099, 1103 (1977). Bishin added that "judicial review is . . . consistent with American democratic theory," *id.* at 1101, because, "the very concept or meaning of democracy includes the principle that the majority shall be limited in its decisionmaking prerogatives." *Id.* at 1117.

118. *Id.* at 1103 n.19 (citing R. DAHL, A PREFACE TO DEMOCRATIC THEORY 124 (1956)).

119. A. BICKEL, *supra* note 43, at 18.

120. Few of the Court's policy decisions can be interpreted sensibly in terms of "majority" versus a "minority" . . . . Generally speaking, policy at the national level is the outcome of conflict, bargaining, and agreement among minorities; the process is neither minority rule nor majority rule but what might be better called *minorities* rule . . . ."

Dahl, *supra* note 106, at 294.

121. A. BICKEL, *supra* note 43, at 19. Professor Bickel is technically incorrect because he

However attenuated that argument may seem, Professor Bickel committed himself to the pluralistic political process rather than to constitutional adjudication, for the articulation of fundamental societal value choices. In an age of social upheaval, political fragmentation and moral relativism, he thought it necessary to abandon hope for the judicial development of "durable principles." He yielded substantive notions of right and wrong to the superior legitimacy of the political process. Bickel justified this extreme deference to the political process based upon the following rationale:

> In the political process, groups sometimes lose out, but so long as the process is operational and both diffuses power and allows majorities ultimately to work their will, no group that is prepared to enter into the process and combine with others need remain permanently and completely out of power.[122]

Professor Bickel's profound despair about the social condition presented a formidable challenge to the defenders of judicial review. At many points, however, his arguments were vulnerable and a number of commentators rose to the challenge.

It was Judge J. Skelly Wright who made the most forceful and incisive response to Professor Bickel's argument:

> The Professor would have us believe that . . . those groups with the most "intense" interests will be the most active in the process, and it is proper that the more "intense" interests be more richly rewarded. This is nonsense. The big winners in the pluralistic system are the highly organized, wealthy, and motivated groups skilled in the art of insider politics. They have the resources to trade for other benefits, and the resources that it takes to press their claims successfully . . . . Unorganized, poor, unskilled minorities simply do not have the sort of "intense" interests in their rights which the pluralistic system regularly rewards.[123]

III. BEYOND THE LEGITIMACY OF PLURALISM

Thus, the revisionist defense of judicial review culminated in a rejection of what Professor Tribe has labeled the "elitist fallacy."

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glosses over the quorum rules, whereby legislation may be enacted by significantly less than a majority of the total of either house of Congress. If such legislation was challenged, the Court would be passing upon the validity of a law which was favored by one minority and was attacked by another minority. Similarly, laws enacted at the state and local level by popular referendum are often the product of a majority vote of the minority of the population that voted.

122. A. BICKEL, *supra* note 92, at 37.

123. Wright, *supra* note 65, at 789 (footnotes omitted). Professor Tribe would, no doubt, agree. *See* notes 25-26 and accompanying text *supra*.

In his symposium address, Professor Tribe stressed the importance of constitutional adjudication for opening up the political process to "perennial outsiders," to provide "an avenue of participation for those individuals and groups that have not yet been effectively absorbed into the mainstream coalitions of pluralist politics."[124] Thus, Professor Tribe joined Judge Wright in opposing Professor Bickel's emphatic reliance on pluralist politics, with its concomitant circumscription of judicial review.

With the publication of his treatise, Professor Tribe has assumed a role of leadership among the current generation of constitutional scholars. His views on the issue of legitimacy, therefore, are important not only for whatever intrinsic merit they may have but also as a measure of the developments in constitutional thought.

Professor Tribe's treatise, for example, "proceed[s] on the premise of a relatively large judicial role . . . because it has become an historical given."[125] He "reject[s] the assumptions characteristic of Justices like Felix Frankfurter and scholars like Alexander Bickel . . . ."[126] In his view, "the Constitution is an intentionally incomplete, often deliberately indeterminate structure for the participatory evolution of political ideas and governmental practices."[127] Therefore, Professor Tribe did not emphasize institutional considerations, such as whether the Court is "the right or wrong forum to review a particular issue and render judgment."[128] The more crucial question for Professor Tribe is "whether the judgment itself was right or wrong as an element in the living development of constitutional justice."[129]

Thus, Professor Tribe and other like-minded defenders of judicial review have opened up the formerly crabbed and pinched universe of discourse. Instead of asking whether it is proper for the courts, rather than the political branches of government, to decide basic issues of social policy, they accept judicial review as a given, whether de facto or de jure, and ask a very different question. These defenders of judicial review ask whether the social policy decisions made by the courts are good or just or right in terms of the underly-

124. Tribe, *supra* note 23, at 46; *cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (Stone, J.).

125. L. TRIBE, *supra* note 2, at 13.

126. *Id.* at iv.

127. *Id.* at iii.

128. *Id.*

129. *Id.* Judge Wright also places the emphasis on the results of adjudication and on the substantive correctness of court decisions: "When the courts interpret constitutional provisions in ways which we believe wrong, we ought not to shift the focus from the merits of their position to a narrowing of their institutional function." Wright, *supra* note 65, at 786.

ing purpose of the constitutional provision at issue: "If the Constitution is seen as substantive law, as a translation of certain values into rights, powers, and duties, then it may be possible to justify constitutional adjudication not by its method but by its results. Decisions are legitimate, on this view, because they are right."[130]

Professor Tribe's argument for the legitimating force of just results is, of course, antithetical to the traditional reliance on what may be called "process validation." That concept was clearly articulated by Justice Rehnquist when he wrote:

> Within the limits of our Constitution, the representatives of the people in the executive branches of the state and national governments enact laws. The laws that emerge after a typical political struggle in which various individual value judgments are debated . . . take on a form of moral goodness because they have been enacted into positive law. It is the fact of their enactment that gives them whatever moral claim they have upon us as a society, however, and not any independent virtue they may have in any particular citizen's own scale of values.[131]

But Professor Tribe has a persuasive counter argument.

During the course of his symposium address, Professor Tribe illuminated, as one of the limitations of pluralist politics, the incapacity of the political process to define fundamental values by a mere head count.

> [T]he initial legitimacy of our Bill of Rights depends in part on the fact that it received a degree of popular sanction and was not simply dictated autonomously from on high. But if one looks closely at the groups who were denied any voice in approving even this basic charter, it becomes clear that the legitimacy of such a catalog of rights cannot turn simply on the fact that more people has favored than opposed the values it expressed. And this is as it must be. For the *legitimacy of any starting point of basic values or basic rights must rest on the persuasiveness of the reasons that can be adduced for them.*[132]

Because of this insufficiency in the theory of pluralist politics, and because the pluralistic political system is not fully accessible to the "perennial outsiders," Professor Tribe is able to take the

130. L. TRIBE, *supra* note 2, at 52.

131. Rehnquist, *supra* note 12, at 704.

132. Tribe, *supra* note 23, at 45 (emphasis added). For examples of highly controversial decisions which, in spite of the use of a much criticized methodology, have achieved legitimacy on the basis of widespread public acceptance and support, see L. TRIBE, *supra* note 2, at 52. The legitimacy of these decisions, therefore, is not a product of process or method, but of the intrinsic merit of these decisions.

orthodox objection to judicial review and turn it on its head: rather than asking whether judicial review is legitimate in the context of a pluralistic political system, he questions whether a pluralistic process can be legitimate without judicial review. His answer is that "the legitimacy of our system of government requires relatively unimpeded access to litigation,"[133] and that adjudication "is indispensable to its legitimacy."[134]

This inversion is not only a forensic *tour de force,* but also is a useful way to gain a new perspective on the issue. Instead of focusing on the dialectical tension between the Court and the "political branches," Professor Tribe's insight is that we are all engaged in a common enterprise: "[A] dialogue among the various components of a political system"[135] in order "to form a more perfect Union."[136] Thus, Professor Tribe advocates "a more candidly creative role than conventional scholarship has accorded the courts . . . ."[137]

The implications of Professor Tribe's position on the legitimacy issue are potentially far-reaching. Already a number of scholars have advocated "going public" with a realistic recognition of the Supreme Court's role as a policymaker.

Archibald Cox, for example, advocates a "candid acknowledgment by the Court that it is and has been exercising implied constitution-making power."[138] Professor Jeffrey M. Shaman argues that a choice among competing values "is a necessary component of judicial review"[139] and that judges should not "mask the policy considerations and value judgments which are the real basis of their decisions."[140] Still another commentator calls for "truth in judging,"

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133. Tribe, *supra* note 23, at 45.

134. *Id.* at 46. Support for this conclusion is provided by the observation that:

> What a government of limited power needs, at the beginning and forever, is some means of satisfying the people that it has taken all steps humanly possible to stay within its powers. That is the condition of its legitimacy, and its legitimacy, in the long run, is the condition of its life. And the Court, through its history, has acted as the legitimator of the government. In a very real sense, the Government of the United States is based on the opinions of the Supreme Court.

C. BLACK, *supra* note 63, at 52.

135. Tribe, *supra* note 23, at 54. It is clear that "judges and courts are an integral part of government and politics." Shapiro, *Political Jurisprudence,* 52 KY. L.J. 294, 297 (1964).

136. L. TRIBE, *supra* note 2, at iv.

137. *Id.*

138. A. COX, *supra* note 3, at 355.

139. Shaman, *The Rule of Reasonableness in Constitutional Adjudication: Toward the End of Irresponsible Judicial Review and the Establishment of a Viable Theory of the Equal Protection Clause,* 2 HASTINGS CONST. L.Q. 153, 171 (1975).

140. *Id.* at 165. This commentator also argues that "[t]he judicial function is not, as Professor Bickel would have it, distinct from the legislative function. At their foundation all

arguing that the Supreme Court functions as a "legiscourt" and that this role has been legitimated by the acceptance of the American people, the states and the other departments of government.[141] Additionally, there is substantial evidence that the Supreme Court bar approaches the Court as a policymaking institution. For example, Professors Miller and Barron, using a questionnaire methodology, have shown that the traditional or Blackstonian judicial model of "found law" does not accurately reflect contemporary Supreme Court practice. On the contrary, "[t]he bar treats the Court much like a legislative committee. A variety of major premises are offered on the basis of their virtue as policy rather than of their authoritative character as law."[142] Finally, the Justices themselves have on occasion lifted the veil to confess the true policymaking nature of the adjudicatory process.[143]

IV. THE INHIBITING IMPACT OF THE LEGITIMACY DEBATE ON SUPREME COURT ADJUDICATION

Despite the marked shift in critical opinion regarding the legitimacy of judicial review and strong evidence of its popular acceptance, the Supreme Court continues to see "[t]he ghost of usurpation"[144] and to hear the admonitions of restraint of Justice Frankfurter and Professor Bickel. But the so-called passive virtues can, and do, have pernicious effects. This has been made manifest by several decisions of the Burger Court on the issue of justiciability.

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rules or laws are value judgments, whether their source is the legislature, the executive, or the judiciary." *Id.* at 161-62.

141. Forrester, *Are We Ready for Truth in Judging?*, 63 A.B.A.J. 1212 (1977). This commentator wrote:

> Unlike a court, its [the Supreme Court's] primary function is not judicial but legislative. It is a governing body in the sense that it makes the basic policy decisions of the nation, selects among the competing values of our society, and administers and executes the directions it chooses in political, social and ethical matters. It has become the major societal agency for reform.

Id. at 1214-15; *see* Dahl, *supra* note 106. Dahl argued that the court must "choose among controversial alternatives of public policy by appealing to at least some criteria of acceptability on questions of fact and value that cannot be found in or deduced from precedent, statute, and Constitution. It is in this sense that the Court is a national policy-maker." *Id.* at 281.

142. Miller & Barron, *supra* note 110, at 1199.

143. [W]hat the Court has done is to make new law and new public policy in much the way that it has in the course of interpreting other great clauses of the Constitution. This is what the Court historically has done. Indeed, it is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.

Miranda v. Arizona, 384 U.S. 436, 531-32 (1966) (White, J., dissenting).

144. L. LEVY, *supra* note 102, at 2 (quoting C. BEARD, THE SUPREME COURT AND THE CONSTITUTION 36 (1938)).

A. *Nonjusticiability: The Vice of the Passive Virtues*

In *United States v. Richardson,*[145] a federal taxpayer brought suit alleging that the secret budget of the CIA violated the statement and account clause of the Constitution.[146] Reversing an *en banc* decision of the United States Court of Appeals for the Third Circuit, the Supreme Court held five to four that the plaintiff lacked standing to maintain the suit because he had not suffered any cognizable injury under article III.

In a rather candid concurring opinion, Justice Powell manifests a tenacious adherence to what Professor Tribe has called the "elitist fallacy." Although he conceded that the statement and account clause "could be viewed as the most democratic of limitations,"[147] and that there were no technical impediments to the existence of standing under article III, Justice Powell argued that "[t]he Court should explicitly reaffirm traditional prudential barriers against such public actions."[148] He wrote:

> Relaxation of standing requirements is directly related to the expansion of judicial power. It seems to me inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a *shift away from a democratic form of government.* I also believe that repeated and essentially head-on *confrontations between the life-tenured branch and the representative branches of government* will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not *exercise self-restraint in the utilization of our power to negative the actions of the other branches* . . . . [T]axpayer or citizen advocacy, given its potentially broad base, is precisely the type of leverage that in a democracy ought to be employed against the branches that were intended to be responsive to public attitudes about the appropriate operation of government.[149]

He further argued that:

> The power recognized in *Marbury v. Madison* . . . is a potent one. Its prudent use seems to me incompatible with unlimited

145. 418 U.S. 166 (1974).

146. "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." U.S. CONST. art. I, § 9, cl. 7.

147. 418 U.S. at 184.

148. *Id.* at 196.

149. *Id.* at 188-89 (emphasis added); *cf.* Baker v. Carr, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting).

> notions of taxpayer and citizen standing. Were we to utilize this power as indiscriminately as is now being urged, *we may witness efforts by the representative branches drastically to curb its use.* Due to what many have regarded as the unresponsiveness of the Federal Government to recognized needs or serious inequities in our society, recourse to the federal courts has attained an unprecedented popularity in recent decades. Those courts have often acted as a major instrument of social reform. But this has not always been the case, as experiences under the New Deal illustrate. The public reaction to the substantive due process holdings of the federal courts during that period requires no elaboration, and it is not unusual for history to repeat itself.[150]

There are two dominant themes in this passage: (1) change initiated through litigation in the federal courts is undemocratic and potentially destructive, and therefore, (2) the courts should exercise self-restraint and defer to the representative branches of government.

This emphasis on prudential considerations is conventional, although Justice Powell's version, with its recurring image of confrontation, is particularly timid, if not disingenuous.[151] The Court-packing confrontation of 1937, after all, occurred in very different, probably historically unique, circumstances when the nation was struggling for survival amidst the most severe economic crisis of the modern industrial world. A challenge to clandestine funding of the CIA, predicated not on the open textures and vague contours of the due process clause, but on the rather explicit constitutional command of the statement and account clause, hardly seems analagous. Moreover, the Court's suggestion that the plaintiff pursue the issue through the political process is gratuitous in light of the pervasive secrecy surrounding the CIA budget that keeps most of Congress

150. 418 U.S. at 191 (emphasis added) (citation omitted).

151. Justice Powell's argument is vulnerable to attack on the basis that the argument ignores the outcome of the confrontation in 1932. I cannot improve on the incisive analysis of Professor Black:

> Now the standard version of the story of the New Deal and the Court, though accurate in its way, displaces the emphasis in a manner unusual in storytelling. It concentrates on the difficulties; it almost forgets how the whole thing turned out. The upshot of the matter was (and this is what I would like to emphasize) that after some twenty-four months of balking (and only a year of real crisis, for it was not until the spring of 1936 that the Court could be said to have taken anything like a resolute and general negative stand) the Supreme Court, without a single change in the law of its composition, or, indeed, in its actual meaning, *placed the affirmative stamp of legitimacy on the New Deal, and on the whole new conception of government in America.*

C. BLACK, *supra* note 63, at 64 (emphasis in original).

ignorant of the dimensions of the problem.[152]

To some, the question may seem to be a close one, but to this author and to the four dissenters, the *Richardson* decision was unquestionably wrong. The decision exemplifies the vices of Professor Bickel's "passive virtues" by its excessive preoccupation with the question of institutional roles and its indifference towards the meaning of the Constitution.[153] Because of the Court's overriding concern with the "proper" relationship of the Court to the political branches of government, a clear and egregious violation of constitutional text was ignored. This is surely a case of reversed priorities.[154]

This excessive concern with institutional relationships has begun to draw critical fire. Justice Hans Linde, for example, has called for a reorientation of constitutional criticism away from the role of the Court to an evaluation of the *results* of adjudication.

> What must ultimately be reconsidered in both criticism and adjudication is the relationship between the Constitution and judicial review. Because constitutional scholarship has remained consistently preoccupied with the institutional concerns of the judicial process, it sees constitutional law as composed of questions about what judges should do, not what government should do. The effect is to treat constitutional law as a consequence of judicial review, rather than vice versa.[155]

In his view, "[b]oth judges and critics best serve their common cause when their focus is on the Constitution rather than on processes and problems of judicial review."[156] Judge Wright has also endorsed this approach, arguing for a mode of constitutional interpretation that proceeds from "the top down—not from the bottom up as the traditional mode of criticism would seem to have it. A judge or scholar should begin by expounding his view of the theory and purpose behind the constitutional provision in question."[157]

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152. Professor Tribe has suggested that, because of the secrecy which surrounds the CIA budget, "the abuse is structurally immune to meaningful political challenge." Tribe, *supra* note 23, at 47.

153. The pernicious effect of this exercise of the passive virtues is that the proponents of maintaining the secrecy which surrounds the CIA budget are supported by the rule of nonactionability established by this decision. *See* note 91 and accompanying text *supra*.

154. Professor Tribe argues that courts should inquire whether the injury complained of impeded the effective operation of pluralistic processes. Concealment of the CIA budget weakens political reform efforts, and, therefore, the existence of such concealment demonstrates the existence of injury in fact so that the standing requirement is satisfied. *See* L. TRIBE, *supra* note 2, at 92.

155. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 251 (1972). Linde traces this confusion to the legacy of realism with its emphasis on "what a court will do in fact." *Id.* at 227.

156. *Id.* at 255.

157. Wright, *supra* note 65, at 785.

Rather than focusing so much attention on the role of the Court, the Justices should "get on with the business of enforcing the purposive commands of the Constitution."[158]

Professor Tribe also proposes a broader view of constitutionalism than that of the realist critics who were preoccupied with "what a court will do in fact."[159] In his treatise, he suggests that the Constitution be viewed as addressing itself to all branches of the government, not solely to the courts.[160] Hans Linde has provided support for Professor Tribe's suggestion by articulating a perspective on the Constitution which is broad enough to reach the behavior of the lower courts and other institutions of government as well as that of the Supreme Court.[161]

B. *The Duty to Decide the Litigated Case*[162]

Professor Wechsler's position on judicial review[163] was entirely principled, treating jurisdictional principles, in Professor Gunther's phrase, as "no less so because they pertain to jurisdiction."[164] His views are thus in inescapable conflict with those of Professor Bickel: between the "passive virtues" and "the duty to decide the litigated case" there is no middle ground.

The concept of nonjusticiability, a technique of avoiding a decision in a case, is so firmly rooted in constitutional law that it seems a futile gesture to argue against the concept. Furthermore, the professional stature of Professor Bickel and his intellectual progenitor Justice Frankfurter are so formidable that a rejection of their concepts of judicial restraint has overtones of *lese majeste.* Yet the truth of the matter is that they are the radicals who broke with tradition and with the Constitution itself.

It is true, after all, that article III, section 2, extends the judicial power of the United States "to *all* cases, in law and equity," not merely to those which the Supreme Court deems it "prudent" to

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158. *Id.* at 787.

159. O. HOLMES, THE COMMON LAW 68 (1963).

160. L. TRIBE, *supra* note 2, at 16.

161. [A] wider focus would not neglect the role of constitutional norms in governmental institutions apart from the courts. An understanding that it is not only possible but obligatory for government to act pursuant to its constitution—an understanding of what is premise and what is consequence in judicial review—should inform not only the work of legal advisors at all levels of government but also shape the judicial articulation of constitutional norms.

Linde, *supra* note 155, at 251.

162. This heading is derived from Professor Wechsler's essay on neutral principles. Wechsler, *supra* note 57, at 6.

163. *See* notes 57-66 and accompanying text *supra.*

164. Gunther, *supra* note 84, at 15.

decide. And however much momentum the ideas of men like Justice Frankfurter and Professor Bickel may carry, the Wechslerian position bears the imprimatur of an even more eminent figure of the law, Chief Justice John Marshall. Marshall, whose grander vision of the Constitution has been largely vindicated by history, originated the idea of the duty to decide in his opinion in *Cohens v. Virginia.*[165]

> It is most true, that this Court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.[166]

Although the phrase "treason to the constitution" sounds a bit florid to the modern ear, the essential point of this passage remains unimpaired: judicial self-restraint is a gloss on article III. "Jurisdictional principles are rooted in statutes and in the Constitution."[167] Accordingly, there is no justification for the Supreme Court to disregard those principles and to withhold adjudication merely because the Court deems it better or wiser in terms of its institutional role, vis-à-vis the other branches of government, or because the Court continues, however implausibly, to see the ghost of 1937 lurking in the shadows. Nothing could be more destructive to a principled constitutionalism. In Professor Black's vivid imagery, "judicial restraint carried far enough becomes judicial catatonia, distinguishable only by the specialist from death."[168] Thus, Professor Black inveighs against what he perceives as "a prevailing overemphasis on this concept of judicial self restraint."[169] The author joins him in that view.

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165. 19 U.S. (7 Wheat.) 264 (1821).

166. *Id.* at 404.

167. Gunther, *supra* note 84, at 15.

168. C. BLACK, *supra* note 63, at 2.

169. *Id.* Black continues:

> I have long felt that the constitutional power of the Court has too often been presented by the disciples of this school as something predominantly dangerous and only doubtfully beneficial, something as to which caution is the prime directive, something to be hedged in and cut down and diluted as thin as can be with the watery fluid of abstention. Though some of the people who represent this point of view wrap themselves in a more than oracular subtlety, their ways of thought, if they prevail, must lead to a most flatly unsubtle conclusion—the end of judicially implemented constitutionalism as a living component in government.

Id.

V. CONCLUSION

Stripped of political rhetoric and jurisprudential jargon, the issue of legitimacy is fundamental because it bears on ultimate political questions: Who governs? Which institutions exercise control? Who sets the standards of permissible behavior in our society? Is abortion, for example, to be a crime or a constitutional right? Without in any way denigrating the importance of the issue, it appears that the productivity of scholarly debate on the legitimacy of judicial review has been exhausted. No definitive theoretical answer has been achieved and in the nature of the case none can be. What is certain, however, is that judicial review is here to stay; it is a reality, legitimated de facto, if not de jure, by popular acceptance over nearly two centuries of our history.

In light of this reality, the continued judicial and scholarly obsession with the flaws in the syllogism of *Marbury v. Madison* should be abandoned. Legitimacy was the preoccupation of an earlier generation, and now it is an idea whose time has passed. With the doubts about the legitimacy of judicial review should go the baggage of the "passive virtues" and other contrivances for avoiding the decision of a case within the Court's article III jurisdiction.

This is not to suggest the abandonment of all restraint on the federal judiciary. The integrity of the Court's work can and should be maintained by the development of rigorous standards of substantive review for all cases within the Court's jurisdiction.[170] Rather than manipulating the various procedural devices in order to avoid its duty to decide, the focus of attention should be on the development of appropriate standards for rendering judgment on the merits. Under this approach, the question would no longer be whether or when the Court should decide: the question would become how it should rule and what it should say in support of its judgment. If in the course of evolving constitutional doctrine, the Court makes mistakes of judgment, which it will certainly do from time to time, then it will be more productive to meet those rulings head on, rather than calling for a judicial retreat by narrowing the Court's institutional role. As Judge Wright put the matter:

170. By "standards of substantive review" is meant the question of how the Court is to rule rather than when. The abandonment of the passive virtues would mean that the Court would always rule, save for a bona fide political question, in cases within its article III jurisdiction. In that event, the Court must face the issue of whether its judgments should reflect, for example, strict scrutiny, minimum rationality or some intermediate standard in cases arising under the equal protection clause. *See* Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

> When the courts interpret constitutional provisions in ways which we believe wrong, we ought not to shift the focus from the merits of their position to a narrowing of their institutional function. This was the fundamental mistake made by liberal legal scholars in the 1930's. Judicial decisions of which we disapprove can best be challenged on their merits, and in a wholly reasonable manner. Arguments over purposes and theories will be healthy, aiding both judges and the political officials who appoint them. This approach will refocus attention, spawn a new mode of judicial criticism, and *allow us to get on with the business of enforcing the purposive commands of the Constitution.*[171]

171. Wright, *supra* note 65, at 786-87 (emphasis added) (footnote omitted).