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Book Review: History of the Supreme Court of the United States, Volume Ix: The Judiciary and Responsible Government 1910-1921. by Alexander M. Bickel and Benno C. Schmidt, Jr.

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HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOLUME IX: THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910-1921. By Alexander M. Bickel[1] and Benno C. Schmidt, Jr.[2] New York: Macmillan. 1984. Pp. xiv, 1041. $75.00.

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In this volume of the scandalously overdue Holmes Devise Series, Alexander Bickel and Benno Schmidt have crafted a work finally benefitting the Series's expectations. Unlike earlier volumes, care is taken here to consider not only the inner workings of the Court, but also the personal and social factors that went into its behavior. The volume conveys a refreshing historical sense of the Court's role in the public policy struggles of the time.

Bickel, who had completed 718 pages at the time of his death in November 1974, had indicated that, unlike the authors of earlier volumes, he hoped to place the work of the Court in its political, social, economic, and intellectual context. He wished to treat great cases not as isolated episodes, but as part of a process, thus emphasizing the background and the consequences as well as the decision. Parts of that purpose were carried out very well. He found the Court confronted in this period with the legislative fruits of the Progressive movement, but vacillating, frequently divided, and as yet (apart from Holmes) not fully equipped for the task. If not hospitable, most Justices were at least surprisingly tolerant toward social reform. Bickel briefly set the stage for this period, detailing the spirit of nationalism abroad, and the new importance of the controversy over the fourteenth amendment. He then moved his characters onstage with careful assessments of their personalities, their political orientation, their legal training, and their constitutional

1. Late Chancellor Kent Professor of Law and Legal History and William Clyde DeVane Professor of Law, Yale Law School.
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philosophies. He showed how such men dealt with a broad range of legal issues, from antitrust cases, tort litigation, contract clause issues, and Indian law, to the new police power regulations of everything from drugs and liquor to minimum wages, maximum hours, and child labor. His discussion is particularly useful in the way it relates judicial opinions to progressivism, examining both the social forces that affected its creation, and the impact judicial rules had upon public policy. Because Bickel's work is now ten years old, however, the sources are obviously dated. In contrast, Schmidt's segment is based heavily on works published since Bickel's death.

Benno Schmidt, in preparing the work's three concluding chapters, chose not to update Bickel but confined himself almost solely to exploring the White Court's civil rights record. He focused heavily upon peonage cases, state restrictive legislation such as the Jim Crow laws, and state disenfranchisement, with special emphasis on the grandfather clause. Like Bickel, Schmidt paints on a broad canvas. In some respects these chapters are even more revealing and successful than Bickel's. Schmidt is more sophisticated in locating the Court in the middle of events sweeping the nation—progressive reform, massive immigration, explosively intensifying racial antagonism, as well as labor struggles and a world war. Thus the Court was confronted with urgent issues regarding civil liberties and Civil War amendments, as well as the need to construe the burgeoning federal social and economic legislation.

Bickel presents extensive evidence of the Court's activism. Before 1915, the Justices either accepted or rewrote progressive legislation, with the intent of upholding federal reform and even encouraging state action. In this context, Bickel devotes over a hundred pages to the "rule of reason." With regard to the states themselves, this progressive trend meant frequent permissive pronouncements in state due process cases. Thus, as Charles Warren pointed out in 1913 in an article entitled *The Progressiveness of the United States Supreme Court,* recent instances in which the Supreme Court struck down social and economic legislation were very few. As Felix Frankfurter pointed out at the same time, "on the whole, we have entered upon an epoch in which Justice Holmes has been the most consistent and dominating force and to which Justices Day and Hughes have been contributing factors." According to Bickel the Justices feared that hidebound constitutional interpretation based upon antiquated social and economic theories would breed extreme radicalism in the country. And certainly, as Bickel carefully details, the leftwing assault upon the judiciary was massive, especially prior to the teens. It included not only blasts at

the Supreme Court, but even more strongly at state courts, which had become particularly distrusted and feared due to their conservative bias.

Telling here were the broadsides of influential progressive leaders. Albert Beveridge, the subsequent biographer of John Marshall, urged that the Constitution be made into a "living thing," growing with the people's growth, aiding the people in their struggle for life, liberty, and the pursuit of happiness. Theodore Roosevelt seldom lost an opportunity in his later career to blast the Court for "protecting fossilized wrong." His charge that the Court had created a "neutral area between the power of the states and the power of the Federal government," convinced many that the Court and the Constitution were instruments of political warfare in conservative hands. Bickel sees this attack on the judiciary as liberalizing the Court. By the mid-teens the attacks diminished and the Court again reasserted its conservatism. Clearly, by the end of the period, it was becoming increasingly recalcitrant and a strong nay sayer through judicial vetoes. Indeed, in this period Bickel sees far less doctrine and far more simple negativism. The trashing of the federal child labor law, through a disturbingly narrow interpretation of the federal commerce power, was a case in point. Thus, as Bickel makes clear, the Court's decisions once again represented the attitudes of bar and bench and the expectations of the propertied classes. This hardening of the Court into what William Swindler has called "an obstructive force of scholastic legalism" characterized its behavior through the twenties and especially in the early thirties.

Perceptions of the Court's changing role in this period clearly differ. Frankfurter saw the Court during the first third of the twentieth century expanding its authority by becoming the final authority upon the relationships of the individual to the state, the individual to the United States, the states to the United States, and the states to each other. It thereby, he argued, surrendered much of its prior function. Bickel disagrees. Constitutional and statutory litigation was clearly on the rise in these years, he contends, but the major reform in the Court's jurisdiction, which was to remove the bulk of ordinary private litigation, lay in the future. In this early period, as shown by Bickel's painstaking review of the Court's docket, the Supreme Court had by no means ceased to be a common law court. In fact, this was still its principal function.

Schmidt also sees a modification of the Court's former "aggressive doctrine of laissez faire constitutionalism." In fact, he sees the partial continuation of the doctrine, plus the institutional revival

and liberalizing pressure on the Court, as important factors in its new willingness to consider constitutional rights for blacks. In doing so, he views the Court of these years departing significantly from the conventional picture of the progressives' total failure in race relations. Rather, he sees these years as the beginning of a new civil rights sensitivity. For the first time, he argues, the Court in the *Grandfather Clause Cases* of 1915 applied the fifteenth amendment and what was left of the federal civil rights statutes to strike down state laws calculated to deny blacks the right to vote. For the first time, it used the thirteenth amendment in 1914 to strike down state laws that supported peonage by treating breach of labor contracts as criminal. For the first time, in 1917 it found in the fourteenth amendment limits on laws requiring racial separation. Also for the first time, in 1914 it put some teeth in the equality side of the "separate but equal doctrine." The decisions taken together, he concludes, mark "the first time in American history that the Court opened itself in more than a passive way to the promises of the Civil War amendments." It thus breathed life into Reconstruction principles that had been left for dead by the Waite and Fuller Courts for three decades. He acknowledges that the promises of these decisions were not to be realized until much later. His argument is persuasive, and many of the previously obscure cases on which he relies will now have to be reexamined in light of his argument.

The volume then is rich in many ways. One only hopes it sets a trend for future volumes and continues the Series on the high road of good history as well as good case law.