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Review Essay

American Liberals and Judicial Activism: Alexander Bickel's Appeal from the New to the Old

MAURICE J. HOLLAND*

I.

Before his death in November 1974, Alexander Bickel ranked among the handful of American legal scholars who could fairly be described as men of letters.¹ This was more than a matter of the lucid and elegant prose in which, in contributions to *New Republic* and *Commentary* over the span of two decades, he illuminated a remarkably various range of subjects. That Bickel attained to more than conventional professional eminence in his academic speciality of constitutional law was most owing to the extraordinary breadth of conception he brought to that pursuit. In a manner more characteristic of the tradition of English than of American constitutional scholarship, a tradition exemplified by Dicey, Maitland, and Bagehot, Bickel's writings are resonant with learning and insight drawn from history, philosophy, and politics. This enabled him to go far beyond mere case analysis and doctrinal explication which, however adept, offer little interest to those not professionally concerned with the field. More than any other figure of his time, Bickel made constitutional law an important contributing element of the nation's "public philosophy."²

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¹ A complete bibliography of Bickel's writings appears in A. BICKEL, *THE MORALITY OF CONSENT* 143-50 (1975) [hereinafter referred to as BICKEL]. Their number is the more impressive in that he died at age forty-nine. His other books are: *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* (1957); *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); *THE NEW AGE OF POLITICAL REFORM: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM* (1968); *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); *REFORM AND CONTINUITY: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM* (1971); and, *THE CASELOAD OF THE SUPREME COURT AND WHAT, IF ANYTHING, TO DO ABOUT IT* (1973). His contribution to Supreme Court scholarship will fittingly culminate in the posthumous publication of *THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910-1921*, a volume in the Holmes Devise *HISTORY OF THE SUPREME COURT OF THE UNITED STATES*, the manuscript of which Bickel left substantially completed at his death.

² See W. LIPPMANN, *THE PUBLIC PHILOSOPHY* (1955). Lippmann used the term "public philosophy" to describe society's informed and reasoned debate concerning the translation of moral values into public policy.

As his long affiliation with *New Republic* implied, Bickel's politics were liberal, though by no means perfervidly so. The two greatest influences on his thought, at least on matters pertaining to the Constitution and the role of the Supreme Court, were two heroes of American liberalism, Louis Brandeis and Felix Frankfurter,³ for the latter of whom he clerked during the 1952 term. Though expressed in a style in which undertones of irony and gentle skepticism were seldom lacking, Bickel partook of most of the liberal enthusiasms of the 1950's and 60's with, until near the end of his life, only an occasional demurrer.

With the publication in 1970 of *The Supreme Court and the Idea of Progress*,⁴ however, Bickel ventured beyond minor caveats about questions of detail, and espoused what, measured by the stringent orthodoxy of the liberal creed, constituted rank apostasy. He assayed the work of the Warren Court and pronounced it seriously flawed in many important respects. Far exceeding the customary professorial license to pick scholarly nits with one or another decision, *The Supreme Court and the Idea of Progress* piqued, even outraged, liberal opinion⁵ by

³ Some reading this might question this characterization as applied to Frankfurter. Granting every concession to the imprecision of political labels, to doubt Frankfurter's liberal credentials betrays excessive present-mindedness and lack of historical perspective about the place of the doctrine of judicial restraint in American political and constitutional thought prior to the most recent decades. It is to forget that until the advent of the Warren Court and the civil rights movement, judicial authority generally and judicial review in particular had been exalted for the most part by conservatives as the ultimate guardian against populist excesses on the part of legislatures, and was viewed with hostility by liberals and progressives for the same reason, though, of course, the latter put it differently.

The New Deal "court-packing" plan of 1937 was merely the culminating episode in an almost unbroken line of liberal (using the word in the broadest sense to include Jeffersonians, Jacksonians, Lincoln and the Abolitionists, Populists and Progressives) resistance to judicial pretensions beginning with the Chase impeachment and Jefferson's abortive assault on the Marshall Court.

Frankfurter's espousal, as a member of the Supreme Court from 1939 to 1962, of the canons of judicial restraint formulated preeminently by Brandeis was of a piece with his earlier career as a Bull Moose Republican, LaFollette Progressive, and New Deal "brain-truster," as is evidenced by the recently published excerpts from his confidential diaries under the title: FROM THE DIARIES OF FELIX FRANKFURTER (Joseph P. Lash ed. 1975) [hereinafter referred to as LASH]. That Frankfurter as a judge and Bickel as a scholar came to be criticized, even pilloried, by many contemporary or "new liberals" for adherence to a conception of the proper limits of judicial power traditionally held by those of that political persuasion betokened the magnitude of the shift in liberal attitude. Hence, although the context and issues could scarcely be more different, a resemblance is suggested between the Bickel of *THE MORALITY OF CONSENT*, appealing to an earlier generation of the party to which he had given lifelong allegiance, and the Edmund Burke of *AN APPEAL FROM THE NEW TO THE OLD WHIGS* (1791), who was similarly estranged from, and abused by the new leaders of his party.

⁴ Delivered as the 1969 Oliver Wendell Holmes Lectures at Harvard Law School, and subsequently published in book form in 1970.

⁵ Among those most piqued was Judge J. Skelly Wright of the U.S. Court of Appeals for the District of Columbia. See Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971). As it would have been obviously inap-

proposing reservations about what its admirers commonly regarded as the Court's most luminous triumphs during Earl Warren's Chief Justiceship: school integration⁶ and legislative reapportionment.⁷ Still more jarring, on a more general plane Bickel questioned the validity of what had become the principal theme sounded, indeed intoned in the manner of an incantation, by liberals in justification of the Court's unprecedented activism during that period,⁸ namely, that the quantity and quality of

appropriate for any of the Warren Court Justices to take up cudgels against Bickel, even by the relaxed standards of judicial aloofness occasionally shown by some of them, that task could not have fallen to anyone more fitting than Judge Wright, of whom it might have been said, in the sense it was said of Judge Learned Hand vis-à-vis the Court of his time, that he was the "tenth Justice" during the period of Earl Warren's Chief Justiceship. Judge Wright dismissed Bickel as one of a coterie of "scholastic mandarins," *id.* at 777, owing allegiance to "the ancient regime," *id.* at 790, whose "[i]deal Justices would become adept at sitting on their hands . . ." *id.* at 782.

⁶ Bickel did not retract his earlier, unqualified approval of the original desegregation decisions. For his eloquent defense of *Brown v. Board of Education*, 347 U.S. 483 (1954), see Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955). Rather, his criticism was directed at the Court's insistence, beginning in the late 1960's, upon the achievement of "racial balance" by mandatory busing if necessary. See A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 130-51 (1970). By transforming the right recognized in *Brown* of black schoolchildren not to be excluded from a public school on account of race into a right to attend a school wherein the minority-majority ratio is proportional to that prevailing in the general population of the school district, the Court, Bickel charged, was arbitrarily exalting one educational value, and that one of dubious and untested character, against others which, at least in the aggregate, might have much greater practical consequences for the quality of education.

⁷ A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 151-75 (1970).

⁸ If activism can be measured at least in part by innovation, then the general impression that the Warren Court was unprecedentedly activist is no illusion. As striking as any quantitative measure of just how innovative it was is that during the sixteen terms of the Warren Chief Justiceship the Court expressly overruled prior Supreme Court holdings interpreting the Constitution on thirty-one occasions, compared with twenty-seven such express overrulings during the previous 163 years of its history. These figures may be more significant for this purpose than a comparison of the number of invalidations of federal and state statutes by the Warren Court with the number of previous invalidations, although the latter certainly also support the impression of extraordinary activism. The Warren Court invalidated federal legislation on twenty-two occasions, as compared with sixty-nine by its predecessors. With regard to state legislation, the numbers are 167 and 575, respectively. See *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION*, S. Doc. No. 82, 92nd Cong., 2d Sess. 1597-1797 (L. Jayson, J. Killian, S. Beckey & T. Durbin ed. 1973).

Of course, the concept of judicial activism is far too elusive to be captured satisfactorily by such grossly quantitative indices. If activism were to be intelligibly measured, some means would have to be devised to take account of, among other qualitative factors, the importance and recency of the decisions overruled, the life-span of the overruled interpretations and the political "weight" behind various enactments struck down. Purely on the quantitative level, adjustment would somehow have to be made for the increasing volume of legislation on the federal and state levels, as well as, in the case of overrulings, the fact that rejection of prior holdings could not be expected during the earliest decades of the Court's existence. In addition, there is obvious difficulty with focusing solely on "express" overrulings. Everyone is aware that much overruling is accomplished *sub silentio* by purporting to distinguish earlier decisions. Some might even say that the Warren Court's proclivity for express overrulings was more a tribute to its candor than a mark of its activism. Finally, as a matter of definition, to speak of "the Warren Court" implies that a unique institutional character coincided with Earl Warren's tenure as Chief Justice.

its interventions, its jettisonings of precedent, its shunting aside of so many tenets of self-restraint, were all uniquely warranted because of supposed defaults and derelictions on the part of the representative organs of government, both federal and state.⁹ In their venality, cowardice, or cumbersomeness, these bodies had, according to this view, permitted an unacceptable number of recalcitrant "problems" to accumulate on the agenda of national reform. Hence, the Court was left with no alternative but to act boldly when the representative branches, surely not for any reasons having to do with their being representative, proved themselves unwilling or unable to do so. In the area of voting, for example, an image was conjured up of the Justices indulgently waiting decades for state legislatures to finally reapportion themselves according to what was at last revealed in 1964 to be the constitutionally mandated formula of "one man, one vote." Their patience exhausted, they simply had to act and purge the anomaly of "malapportionment."¹⁰

For commentators like Professor Cox, the only difficulties attendant upon the long-overdue reform of reapportionment stemmed from the fact that the dawning of this new day occurred under judicial auspices.

Needless to say, the majorities which during the period 1954 to 1969 overruled prior constitutional interpretations did not always include Chief Justice Warren, and even when they did, they necessarily included Justices who were members of the Court either before or after his tenure; in the cases of Justices Black and Douglas, both. Nevertheless, granting full force to all of these qualifications, the statistical comparisons are dramatic enough to furnish underpinning for what everyone knows impressionistically—namely, that from the time roughly coinciding with Chief Justice Warren's appointment, the Court began behaving quite differently from the past.

⁹ Archibald Cox is as distinguished as any scholarly spokesman for this point of view. See A. COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* (1968) [hereinafter cited as *WARREN COURT*]. He reflected awareness of what he called "the basic dilemma of constitutional adjudication," *id.* at 13, when he conceded that:

The problem is more complex for those who think partly in institutional terms and believe that in the long run human events may be profoundly influenced by the allocation of power among governmental agencies and by the way in which the judiciary exercises its share of power—more complex not because they are any less enthusiastic over the substantive progress but because it has been accompanied by major institutional changes whose long-range consequences are difficult to measure and which the present Court sometimes seems to brush aside without careful consideration in its enthusiasm for immediate progress.

Id. at 13.

This book evidently grew out of Professor Cox's sense that the Warren Court could well do with something in the way of an apologia. The justifications he gives for the "institutional changes" wrought by the Court are cast essentially in terms of approval for the "substantive progress"—that is, the political results it mandated. The balance in favor of the Court is ultimately struck not merely by approval of these results, but also by the belief that they were not otherwise attainable through the ordinary political processes. To some it might seem odd that a scholarly justification for the Court's more than occasional failure to observe the limitations which differentiate the functions of adjudication from legislation should rest upon considerations wholly applicable to the latter.

¹⁰ *Id.* at 114-20.

Of these, there were quite a number, not the least of which was a recent Supreme Court decision¹¹ squarely holding legislative apportionment a non-justiciable political question. It might be added that everything theretofore understood about the equal protection clause of the fourteenth amendment suggested it had little, if anything at all, to do with how states apportioned their legislatures. Though the balance was close, such "institutional difficulties" were outweighed for Professor Cox by the fact that the reapportionment decisions, after all, constituted a great reform. If this quality about them was not self-evident, he went on to explain that they should on balance be applauded because their tendency was "egalitarian," and because state legislatures such as Tennessee's "had failed to adapt themselves to the burgeoning problems of an urban, industrialized society."¹² Finally, to dispel any remaining doubt and clinch the point, the familiar incantation was intoned in terms of "the stark fact that the cancer of malapportionment would continue to grow unless the Court excised it."¹³

If any one person could be said to have lead the Warren Court's cheering section throughout the 1960's, cuing his readers in applause for each bold advance and innovative breakthrough, it was Anthony Lewis of *The New York Times*. By the middle of the decade, Lewis's widely-esteemed coverage of the Court earned him a regular place among the *Times's* columnists, in which position he was freer to move from mere reporting to interpretation of its noble doings. For Lewis it was as self-evident as it was for Professor Cox that the country's ordinary agencies of legal change had broken down to the point where there was no alternative but for the Court to pick up the torch of reform and, to mix

¹¹ *Colegrove v. Green*, 328 U.S. 549 (1946).

¹² WARREN COURT, *supra* note 9, at 115. Of course, Professor Cox is entitled to his opinion about the performance of Tennessee's or any other state's legislature, though one can only marvel at the Olympian heights he must have attained to make such a sweeping judgment. What weight should be assigned, for example, to a legislature's refusal to "adapt . . . to the burgeoning problems" by plunging into huge budget deficits and imposing taxes at a level which drives job-creating industry to other states? More to the point, what weight should the Justices assign to such clearly political decisions in determining whether an issue like apportionment should cease to be deemed non-justiciable?

¹³ *Id.* at 117-18. This familiar justification for the repudiation of the prior, long-settled understanding that legislative apportionment is a "political question" rings slightly false in light of the fifteenth, seventeenth, nineteenth, twenty-third, twenty-fourth, and twenty-sixth amendments. Each of these reflected a political decision by those benefitting from an existing arrangement of the franchise to extend it in favor of people then excluded from it, and required no prompting from the Supreme Court. They also pose a serious, if not insuperable, doctrinal obstacle to the Court's holding that the equal protection clause of the fourteenth amendment has anything to do with how the franchise is distributed, much less that it imposes a constitutional requirement of anything like mathematical equality in voting weight. This point, pressed by Justice Harlan in his dissent in *Reynolds v. Sims*, 377 U.S. 533, 589 (1964), was not even mentioned in passing in Chief Justice Warren's opinion for the Court.

metaphors slightly, run with it. Thus, speaking of the reapportionment cases, Lewis declared:

Moreover, the national conscience had found no way to express itself except through the Supreme Court. The Court moved in only when the rest of our governmental system was stymied, when there was no other practical way out of the moral dilemma.

The conclusion is that the Supreme Court has tended in recent years to act as the instrument of national moral values that have not been able to find other governmental expression. If the Court has changed, it is because we have changed.¹⁴

Leaving to one side why Tennessee or any other state should be compelled to organize its legislature in accordance with something called "the national moral conscience," one might be lead to wonder why, if in fact "we have changed," that change was not reflected by the representative branches, and precisely how the Court knew when "the rest of our governmental system [was] stymied," so that it was time for it to "move in," rather in the manner of an occupying force. Some enlightenment in this regard was surely called for, lest some naive reader jump to the conclusion that, by the premises of democratic self-government, "national moral values that have not been able to find . . . governmental expression" other than through the Court ought not find expression at all, at least in the mandatory terms of supreme law. Happily, Lewis also helpfully explained that "the Federal legislative path to reform was blocked by the South's power in the Senate."¹⁵

What marvelous new vistas in constitutional jurisprudence were revealed in that last phrase! A wholly new and heroic dimension of Supreme Court jurisdiction comes splendidly into view. With all of their other, more conventional preoccupations, the Justices are each to keep one eye cocked on "the national moral conscience" and another on the "Federal legislative path to reform." Whenever the latter is "stymied" or "blocked" by "the South's power in the Senate," or possibly other obstacles equally nefarious, the stage is set for the Court to "move in." Of course, the Court cannot enforce upon the Tennessee legislature or anybody else anything quite as lacking in jural status as "national moral values" per se. Yet for Justices equipped to say when "the rest of our governmental system is stymied," translating them into something approaching conventional constitutional doctrine is not likely to prove an insuperable task, though an occasional *ipse dixit* might have to be re-

¹⁴ Lewis, *Historic Change in the Supreme Court*, in *THE SUPREME COURT UNDER EARL WARREN 78-79* (L. Levy ed. 1972).

¹⁵ *Id.* at 77.

sorted to in a pinch. In fact, more than once during the Warren period, the task proved to be mere child's play. Matters were considerably facilitated by a child-like capacity to ignore unpleasant things which might upset the play, such as that the "South's power in the Senate" was for more unambiguously derived from the Constitution than the mandate of "one man, one vote."

Lewis's remark about the South was revealing of another theme which ran through much of the Warren Court's adulation by liberals of the period. That is, whoever constituted the "we [who] have changed" and were the keepers of the "national moral conscience," they did not include Southerners. When Lewis spoke of the national conscience which the Court was to consult, he did not mean to be taken quite literally, as most *Times* readers can safely be assumed to have understood.

It was characteristic of Bickel to be mordantly impatient with moralizing cant even, or perhaps especially, when uttered in the name of political goals with which he in the main sympathized. At some risk to his liberal credentials, Bickel's appraisal of the reapportionment decisions was caustic:

It remains to ask whether we have evolved or can see emerging some other operative principle—other than equal representation—which is capable of general application. Neither the Supreme Court nor any of the other courts that have been busily tackling the problem has come within shouting distance of such a principle [W]hen things are to be decided on hunch or out of thin air, . . . it is a fixed characteristic of our system that we let the political institutions do it. The political institutions reflect the people, even if imperfectly, and they include a governor responsive to the majority. Malapportioned though they may be, they are more easily subject to correction and more nearly responsible and responsive than courts, which do not suffer from malapportionment, because they are not apportioned, nor are they representative. It is an irony . . . that the superdemocrats look to the unrepresentative courts for an arbitrary decision which they resent when it is made by a faultily representative legislature, acting in concert with a majoritarian governor.¹⁶

II

In the posthumous collection of essays entitled *The Morality of Consent*, Bickel was not concerned with flaying the Warren Court, much about which he admired, albeit with some ambivalence. Rather, his purpose in the chapter¹⁷ to which this essay is addressed was to

¹⁶ A. BICKEL, *POLITICS AND THE WARREN COURT* 188 (1965).

¹⁷ Chapter 1, entitled *Constitutionalism and the Political Process*. Subsequent chapters are: *Citizen or Person? What Is Not Granted Cannot Be Taken Away*; *Domesticated Civil*

reflect, from a perspective afforded by the thought of Edmund Burke, upon the place of a written constitution in the totality of American political processes—a written constitution, moreover, many of whose most important provisions are cast open-endedly in terms of the greatest generality, and whose meaning is left for final and authoritative pronouncement by non-elected, life-tenured judges. This theme is at once the most engrossing and the most perdurable of that strand of political philosophy that goes under the rubric of constitutionalism—how to reconcile with the central premise of popular self-government a scheme of constitutional adjudication which to a greater or lesser degree tends to displace elected representatives in the resolution of questions of moral value and policy preference. It is a theme demanding an understanding informed both by history and philosophy, but which has more often inspired little more than banalities about counter-majoritarian restraints on legislative excess and the need for leavening our supposedly interest-dominated politics with occasional injections of principle.

Whether or not in sympathy with Bickel's views on the subject, they are not likely to impress the reader as banal. American constitutionalism is considered from a vantage point which might, at first blush, be thought unusefully remote if not wholly alien to it—the English Whig tradition as epitomized in the writings of Edmund Burke.

Burke will no doubt strike many as an odd source to consult for wisdom about any contemporary American institution, not the least about the modern Supreme Court. To the meager extent he is today associated with anything by anybody, apart from specialists in the history of political thought and devotees of English Augustan prose style, it would certainly be with his great philippic against the principles of the French Revolution.¹⁸ The latter have, as Bickel conceded, long ago won the day, and in winning have cast Burke in the role of a cranky if eloquent—grandiloquent some would say¹⁹—defender of privilege,

Disobedience: The First Amendment, from Sullivan to the Pentagon Papers; Civil Disobedience, Revolution, and the Legal Order; and Moral Authority and the Intellectual.

¹⁸ See E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (Todd ed. 1959) (1st ed. London 1790) [hereinafter referred to as REFLECTIONS]. Citations to works of Burke other than REFLECTIONS are to SELECTED WRITINGS OF EDMUND BURKE (W. J. Bate ed. 1960) [hereinafter referred to as WRITINGS], except as otherwise expressly indicated.

¹⁹ As representative as any passage of Burke's eloquence, or grandiloquence, is the following famous one from REFLECTIONS, *supra* note 18:

But the age of chivalry is gone.—That of sophisters, economists, and calculators, has succeeded; and the glory of Europe is extinguished forever. Never more shall we behold that generous loyalty to rank and sex, that proud submission, that dignified obedience, that subordination of the heart, which kept alive, . . . the spirit of an exalted freedom. The unbought grace of life, the cheap defense of nations, the nurse of manly sentiment and heroic enterprise is gone! It is gone, that sensibility of principle, that chastity of honor, which felt a stain like a wound,

prejudice and the *ancien regime*. Probably because the later writings, which retain the greatest literary interest, are also those wherein Burke's politics appear most reactionary, one can easily forget that he was first and foremost a reformer, a staunch defender of the House of Commons' constitutional prerogatives as against the Crown under the revolutionary settlement of 1688, an advocate of reconciliation with the American colonies on terms which foretold many features of the modern Commonwealth, and a spokesman both for Catholic toleration and amelioration of Irish conditions. Had he not lived just long enough to be overtaken by revulsion at the wave of initial enthusiasm for the supposed principles of the French Revolution which swept over Europe, a revulsion heightened to a pitch of magestic rage at what he exaggerately took to be a conversion to those principles on the part of the "New Whigs,"²⁰ Burke would today be less remembered, but more favorably, as a benevolent champion of moderate, timely, and practical reform.

Since the age and society in which Burke lived were so markedly different from our own, anyone looking to his writings for illumination of contemporary issues and institutions must borrow at the level of mood and spirit rather than of specific pronouncements. Most of the latter were simply too topical and ad hoc to have direct application today, two centuries after they were made. Distilling the mood and spirit of Burke is the more difficult because he was not given to discoursing at large on political theory in the manner of a Locke or Hume. His only systematic work not more or less directly responsive to some discrete event or provocation was *A Philosophical Inquiry into the Origin of Our Ideas of the Sublime and the Beautiful*, an early essay on aesthetic psychology written before politics became his all-consuming preoccupation.

which inspired courage whilst it mitigated ferocity, which ennobled whatever it touched, and under which vice itself lost half its evil, by losing all its grossness.

Id. at 91-92.

²⁰ In the spring of 1791, Charles James Fox, the leader of the "New Whigs," casually spoke some words in the House of Commons in praise of the work of the revolutionary French National Assembly. Burke took this as an implied aspersion on his just-published *REFLECTIONS*, *supra* note 18. Enraged, he replied with an outburst during which he likened the younger Whig members who shouted him down as out of order to "the barking little dogs" of *King Lear*. When Fox later tried to mollify Burke by saying that they could stay friends, the latter replied that all friendship was at an end. The episode is recounted in 29 *PARLIAMENTARY HISTORY* 363-428 (1890). Burke described Englishmen who sympathized with the French Revolution as "a sect of fanatical and ambitious atheists," *WRITINGS*, *supra* note 18, at 482, and as "literary caballers and intriguing philosophers [and] political theologians and theological politicians," *REFLECTIONS*, *supra* note 18, at 10. In an age notorious for the unbridled and ingenious terms of abuse exchanged between political opponents, Burke was unsurpassed.

In his application of what he distilled from Burke to American constitutionalism, Bickel identified "[t]wo diverging traditions in the mainstream of Western political thought . . . both of which have controlled in the direction of our judicial policy at one time or another":

One of these, the contractarian tradition, began with the moderate common sense of John Locke. It was pursued by Rousseau, and it long ago captured, and substantially retains possession of, the label liberal, although I would contest its title to it. The other tradition can, for lack of a better term, be called Whig in the English eighteenth-century sense. It is usually called conservative, and I would associate it chiefly with Edmund Burke. This is my own model.²¹

Since both traditions can be traced to a common source, Locke's *Two Treatises of Government*, Bickel was surely right in describing them as "diverging" rather than opposed. The *Treatises* were not only the classic exposition of the contractarian theory of government but also the major polemical defense of the constitutional settlement brought about by the "Glorious Revolution." The preservation of this settlement, founded upon the twin pillars of the "mixed constitution" and the Protestant succession, was what brought the Whig party into existence, and remained its unifying principle until near the end of Burke's parliamentary career. By that time, the mixed constitution was established beyond assault, and new political alignments took shape around the issue of what England's response should be to the French Revolution and its egalitarian doctrines. The "New Whigs," from whom Burke appealed, for a time welcomed both, in the quaint belief that the French revolutionaries were merely acting like Englishmen, dealing with Louis XVI as the "Old Whigs" had dealt with James II a century before.

Interesting as all this lineage might be to the historian, Bickel's purpose, directed to the present, was to adduce the contrasting characteristics of the Whig and contractarian traditions, and to commend the former as furnishing a sounder approach to politics. He outlined the salient differences as follows:

The liberal contractarian model rests on a vision of individual rights that have a clearly defined, independent existence predating society and are derived from nature and from a natural, if imagined, contract. Society must bend to these rights. . . . They condition everything, and society operates within limits they set. Deduced from premises that cannot be questioned closely, they must themselves be deduced by pure reason.

The Whig model, on the other hand, begins not with theoretical rights but with a real society, whose origins in the historical mists it

²¹ BICKEL, *supra* note 1, at 3.

acknowledges to be mysterious. The Whig model assesses human nature as it is seen to be. It judges how readily and how far men can be moved by means other than violent, that is to say, how far they can be moved by government. The values of such a society evolve, but as of any particular moment they are taken as given. Limits are set by culture, by time- and place-bound conditions, and within these limits the task of government informed by the present state of values is to make a peaceable, good, and improving society. That, and not anything that existed prior to society itself and that now exists independently of society, is what men have a right to. The Whig model obviously is flexible, pragmatic, slow-moving, highly political. It partakes, in substantial measure, of the relativism that pervades Justice Oliver Wendell Holmes's theory of the First Amendment, although not to its ultimate logical exaggeration.

.....

The contractarian model, in contrast, is committed not to law alone but to a parochial faith in a closely calibrated scale of values. It is moral, principled, legalistic, ultimately authoritarian. It is weak on pragmatism, strong on theory. For it, law is not so much a process, and certainly not a process in continual flux, as it is a body of rules binding all, rules that can be changed only by the same formal method by which they were enacted. The relationship between the individual and government is defined by law; as are the entire public life of the society and, indeed, the society itself.

.....

In the liberal contractarian view, the limits on majority rule through appeal to the Constitution tend to be absolute, timeless, in response to the resistance of a majority, or even a minority. Most of life is seen in moral rather than prudential terms. None of the pragmatic skepticism so salient in the Whig model infects the Constitution of the contractarian. This was Justice Hugo Black's Constitution, a storehouse of principles, inflexible and numerous The Warren Court in its heyday was Hugo Black writ large.²²

The foregoing antitheses are all very well, but one might ask how they are pertinent to American constitutionalism and, more particularly, to the place of the Supreme Court in the American polity. The question thus posed is shortly answered upon reflection that constitutional adjudication in this country has come to be one of the prime modes of governance—governance in the sense of the process by which sovereign choices among competing values and policies are finally and conclusively made for society, as opposed to merely applied or enforced. It may to a degree have been so since the beginning, but the variety and importance of the issues in recent years preempted from legislative in favor of judicial resolution leave little doubt that judges, Supreme Court Justices in

²² *Id.* at 4-9.

the final instance, now wield an unexampled share of sovereign authority. The manner in which this authority is exercised is in large measure determined by how those exercising it conceive that society is best and most justly ordered. It is about such conceptions that the Whig and the contractarian traditions afford important and significantly differing teachings.

Since the Progressive Era there has been no serious assertion that there is inherent in the Court's role in governance anything sinister or usurpacious,²³ though vehement hostility has of course persisted in response to specific decisions and lines of decisions. The Court's role in governance has for some time been conceded, with greater or lesser equanimity, to be necessarily entailed in the institution of judicial review, however bitterly the specific decisions might be denounced. Even if Charles Evans Hughes's oft-quoted remark that "the Constitution is what the judges say it is"²⁴ has not been accepted in a literal sense, as it was not meant to be, still most would ascribe a greater measure of truth to it than to the quaint account of the Court's function left by his fellow-Justice, Owen Roberts, in *United States v. Butler*.²⁵ Indeed,

²³ L. BOUDIN, *GOVERNMENT BY JUDICIARY* (1932) represented the last in a series of scholarly attacks on the institution of judicial review by writers of varying Progressive hues. Thus, Walter Clark in *GOVERNMENT BY JUDGES* (1914) and William Trickett in *The Newest Neologism of the Supreme Court*, 41 *AMER. L. REV.* 729 (1907) and *The Great Usurpation*, 40 *AMER. L. REV.* 356 (1906) attempted serious arguments to the effect that judicial review was a usurpation not intended by the Founding Fathers. More well-known were Herbert Croly and Charles Beard, who in *THE PROMISE OF AMERICAN LIFE* (1909) and *THE SUPREME COURT AND THE CONSTITUTION* (1912), respectively, conceded the historic legitimacy of judicial review, but regretted it and urged that it be abolished or curtailed by constitutional amendment. Some of their less drastic proposals, such as recall of judges or judicial decisions, were taken up by Theodore Roosevelt as the "Bull Moose" candidate for president in 1912. Hostility towards judicial review remained a staple of the Progressive Movement through the 1920's and reemerged in the New Dealers' "court-packing" plan of 1937. Felix Frankfurter was one of the formulators of Robert LaFollette's platform plank in 1924 which called for a constitutional amendment giving Congress power to override Supreme Court invalidation of federal statutes by a two-thirds vote. Frankfurter even advanced the modest proposal of excising the due process clause from the fourteenth amendment. See Frankfurter, *The Red Terror of Judicial Reform*, *NEW REPUBLIC*, Oct. 1, 1924, at 110. For an illuminating discussion of Frankfurter's place in this movement, see Lash, *A Brahmin of the Law*, in LASH, *supra* note 3, at 3.

²⁴ Address at Elmira, New York, May 3, 1907, quoted in M. PUSEY, *CHARLES EVANS HUGHES* 204-05 (1963). The remark, which later proved something of an embarrassment to him when he became first an Associate and then Chief Justice of the Supreme Court, was made by Hughes when he was Governor of New York. He was at the time embroiled in a controversy over the scope of judicial review of orders of a public utility rate commission he had pioneered in establishing. Something of a progressive, he favored an extremely limited scope of review.

²⁵ 297 U.S. 1 (1935).

Justice Roberts stated:

There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The

given the characteristic textual vagueness of the constitutional provisions which have been invoked in support of the most frequent and broad-gauged judicial interventions, and further given the obscurity of the framers' and ratifiers' historic intent regarding such provisions, it may be only a slight exaggeration to conclude that the fact of the American Constitution being a written one, so much relied upon by John Marshall in his argument for judicial review,²⁶ no longer has much practical limiting effect in controlling the Court's results. So far has the notion come to prevail that the Justices are charged with "keep[ing] the Constitution up-to-date" and "bring[ing] it into harmony with the times" that Justice Black's dissenting jibe that the Court was acting in the manner of "a continuously functioning constitutional convention"²⁷ should rate as more than a mere rhetorical stoke. If the Court assumes an active, constitutive role, in addition to its formally defined interpretive one, in that mode of governance carried out under the form of constitutional adjudication, then it is surely appropriate to assess its performance according to the larger precepts of political philosophy.

Bickel suggested a number of ways in which Burkean precepts might be reflected in the Court's performance. Perhaps foremost among these would be greater sensitivity and deference to what he called "evolving principle."²⁸ This was his term for the idea, central in Burke's conception of society and social change, that the growth and transformations of a political community's core values and ruling norms should occur through a gradual, incremental process of evolution over time, on the model of natural evolution. For Burke, human societies are not atomistic aggregations of individuals associated with one another primarily in the juristic way of parties to a contract, with rights and obligations precisely defined in some more or less explicit social compact alterable only by recourse to formally prescribed procedures. They are, instead, organic communities whose constituent elements—social classes, vocations, volun-

Constitution is the supreme law of the land ordained and established by the people When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.

Id. at 62.

The picture which emerges of Justice Roberts from the Frankfurter diaries is that of a virtuoso of naivete. Frankfurter concurred in Justice Black's description of him as "the most naive man I have ever known in my life—a fine character but as innocent as a child." Frankfurter himself compared him to one "of whom I once said that experience passes through him without stopping." *LASH*, *supra* note 3, at 174-75.

²⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803).

²⁷ *Katz v. United States*, 389 U.S. 347, 373 (1967).

²⁸ *BICKEL*, *supra* note 1, at 25 *et seq.*

tary associations of various kinds, localities, and religious groups—are differentiated in function and hierarchically ordered in their relationships. As with natural organisms, societies must constantly evolve in order to flourish, but this must “proceed by insensible degrees.”²⁹

A society's vital, animating core inheres, in Burke's view, in its moral values as expressed not only in the private virtues it esteems but also in its public morality, the latter consisting of those norms of conduct insisted upon with varying degrees of rigor and enforced through positive law, social conventions, and the nurture of succeeding generations. No less than with a society's institutional forms and structures, societal values must be left free to evolve in organic, integral relationship with all of its constituent elements. In order to claim authenticity and legitimacy, they must emerge from the warp and woof of the social fabric, from its ethos, in a way which maintains continuity from generation to generation. Values cannot be mechanistically imposed, as by decree, lest the subtle and largely implicit coherence which is the source both of society's stability and its vitality be disordered.³⁰

Soundly conceived, government is the servant, not the master, of society. It must reflect the latter as it is and has been. Its function is to preserve and defend, and not to reshape society nor impose new values upon it. Reform is essential, but it must be practical rather than ideo-

²⁹ *Letter to Sir Hercules Langrische on the Catholics*, 3 WORKS OF EDMUND BURKE 340 (Bohn ed. 1848) [hereinafter referred to as WORKS]. The gradual diminution, nearly to the point of disappearance, of the actual constitutional authority of the British monarch from Burke's time to the present illustrates the advantage which accrues to a society from evolutionary change “by insensible degrees.” The gradual, painless paring away of such authority by a process of general, tacit consent, accompanied by the retention of formal, ceremonial power, in a manner which avoided frontal assaults on, and theoretical scrutiny, of the institution, has enabled Britain to avoid the rankling fissures produced by the sudden, outright abolition of other European monarchies. Britain has had its share of divisive issues, but the position of the Crown has not figured importantly among them since George III's attempt to conduct an extra-parliamentary ministry was defeated by Burke and his “Old Whig” allies.

³⁰ In his organic conception of society, his veneration for sentiment and tradition, and his celebration of a distinct national ethos, Burke anticipated many lineaments of nineteenth-century political thought. His analogies of society to nature assumed a natural order more Lamarkian, even Darwinian, than the static, mechanistic, symmetrical, Newtonian depiction of nature from which most eighteenth-century political thinkers drew. In the decades immediately following his death in 1797, Burke enjoyed far more of a reputation in Germany than in England, in the former of which Newtonian rationalism had not enjoyed much of a vogue, and where the burgeoning Romantic Movement gained expression in the realm of political thought as well as in music and literature. The dessicated rationalism of John Stuart Mill's “philosophical radicalism”—i.e. classical liberalism—and the arid utilitarianism of Jeremy Bentham, which together dominated English political thought in the first half of the nineteenth-century, were conducive to a climate of opinion quite uncongenial to Burke's ideas. Appreciation of Burke in England was for the most part confined to such literary figures as Coleridge and Southey. See generally G. SABINE, *A HISTORY OF POLITICAL THEORY* 607-19 (3rd ed. 1961); A. COBBAN, *EDMUND BURKE AND THE REVOLT AGAINST THE EIGHTEENTH CENTURY* (1929).

logical in inspiration and purpose. Reform should in the main consist of measures which government imposes upon itself, the better to adapt itself to society rather than the opposite. Burke's model of society was by no means static, but change must well up from the springs of popular mores and sentiment, not from any programatically formulated scheme or platform concocted by some neoteric faction, whether of the rulers or the ruled.

When values are transformed from mere customs and conventions, informally enforced by exhortation or disapproval, into positive law, there must be a focal point, an institution or set of institutions empowered to register, clarify and formulate them in mandatory terms—in short, to legislate. In the England of Burke, that institution was the King in Parliament, the legitimacy of which did not rest upon democratic premises. In the present-day United States, where democratic premises are assumed to prevail, the legislative function is vested in those organs of government whose accountability to the people legitimate their registering, clarifying and formulating societal values in the latter's behalf: the Congress, the President, and the legislatures and governors of the states. This is, of course, what ordinarily does occur, except when the process is overridden, and its allocation of decision-making power displaced, by the intervention of judicial review.

Anyone not prepared to re-argue *Marbury v. Madison*⁸¹ must concede that there are *some* circumstances where the task of formulating and mandating values is removed from its normal locus in the political branches and vested in the courts—finally in the Supreme Court. Putting aside the easy and relatively rare instances in which a statute approaches literal repugnancy to some provision of the Constitution, the problem is determining under what other circumstances this shift in the locus of governance should occur.

A problem attains the dignity of a dilemma when it is generally conceded that it defies any clear-cut, good-for-all-cases solution. Bickel wrote perceptively about Frankfurter's heroic but ultimately unavailing search for some comprehensive principle by which to identify and rationalize the occasions on which departures from what was for him the norm of judicial restraint were warranted,⁸² and by no means claimed to have discovered such a principle himself. In Burke, however, he discerned some broad political principles which, when joined with a Frankfurterian conception—*i.e.*, the traditional, pre-Warren Era conception

⁸¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁸² *Felix Frankfurter 1882-1965*, NEW REPUBLIC, Mar. 6, 1965, at 7.

held by American liberals—of the proper role of courts, yielded, if not an answer, at least a method of approach.

The starting point is appreciation of Burke's teaching that the fundamental values which lend vitality and coherence to society are only in part, and not the greater part, rational constructs logically deducible from any set of abstract propositions. They are, rather, amalgams of sentiment, tradition, instinct, prejudice, and, especially important for Burke, religious conviction. These were precisely the sources of value judgments which the "New Whigs" of Burke's time, bemused by the French *philosophes'* assault on tradition and religion, were determined to replace with the tenets of Enlightenment rationalism. Burke's writings from his later years, when the latter seemed to him to be becoming dangerously fashionable in England, are studded with expressions of scorn for the notion that men can be governed according to "metaphysical"—his favorite term of opprobrium—"speculations":

Man acts from adequate motives relative to his interest, and not on metaphysical speculations. Aristotle, the great master of reasoning, cautions us . . . against this species of delusive geometrical accuracy in moral arguments, as the most fallacious of all sophistry.³³

There are people who have split and atomized the doctrine of free government, as if it were an abstract question concerning metaphysical liberty and necessity, and not a matter of moral prudence and natural feeling . . . Civil freedom . . . is not, as many have endeavored to persuade you, a thing that lies hid in the depth of abstruse science. It is a blessing and a benefit, not an abstract speculation; and all the just reasoning that can be upon it is of so coarse a texture as perfectly to suit the ordinary capacities of those who are to enjoy it, and of those who are to defend it. Far from any resemblance to those propositions in geometry and metaphysics which admit no medium, but which must be true or false in all their latitude, social and civil freedom . . . are variously mixed and modified, enjoyed in very different degrees, and shaped into an infinite diversity of forms, according to the temper and circumstances of every community.³⁴

Pure metaphysical abstraction does not belong to these matters. The lines of morality are not like the ideal lines of mathematics. They are broad and deep as well as long. They admit of exceptions; they demand modifications. These exceptions and modifications are not made by the process of logic, but by the rules of prudence. Prudence is not only the first in rank of the virtues political and moral, but she is the director, the regulator, the standard of them all.³⁵

The foundation of government is . . . laid, not in imaginary rights of man . . . but in political convenience, and in human nature—either

³³ *Speech on Reconciliation with the American Colonies*, WRITINGS, *supra* note 18, at 166.

³⁴ *Letter to the Sheriff of Bristol*, *id.* at 210-11.

³⁵ *An Appeal from the New to the Old Whigs*, 4 WORKS, *supra* note 29, at 81.

as that nature is universal, or as it is modified by local habits and social aptitude. The foundation of government is laid in a provision for our wants and in a conformity to our duties; it is to purvey for the one, and to enforce the other.³⁶

If the principles and values which inform and direct the life of society in the United States are to have the Burkean attributes Bickel commends, the Supreme Court's role in defining and elaborating them must be a sharply delimited one. This is so because, however wise and high-minded the members of the Court may be in matters of "moral prudence and natural feeling" and "political convenience," as Justices they have no special institutional competence, certainly not such as entitles them to override the deliberate choices of the people as expressed through the representative branches. Their special competence, which legitimates judicial review in derogation of the norm of majority rule, is confined to issues resolvable "by the process of logic," not by "the rules of prudence."

Burke's phrase "process of logic" is not quite right for present purposes, since it connotes more of paradigms and syllogisms, of a closed-ended system of formal premises and conclusions, than what is commonly encountered in legal reasoning. Professor Wechsler's insistence that courts adhere to "neutral principles"³⁷ probably corresponds more closely to what Bickel regarded as the institutional obligation of courts upon which their special competence rests. This obligation is especially compelling as it relates to judicial review by the Supreme Court, where its rigorous fulfillment supplies justification not simply for the judgment which binds the parties as in ordinary litigation, but for the attendant annulment of the popular will as embodied in the invalidated statute.

For Bickel, as for Burke, if the power of government is to be exercised morally, it must be exercised in conformity with "the morality of consent," the consent being that of the governed. However such consent may have been manifested in eighteenth-century England, in twentieth-century America it is accorded to actions of legislators by periodic elections at which a universal adult franchise is exercisable. Consent of the governed is, however, no less requisite for decisions of courts which are not amenable to legislative correction—*i.e.*, decisions announcing and applying a rule of constitutional law.

The nature of this latter kind of consent, and the way in which it is derived, differ importantly from the consent conferred electorally upon

³⁶ *Id.* at 207.

³⁷ Wechsler, *Toward Neutral Principles in Constitutional Law*, 73 HARV. L. REV. 1 (1959).

legislators. When the rule applied by a court in the exercise of judicial review can be persuasively demonstrated in a reasoned, principled way to derive from the Constitution, and not from judges' values and policy preferences of the sort appropriate to legislative judgment, the morality of consent is not contravened, even though the will of an electoral majority, as expressed through a legislative majority, is set aside. This rests, of course, upon the presumed continuing consent of the American people to be governed according to the principles embodied in the Constitution, as translated into rules of decision by courts, in preference to whatever conflicting rules might from time to time be formulated by ordinary legislative majorities. This continuing consent, while concededly savoring of legal fiction, is nonetheless no such mystical thing as that which English constitutional theory of Burke's time advanced on behalf of the King in Parliament, because the former can, in a sense, be actually registered by non-resort to the formally-prescribed process of constitutional amendment.

Much of the above might be dismissed as civics-book platitudes which nobody seriously disputes. To be sure, at the level of explicit avowal there is to be found little disagreement with the proposition that judicial review can be reconciled with the premises of popular self-government—"the morality of consent" in the American context—only when the subordinating rule of decision is authentically derived from the Constitution. Since few, even among the most ardent admirers of the judicial activism of recent decades, would deny this in theory, the matter obviously turns upon what qualifies as such a rule. The language of the document being anything but self-interpreting, and the historic intent of the framers being typically elusive, there must of necessity be much recourse to analogizing and extrapolation in order to close the gap between a pertinent constitutional text and a rule of decision purportedly derived therefrom. A substantial part of Bickel's insight was in insisting that the obligation of judges to discipline their analogizing and extrapolating by rigorous adherence to the methods of, and limitations upon, legal reasoning flows not merely from traditional notions of judicial technique, but, even more compellingly, from the political values subsumed by the morality of consent.³⁸

³⁸ This insight did not await the growing reservations about the Warren Court which Bickel expressed systematically only in his last years. As early as 1958 he had written:

The Supreme Court is, of course, compatible with government by the consent of the governed because it is not free to make policy after the fashion of the representative institutions. Its process is different. It responds not to pressures, but to reason. When driven to judgment whose ultimate validity is not demonstrated by reasoned argumentation, it is guided and restricted in its choices by the meticulously recorded history of upwards of 150 years of litigation, which embodies choices

It would be naive to the point of disingenuousness to suggest that the methods and techniques of constitutional interpretation resemble those of, say, a chemistry experiment, in being susceptible of entirely objective, universally accepted standards of validity. Although not a science, the process of rendering judgment is, or should be viewed as, at least a craft, and, as such, sufficiently amenable to the intellectual disciplines associated with reasoned discourse as to make appraisal possible in terms other than approval or disapproval of the result. Its essential requisite in the context of judicial review consists in the logically persuasive location of decisional premises in the Constitution and the rational connection of results with those premises. When the latter is lacking in ordinary, non-constitutional adjudication, the offense is merely against the punctilios of *elegantia juris*, a matter of slight moment at most ruffling professional sensibilities. When either is lacking in constitutional adjudication, however, the offense is against the polity; the transgression is against the morality of consent.

III.

Bickel's appeal was from his contemporary fellow-liberals who, he thought, in their enthusiasm for judicially-mandated results on political grounds, slighted this morality of process. His appeal was to the more austere, principled attitude toward judicial power espoused by the likes of Brandeis and Frankfurter, who insisted, in the terms of *Federalist No. 78*,³⁹ that the office of the judicial branch is to propound judgment and not to impose will, the latter being a function of the political branches. No one supposes, and nowhere did Bickel suggest, that judgment is ever wholly separable from will, but he did find in many of the more luxuriant, latter-day exertions of judicial activism an undue preponderance of will. The hallmarks of this were bald assertion, a propensity for discovering "new meanings" in the Constitution,⁴⁰ an indifference to long-settled and recently-affirmed lines of precedent, a proclivity for ignoring doc-

tried and accepted, or tried and found wanting, before . . . Thus the process is the all-important thing about the Court, since it is the justification for its existence.

Bickel, *Law and Reason*, NEW REPUBLIC, Nov. 3, 1958, at 18-19.

³⁹ The due process clause of the fourteenth amendment, now as in the past the most apt vehicle for judicial imperiousness, is the obvious example of this thought. The view of due process espoused by that "Old Liberal," Justice Holmes, was anything but compatible with looking to it as a source of "new meanings":

The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case to affect it . . .

Jackson v. Rosenbaum Co., 260 U.S. 22, 31 (1922).

⁴⁰ THE FEDERALIST No. 78 (A. Hamilton).

trinal impediments, and occasionally even a foot-stomping disposition to command without troubling to explain.⁴¹ To these might be added a willingness to exalt certain political values, arguably of constitutional derivation, to the point of annulling others at least equally discernible in the Constitution.⁴²

Common to all of these failings was some apparent loss of the chastening awareness that the finality and preeminence of judges in expounding the Constitution rests upon the fact that it comes before them

⁴¹ Typical is the series of per curiam orders following *Brown v. Board of Education*, 347 U.S. 483 (1954), in which the Court struck down segregation in a wide range of public facilities other than public schools. See, e.g., *New Orleans City Park Imp. Ass'n v. Detiege*, 358 U.S. 54 (1958); *Gayle v. Browder*, 352 U.S. 903 (1956); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955). The Justices may have thought the rationale for these decisions self-evident; but given the degree to which the reasoning of *Brown* was pitched so narrowly in terms of the supposed uniqueness of the educational experience and the special harm inflicted on black children by having to attend segregated schools, some further explanation might well have been deemed appropriate when the Court was engaged in outlawing an institution which, however regretably or even reprehensibly, had been so deep-rooted and had so long been constitutionally sanctioned.

⁴² For example, in the line of decisions removing most of the traditional, state-imposed qualifications for exercise of the franchise in the name of equality, the Court exalted certain political values over others equally well supported in the Constitution. See, e.g., *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). The baldly political preference implicit in the *Harper* decision, in which Virginia's \$1.50 poll tax was struck down, was exposed by Justice Harlan in dissent:

Property qualifications and poll taxes have been a traditional part of our political structure. In the Colonies the franchise was generally a restricted one. Over the years these and other restrictions were gradually lifted, primarily because popular theories of political representation had changed

Similarly with property qualifications, it is only by fiat that it can be said, especially in the context of American history, that there can be no rational debate as to their advisability. Most of the early Colonies had them; many of the States have had them during much of their histories; and, whether one agrees or not, arguments have been and still can be made in favor of them. For example, it is certainly a rational argument that payment of some minimal poll tax promotes civic responsibility, weeding out those who do not care enough about public affairs to pay \$1.50 or thereabouts a year for the exercise of the franchise. It is also arguable, indeed it was probably accepted as sound political theory by a large percentage of Americans throughout most of our history, that people with some property have a deeper stake in community affairs, and are consequently more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means, and that the community and Nation would be better managed if the franchise were restricted to such citizens

These viewpoints, to be sure, ring hollow on most contemporary ears

Property and poll-tax qualifications, very simply, are not in accord with current egalitarian notions of how a modern democracy should be organized. It is of course entirely fitting that legislatures should modify the law to reflect such changes in popular attitudes. However, it is all wrong, in my view, for the Court to adopt the political doctrines popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious, barring them from the range of choice by reasonably minded people acting through the political process

. . . .

as a species of law, and not as furnishing the pretext for them to play the part of "Platonic Guardians,"⁴³ much less keepers of the national conscience, as Anthony Lewis would have it. While the pervasive generality of the text of the Constitution, among other factors, precludes the application to it of the techniques which the law has developed for the construction of authoritative language in precisely the same way as they are to wills, contracts, or even statutes, the differences should be of degree and not of kind. The applicability of the canons of construction to constitutional interpretation was once almost unanimously taken for granted by commentators and judges alike,⁴⁴ but little has been heard of that idea lately.

Most, if not all, of these objections against the imperiousness of courts could be, indeed have been, advanced by proponents of judicial restraint without any need of recourse to Burke. While more implied than explicitly elaborated by Bickel, "vouching in" Burke suggests an additional and different kind of distortion that can be expected to flow from overreaching on the part of judges, one that goes beyond undue aggrandizement of power by one branch at the expense of the others. This distortion has to do, not with the forum in which fundamental issues of moral value and public policy are resolved, but with how such issues are characterized and the terms in which they are addressed. Because of the conventions which traditionally pertain to the process of adjudication, issues referred to that mode of resolution must be amenable to definition

⁴³L. HAND, *THE BILL OF RIGHTS* 73 (1958).

⁴⁴*See, e.g.*, 1 STORY ON THE CONSTITUTION § 400 (2d ed. 1851), where it is stated that "[t]he first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intents of the parties"; I T. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS* 123-24 (8th ed. 1927), where it is stated:

A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law.

See also *South Carolina v. United States*, 199 U.S. 437 (1905), where the Supreme Court, per Justice Brewer, stated:

The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. . . . This in no manner abridges the fact of its changeless nature and meaning.

Id. at 448-49.

and decision by appeal to the categories of logic and the imperatives of reason, or at least must be made to appear so. When moral and political questions are engrossed by the judiciary as questions of constitutional law, they are removed, not just from the purview of the representative branches, but also from the domain of "evolving principle." Institutional proprieties require a style and method of decision in which popular sentiment, lay intuition, and inherited convictions, to say nothing of prejudices, are severely put aside, and a thus truncated analysis supposedly dependent upon professional expertise is asserted to be sufficient.

In no recent decision are the imperious pretensions of adjudication better illustrated than in *Roe v. Wade*.⁴⁵ Aside from an almost cavalier indifference about locating its governing principle in the Constitution, Justice Blackmun's opinion for the Court threaded a few dubiously connected syllogisms through a miscellany of facts about human gestation to reach a solution to the abortion dilemma whose entitlement to rank as part of the supreme law of the land rests upon the supposition that treatment of the issue could be wholly enclosed within the parameters of legal reasoning. Were this not supposed, there would be no justification for withdrawing the question from the processes whereby evolving popular attitudes are permitted to continue to shape and mould the law.

Another subject, much involved with tradition, sentiment, and religious convictions, about which popular attitudes have been distinctly evolving is the relationship between men and women in contemporary American society. This evolution has been importantly reflected politically by a wide range of legislation at the federal and state levels abolishing many of the disabilities and inequalities formerly imposed upon women, and by the continuing struggle over the proposed Equal Rights Amendment. Yet a plurality of the Supreme Court was prepared in *Frontiero v. Richardson*⁴⁶ to, in effect, remove these issues from the arena of political controversy, wherein evolving principle is expressed in law, and claim them for resolution by adjudication. This it was prepared to do by assimilating sexual classifications to racial ones and declaring them similarly "suspect." Racial classifications had acquired their suspect or invidious character by means of the moral and political judgments repre-

⁴⁵ 410 U.S. 113 (1973) (power of states to restrict access to abortions substantially curtailed as violative of due process). In citing *Roe* as epitomizing judicial activism and encroachment on the legislative domain, Bickel implicitly acknowledged that the Court's disposition toward free-wheeling interventions had by no means ended, if indeed it has substantially abated, with the retirement of Chief Justice Warren and the accession of the Nixon appointees.

⁴⁶ 411 U.S. 677 (1973) (invalidating statutory distinction as between male and female Armed Forces members respecting proof of spousal dependency).

sented in the Reconstruction Amendments. Justice Brennan was of a mind to short-cut the cumbersomeness of the amending procedure and pronounce a judicial doom on legislation reflecting a persistence of what he called an "attitude of romantic paternalism"⁴⁷ toward women, which attitude he disapprovingly conceded to be "firmly rooted in our national consciousness."⁴⁸ Precisely how such an attitude had become a constitutionally impermissible legislative motivation he omitted to say. How it came to be any proper business of his to banish it from the realm was not explained. The number of Americans, men and women, who benightedly still cling to "notions" such as Justice Bradley's, quoted in the plurality opinion,⁴⁹ was presumably unknown to Justice Brennan, and was apparently of no concern. It was enough for him that such attitudes are "traditional" and "old-fashioned" to run them off the field of political battle.

IV

It would be wrong to conclude, with Judge Wright, from this that Bickel's ideal Justices would "become adept at sitting on their hands."⁵⁰ He fully realized that the Constitution is itself one of the repositories of the nation's evolving principle, and that the evolution of constitutional principle requires, no less than any other, adaptation to changing circumstances, sometimes in bold measure. He knew also that there exists no clearly discernible fixed line of demarcation separating constitutional adjudication from the broader workings of politics. He was aware that though federal judges are exempt from retirement by the electorate, they are not entirely insulated from the salutary restraints imposed, at least in the long run, by the limits of popular acquiescence in their decisions. In sum, he differed only as a matter of degree with Professor Cox

⁴⁷ *Id.* at 684.

⁴⁸ *Id.*

⁴⁹ "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say the identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .

" . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."

Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973), quoting *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1872).

⁵⁰ Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971).

and others more disposed than he to applaud reform and innovation carried out under judicial auspices.

What troubled Bickel most, however, was the expansive, incautious, sometimes almost domineering spirit which he discerned in some of the Court's most important opinions of recent times, wherein the Justices seemed nearly to forget that they are, after all, only judges—judges who, to be sure, exercise a uniquely exalted authority by virtue of which they are sometimes called upon to be statesmen. But they are not true to their office when they assume the mantle of oracles, as though commissioned to act together as anything like “midwife to a newer world,”⁵¹ in Leonard Levy's ludicrously fawning phrase.

In addition to urging upon the Justices the wisdom of the Brandeisian canons of self-restraint, and the Frankfurterian duty of producing finely-crafted and intellectually honest opinions, Bickel counseled that the Constitution be once again viewed as “a series of admonitions, an eighteenth-century checklist of subjects,” rather than as a fund of “definite comprehensive answers on matters of social and economic policy.”⁵² “Once again” is inserted advisedly, since the disposition to look to the Constitution for answers to virtually every question of public policy, ranging from how school children should be disciplined to how state unemployment compensation funds should be administered, represents a fairly recent recrudescence of the supposedly discredited attitude associated with *Lochner v. New York*⁵³ and its ilk. Giving free rein to

⁵¹ L. Levy, *Introduction, THE SUPREME COURT UNDER EARL WARREN 3* (L. Levy ed. 1972).

⁵² BICKEL, *supra* note 1, at 25-26.

⁵³ 198 U.S. 45 (1905). The spirit of unabashed interventionism, which this decision is always cited as exemplifying *par excellence*, was most tellingly betrayed by Justice Peckham when he stated regarding state legislation designed to safeguard the health of citizens generally: “We do not believe in the soundness of the views which uphold this law.” *Id.* at 61. Despite the tone of repugnance with which the modern Court unflinchingly mentions this decision, it is not itself above *Lochnerizing*—to both adopt and adapt Professor Ely's awkward but useful term—with a vengeance. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 944 (1973). Thus, Justice Blackmun's response to Missouri's attempted justification for requiring parental consent for abortions on minors below the age of 18 on the ground that it furthered the interest in maintaining parental authority:

One suggested interest is the safeguarding of the family unit and of parental authority. . . . It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the non-consenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure.

Planned Parenthood v. Danforth, 96 S. Ct. 2831, 2844 (1976).

Like Justice Peckham's views on public health measures, Justice Blackmun's understanding of the social psychology of family life might well be superior to the legislature's.

that disposition inevitably draws more and more issues within the ambit of governance by constitutional mandate, and works an accompanying atrophication of evolving principle. The Warren Court was especially inclined to idealize the efficacy of democratic processes in the abstract, but quite ready to condemn judgments actually reached by them.

To check this tendency, Bickel thought the courts should confine themselves to what he called "middle-distance principles."⁵⁴ These are principles which can be developed and elaborated on the basis of modest, cogently-reasoned extrapolation from settled constitutional understandings. Change there concededly must be, the full burden of which cannot be borne by the amending process, but its pace and amplitude should be cautiously incremental. Although he did not cite it as such, Bickel would almost certainly have approved the result in *Griswold v. Connecticut*⁵⁵ as firmly grounded in middle-distance principles, though his approval would more likely have been couched in terms of Justice Harlan's concurrence than in the free-wheeling lyrics of Justice Douglas's opinion for the Court. From the latter would spring a newly-minted, free-floating, generalized "right to privacy" which in *Roe* and its progeny, turned out to be a right not to have one's conduct constrained by law when the Justices concluded that it was inappropriate to do so. Until these decisions, whose presiding spirits were apparitions to which Justice Douglas had whimsically given the names "penumbras" and "emanations,"⁵⁶ such resolute indifference to anything in the text or prior interpretation of the Constitution, even while striking down statutes by its authority, had not been seen since the palmiest days of Justice Peckham.

The reason why *Griswold*, in contrast to *Roe* and its sequels, exemplified middle-distance principles is that the interests protected were, if not identical to, yet persuasively extended from, interests long established under fourth amendment decisions. The Court believed that the Connecticut anti-contraception statute would require for its enforcement searches and seizures so inherently offensive as to be unreasonable even if a warrant was obtained. Not only did the decision constitute only a modest extrapolation from precedent, but the Court's power was exerted

But to use the due process clause as a vehicle for overriding the latter is nothing else but *Lockmerizing*. In fact, it is only by restricting the kind of parental authority which a state may legitimately maintain to moral suasion that Justice Blackmun can say that giving parents a "veto power" over their minor child's decision to abort will not enhance their authority. Why states are precluded from preserving a kind of parental authority more closely resembling that exercised by the Court of which Justice Blackmun is a member was not clearly explained.

⁵⁴ BICKEL, *supra* note 1, at 25.

⁵⁵ 381 U.S. 479 (1965).

⁵⁶ *Id.* at 484.

in conformity with what certainly must have been popular sensibilities respecting what police should be permitted to do.

The contrast with what the Court did in *Roe* could hardly be more striking. In the latter, on the level of judicial technique, Justice Blackmun's opinion barely troubled to specify which provisions of the Constitution, aside from the due process clause of the fourteenth amendment, were controlling. The broadly cited precedents were so far afield and wide-ranging that they could have been invoked to support virtually anything the Court was prepared to hold. Many of the cases cited were decided under the aegis of *Lochner* and were instinct with its spirit, though the opinion began with assurance that the Court would never do that sort of thing again,⁵⁷ after which it proceeded to do precisely that sort of thing. More to the point, because perfectly illustrative of what middle-distance principles are distinctly not, the Court proceeded to set aside, not a disused statute which was substantively an aberration that fairly invited procedural grotesqueries, but an enactment representative of the expressed, considered judgment reached by the majority of state legislatures respecting the nature of fetal life and the protection it should be afforded.

Those who look to courts to be midwives of new worlds, or to ensure that government at every level conforms itself to the changing national conscience in case the electorate falters in this regard, will surely object that Bickel's notion of middle-distance principles implies too self-effacing, not to say supine, a role for courts. Their function thus conceived, there would not be much for judges to do but manage the conduct of litigation, find facts or oversee their finding, apply the law and on occasion modestly improve it, and keep intact the established principles of the Constitution, while not undertaking often or in large measure to improve on them. Judges who confined themselves to those limited, work-a-day tasks would doubtless be regarded by Judge Wright as doing nothing but sitting on their hands. That a Holmes or a Cardozo would certainly have regarded such a conclusion as beyond comprehension betokens how far many "new liberals" have departed from those from whom they claim political descent in their attitude toward judicial power and its place in a democracy.

⁵⁷ 410 U.S. at 117.