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Remember, It Is the Supreme Court That Is Expounding: The Least Dangerous Branch and Popular Constitutionalism

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Cover Page Footnote

I am grateful for the feedback I received, on much earlier drafts of this essay, from Beau Breslin, Mark Graber, Steven Lichtman, and Kevin McMahon. Additionally, the arguments made in this Article have greatly benefited from an ongoing series of conversations about “popular constitutionalism” that have occurred both on and off panels at recent annual meetings of the New England Political Science Association and the Northeastern Political Science Association.

REMEMBER, IT IS THE SUPREME COURT THAT IS EXPOUNDING: *THE LEAST DANGEROUS BRANCH* AND POPULAR CONSTITUTIONALISM

Helen J. Knowles*

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I. INTRODUCTION

There is nothing controversial about saying, as Alexander Bickel did in *The Least Dangerous Branch* in 1962, “that judicial review is a counter-majoritarian force”¹ When one gives an *unelected* judiciary the power to declare null and void laws enacted by popularly *elected* representatives, there automatically exists the possibility that those jurists will rule counter to the wishes of a majority. To be sure, the existence of this judicial power creates fundamental problems in a constitutional democracy, and many forests have been felled in the scholarly quest to analyze those problems. As Bickel observed, the counter-majoritarian nature of judicial review is *the* root difficulty in the American judicial system. He also noted, however, that this force is an “ineluctable reality.”² It is therefore misleading to argue that, “empirical studies of judicial review have consistently found that Bickel’s ‘difficulty’ does not actually exist.”³ The difficulty of which Bickel wrote did, and most definitely does, continue to exist. Unpacking the socio-political factors that influence the way in which the “difficulty” manifests itself in judicial decision-making has prompted the aforementioned studies.

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¹ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).

² *Id.*

³ Matthew E. K. Hall, *Rethinking Regime Politics*, 37 L. & SOC. INQUIRY 878, 878 (2012).

However, those studies have never shown, because they never could show, that the “difficulty,” as Bickel defined it, “does not actually exist.”⁴

If we view *The Least Dangerous Branch* as a monologue on the problematic counter-majoritarian nature of judicial review in America’s constitutional democracy, then the central question that Bickel seems to pose is: “*who* should authoritatively interpret the U.S. Constitution?” This Article contends that Bickel’s analysis is instead dominated by a different question, namely: “*how* should the U.S. Supreme Court interpret the Constitution?” At first blush, this suggests that the concerns and principles animating *The Least Dangerous Branch* are very different from those comprising the works of the “popular constitutionalism” movement that arose in the 1990s, works which are dominated by the “*who*?” question. Yet, upon closer inspection, one finds much in common between Bickel’s book and the arguments set forth by the advocates and defenders of “popular constitutionalism.” Both accept that the Supreme Court has an important role to play in authoritatively interpreting the Constitution. Neither Bickel nor the popular constitutionalists reject, or even advocate the eschewal of judicial review. As we will see, this becomes clear when we focus on the intellectual heart of that book, namely Bickel’s elucidation of the passive virtues that the Supreme Court can choose to draw upon in its work.

II. “BRING[ING] . . . THE PEOPLE BACK IN[TO]”⁵ THE CONSTITUTIONAL DIALOGUE

Just like the counter-majoritarian difficulty, at its core “popular constitutionalism” is easy to define. The principal belief shared by popular constitutionalists is that greater interpretive authority should be placed in the hands of “The People.” The “basic principle,” Larry D. Kramer contends, is “the idea that ordinary citizens,” rather than the courts, “are our most authoritative interpreters of the Constitution . . .”⁶ As Mark Tushnet suggests, “popular constitutionalism” is underpinned by a belief that the courts should not have “normative priority in the conversation” about the meaning of the U.S. Constitution.⁷ In other words, the “popular constitutionalism” movement refuses to bestow its uncritical acceptance and adulation upon the grand, and rather tendentious judicial proclamation, in *Marbury v. Madison*, that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”⁸

“Popular constitutionalism” has, however, spawned a literature that

⁴ *Id.*

⁵ Daniel J. Hulsebosch, Book Review, *Bringing the People Back In: The People Themselves: Popular Constitutionalism and Judicial Review*, 80 N.Y.U. L. REV. 653, 655 (2005).

⁶ Larry D. Kramer, *Undercover Anti-Populism*, 73 FORDHAM L. REV. 1343, 1344 (2005).

⁷ Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHL.-KENT L. REV. 991, 999 (2006).

⁸ 5 U.S. 137, 177 (1803).

makes it seem anything but simple.⁹ This is in part the fault of its principal advocates. For example, the rhetoric that Tushnet employs in *Taking the Constitution Away from the Courts*¹⁰ (one of the most significant “popular constitutionalism” books) is oftentimes radical and inflammatory. It can leave one with the misleading impression that the author’s understanding of “popular constitutionalism” is anti-*Marbury* instead of anti-judicial supremacy. To be sure, Tushnet advocates some form of protection for the people (some kind of non-parchment, prophylactic device), but the option he has in mind is probably *not* “systemic judicial castration.” Rather, it is closer to the “series of cold showers” that Kramer’s work *seems* to advocate.¹¹ “Seems to” is deliberately italicized because, like Tushnet, Kramer has left his readers confused about exactly what his conception of “popular constitutionalism” is. Kramer has earned the “Founding Father”¹² of modern “popular constitutionalism” appellation because of his 2004 book *The People Themselves*.¹³ However, that book built upon his 2001 *Harvard Law Review* Foreword,¹⁴ an article where his ostensibly historical analysis was infected by his negative reaction to the U.S. Supreme Court’s most recent “supremacist” decisions, especially *Bush v. Gore*.¹⁵

Kramer’s argument was forcefully directed towards advocating “popular constitutionalism” as a cure for the judicial supremacy ills imposed upon the nation by the Rehnquist Court. The article, like chapter seven of Tushnet’s book, read like a decision-driven screed against the perceived conservative “judicial activism” of that Court. *The People Themselves* was primarily a historical work that investigated the constitutional conversations that occurred between different federal departments, as well as those departments and the people, throughout the development of American politics. However, its closing sentences confirmed that in many ways the author’s conception of “popular constitutionalism” remained beholden to his anger at what he perceived to be the recent Court’s supremacist stance.¹⁶

In recent years, readers of law journal articles would, in part because of this literature confusion, be forgiven for thinking that “popular constitutionalism” was a radical, elite attempt, by disaffected liberal law professors, to overturn *Marbury* because the conservative federal judiciary

⁹ Helen J. Knowles & Julianne A. Toia, *Defining “Popular Constitutionalism”: The Kramer versus Kramer Problem*, 42 S.U. L. REV. 31 (2014).

¹⁰ MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

¹¹ Steven B. Lichtman, *Does Popular Constitutionalism Require a Willing Audience?* 9 (May 2-4, 2013) (unpublished paper) (on file with author).

¹² Tom Donnelly, *Making Popular Constitutionalism Work*, 2012 WIS. L. REV. 159, 163 (2012).

¹³ LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

¹⁴ Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).

¹⁵ 531 U.S. 98 (2000).

¹⁶ KRAMER, *supra* note 13, at 248.

cannot be trusted to “say what the law [really] is.”¹⁷ However, “popular constitutionalism” is non-ideological, and reflects concerns about judicial supremacy that are not new. The modern movement probably emerged (its exact origins are hard to pinpoint) as a “distinct scholarly phenomenon” in the 1990s, and found its most prominent voice in the writings of Tushnet and Kramer.¹⁸ However, it “is largely a rediscovery of a very basic feature of our constitutional culture that goes back to the Founding and has persisted to the present day.”¹⁹ That feature involves living with, rather than seeking to abandon, judicial review. It involves living with the narrow “power to ignore unconstitutional acts when resolving cases” (judicial review), and expressing concern about “the power to establish principles that bind all other political actors” (judicial supremacy).²⁰ In other words, “popular constitutionalism” seeks to “bring . . . the people back” into the constitutional dialogue,²¹ thereby empowering “all [of those] other political actors.”

A concern about judicial supremacy is a central conceptual characteristic of both “popular constitutionalism” and *The Least Dangerous Branch*. However, Bickel’s attempt to unpack and analyze the ways in which the Supreme Court should be engaging in authoritative constitutional interpretation often gets lost in discussions of his seminal book. Bickel was not anti-judicial review, as the “academic obsession”²² with the counter-majoritarian difficulty suggests. Instead he was anti-judicial supremacy. Consequently, our attention should be focused—as was Bickel’s—on a discussion of the Supreme Court’s “passive virtues.”

III. WHITHER THE PASSIVE VIRTUES?

A year before the publication of *The Least Dangerous Branch*, Bickel fleshed out many of that book’s arguments in a *Harvard Law Review* Foreword, an article whose title—“The Passive Virtues”—perfectly summarized its content.²³ To be sure, the concept of the Court as a counter-majoritarian institution was evident within its pages, but Bickel did not focus on the “*who* should authoritatively interpret the U.S. Constitution?” question. Instead, he accepted that the Supreme Court had the power of judicial review. Consequently, he proceeded to sketch out his responses to the “*how* should the U.S. Supreme Court interpret the Constitution?” inquiry. Many of those

¹⁷ Knowles & Toia, *supra* note 9.

¹⁸ Lee J. Strang, *Originalism as Popular Constitutionalism?: Theoretical Possibilities and Practical Differences*, 87 NOTRE DAME L. REV. 253, 259 (2011).

¹⁹ Jack M. Balkin, *Jack Balkin’s Constitutional Text and Principle: Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 863 (2012).

²⁰ MARK A. GRABER, A NEW INTRODUCTION TO AMERICAN CONSTITUTIONALISM 101 (2013).

²¹ Hulsebosch, *supra* note 5, at 655.

²² Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 159 (2002).

²³ Alexander M. Bickel, *The Supreme Court 1960 Term: Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

observations became sections of chapter four of *The Least Dangerous Branch*.

It is no trivial observation to note that at 88 pages, that chapter—also called “The Passive Virtues”—is twice the length of the next longest chapter. Its disproportionate length does not translate into analytical verbosity. This was not a case of minding the quality and feeling the width. For it is this section that is home to the book’s intellectual heart, a heart that Bickel succinctly described in the following way:

One of the chief faculties of the judiciary, which is lacking in the legislature and which fits the courts for the function of evolving and applying constitutional principles, is that the judgment of courts can come later, after the hopes and prophecies expressed in legislation have been tested in the actual workings of our society. . . .²⁴

The Court’s power of judicial review, wrote Bickel, “looms, for the most part, in the background.”²⁵ By contrast, its passive virtues—its ways of “not doing”—constitute “the foreground.”²⁶

The “techniques of not doing” were described by Bickel as “devices for disposing of a case while avoiding judgment on the constitutional issue it raises.”²⁷ These included faithfully adhering to the doctrines of ripeness and standing, cautiously exercising the power to grant writs of certiorari, respecting the importance of the doctrines of vagueness and delegation (both parts of the concept of desuetude), and maintaining a keen judicial awareness of the fundamental importance of the political question doctrine.²⁸ In a constitutional democracy, all of these “devices” have the inestimable value of providing the judiciary with its own ways to delay (or avoid) becoming involved in the dialogue of constitutionalism.²⁹ In other words, they facilitate a respect for the significant differences between judicial review and judicial supremacy.

IV. THEORETICAL AND FACTUAL FATALITIES?

If “popular constitutionalism” seeks to “bring the people back” into the constitutional dialogue, one might justifiably enquire about the identity of those “political actors.”³⁰ What has it meant, over the course of American history, to argue that courts should not have “normative priority in the

²⁴ BICKEL, *supra* note 1, at 115.

²⁵ *Id.* at 235.

²⁶ *Id.*

²⁷ *Id.* at 169.

²⁸ *Id.* at 111–98.

²⁹ *Id.* at 115.

³⁰ Hulsebosch, *supra* note 5, at 655; GRABER, *supra* note 20, at 101.

conversation” about the meaning of the U.S. Constitution?³¹ Is “popular constitutionalism” an endorsement of jury nullification? Can it mean the recall of elected judges? What about Jeffersonian departmentalism? Or even mob rule? Some works have demonstrated a few of the ways in which “popular constitutionalism” can be operationalized,³² but there is no literary consensus about just what makes a reaction to judicial supremacy a valid exercise of this concept. “Popular constitutionalism” can easily be viewed as fatal in theory *and* fact (to borrow Gerald Gunther’s pithy phrase).³³ As a theoretical construct, it all too often lends itself to the conclusion that it is the pursuit of unworkable and unrealistic goals—all popular sovereignty pomp and no circumstance—one might say.

To an extent, the same criticism can be leveled at *The Least Dangerous Branch*, for that book is thought-provoking and question-begging, but oftentimes not question-answering. Indeed, ironically it does its best not to decide many things. Its theory of passive virtues leaves much to the imagination—in the words of Edward Purcell, it is an “ultimately amorphous” theory.³⁴

Bickel provided his readers with a list of the judicial “passive virtues,” but those readers could be forgiven for believing that Bickel was not completely committed to his own theory. It was too easy to conclude, as Professor Gunther famously did, that Bickel had a “100% insistence on principle, 20% of the time.”³⁵ It was too easy to imagine cases that on the one hand *should* elicit, from Bickel, a “don’t decide that” (take the virtuous high road of judicial passivity) response but in which, on the other hand, it instead was also all too easy to imagine the liberal Professor Bickel defending the advantages of judicial aggressiveness (an ideological pick-and-choose accusation which, as mentioned above, can also be leveled at “popular constitutionalism”).

V. REAPPORTIONMENT: A PARTICULARLY THORNY THICKET

Writing the *Harvard Law Review* Foreword that reviewed the Supreme Court’s October 1960 Term provided Bickel with an important opportunity to preview the content of his forthcoming book. That November 1961 article has rightly come to be viewed as a classic Foreword, something

³¹ Tushnet, *supra* note 7, at 999.

³² See GEORGE I. LOVELL, THIS IS NOT CIVIL RIGHTS: DISCOVERING RIGHTS TALK IN 1939 AMERICA (2012); Emily Zackin, *Popular Constitutionalism’s Hard When You’re Not Very Popular: Why the ACLU Turned to Courts*, 42 L. & SOC’Y REV. 367 (2008); Helen J. Knowles, *Seeing the Light: Lysander Spooner’s Increasingly Popular Constitutionalism*, 31 L. & HIST. REV. 531 (2013).

³³ Gerald Gunther, *The Supreme Court Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

³⁴ Edward A. Purcell, Jr., *Alexander M. Bickel and the Post-Realist Constitution*, 11 HARV. CIV. RTS. & CIV. LIBERTIES L. REV. 537, 541 (1976).

³⁵ Gerald Gunther, *The Subtle Vices of the “Passive Virtues” – A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 3 (1964).

that is no mean feat given the prestige that attaches to those articles.³⁶ However, in delineating the relationship between *The Least Dangerous Branch* and “popular constitutionalism,” there is just as much analytical value in consulting another Bickel-authored article—“The Durability of *Colegrove v. Green*”—that appeared in November 1962 (at the same time as the book).³⁷ For it is in that article that we find a Bickelian explanation of the passive virtues, which is an explanation that (a) has greater operational clarity than *The Least Dangerous Branch*, and (b) is applied to the study of a judicial decision that at first blush would seem to betray the “passive virtues,” but which upon closer examination is ultimately a very good vehicle for Bickel to expound upon his theory.

“The Durability of *Colegrove v. Green*” was Bickel’s contribution to a *Yale Law Journal* symposium on the Supreme Court’s landmark decision, eight months earlier, in *Baker v. Carr*.³⁸ In *Baker*, the Court held that legislative apportionment was a justiciable issue³⁹—it was not a subject matter that raised purely political questions, questions that could only be settled at the ballot box. It was a monumental decision that essentially overruled the Court’s 1946 decision in *Colegrove* (at the very least it can be said to have rendered that precedent legally irrelevant).⁴⁰ Chief Justice Earl Warren later identified *Baker* as “the most important case of my tenure on the Court.”⁴¹ As Thomas I. Emerson argued in one of the articles that accompanied Bickel’s contribution to the Yale symposium, *Baker* was “a momentous step forward in utilizing law and legal principle for the maintenance and invigoration of the democratic structure of our society and in the assumption of a positive role by the Supreme Court in that task.”⁴² Bickel also approved of the decision, but his analysis was far less sanguine. He began and ended with expressions of caution; urban voters were advised against putting all their collective hopes and dreams of greater electoral fairness into one judicial basket, and the nine justices were encouraged to exhibit restraint in future apportionment cases—to resist the temptation of unnecessarily wading further into the metaphorical “political thicket.”⁴³

The “political thicket” metaphor was the legal linguistic creation of Justice Felix Frankfurter, for whom Bickel clerked during the October 1952 Term. The metaphor was a fundamental component of Frankfurter’s majority opinion in *Colegrove*. It stood for a “school of thought of which Mr. Justice Frankfurter has been the intellectual and spiritual leader,” a school of judicial

³⁶ See Mark Tushnet & Timothy Lynch, *The Project of the Harvard Forewords: A Social and Intellectual Inquiry*, 11 CONST. COMMENT. 463, 474–77 (1994).

³⁷ Alexander M. Bickel, *The Durability of Colegrove v. Green*, 72 YALE L.J. 39, 39–45 (1962).

³⁸ 369 U.S. 186 (1962).

³⁹ *Id.*

⁴⁰ 328 U.S. 549 (1946).

⁴¹ EARL WARREN, THE MEMOIRS OF EARL WARREN 306 (1977).

⁴² Thomas I. Emerson, *Malapportionment and Judicial Power*, 72 YALE L.J. 65, 79 (1962).

⁴³ Bickel, *supra* note 37, at 39, 44–45.

restraint.⁴⁴ Frankfurter concluded:

The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. . . . The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights.⁴⁵

Apportionment of legislative districts was one such duty. As Frankfurter wrote in the dissent in *Baker* (a case that was a ““massive repudiation”” of his jurisprudence),⁴⁶ “[a]ppeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people’s representatives.”⁴⁷ Frankfurter, who retired from the Court four months later, suffered a stroke on April 5, two weeks after the announcement of *Baker*. It was a stroke that Frankfurter is reported to have attributed to the exertion of penning his bitter and ferocious dissent in that case.⁴⁸

In so many ways, Frankfurter had been Bickel’s mentor. Perhaps more significantly, however, it can be said that the Justice was “Bickel’s jurisprudential progenitor.”⁴⁹ One might think, therefore, that the decision in *Baker* was a very bitter pill for Bickel to swallow. In actuality, it was not a difficult judgment for the Professor to accept. In *Baker*, Frankfurter saw no more reason to pass a judgment of judicial condemnation upon the legislative failure to reapportion in Tennessee than he had done in *Colegrove*, which addressed malapportionment in Illinois. Bickel, by contrast, looked upon the situation in the Volunteer State and realized that judicial intervention was imperative. For too long self-interested legislators in Tennessee had ignored the shifting patterns of population, demonstrating that *their* “conscience” was impenetrable, it could not be “sear[ed]” by the “aroused popular conscience” of which Frankfurter had written in *Colegrove*.

In this respect, Bickel’s views about *Baker* strongly resembled those held by Archibald Cox, another one of Frankfurter’s mentees. As President Kennedy’s Solicitor General of the United States, Cox was responsible for deciding in which of the flurry of early 1960s state apportionment cases the federal government should file amicus briefs. These were very difficult

⁴⁴ Emerson, *supra* note 42, at 79.

⁴⁵ *Colegrove*, 328 U.S. at 556.

⁴⁶ Emerson, *supra* note 42, at 79.

⁴⁷ *Baker v. Carr*, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting).

⁴⁸ See SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 191 (2010).

⁴⁹ PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 61 (1982).

decisions for him.⁵⁰ Indeed, on one occasion he expressed his fear that overly aggressive judicial involvement in reapportionment would “risk” triggering “a severe constitutional crisis.”⁵¹ However, he believed that situations existed when “discrimination and legislative *inaction* [was] sufficiently invidious as to warrant judicial *action*”; in 1962, Tennessee was one such example.⁵² As he wrote in the Brief for the United States as Amicus Curiae in that case, “at some point malapportionment of state legislatures becomes so gross and discriminatory that it violates the Fourteenth Amendment.”⁵³ Bickel agreed with this assessment—*Baker* was “an extreme case” in which “the Court should see its way clear to make its own judgment of necessity, overriding the political one, and to apply the principle of equality.”⁵⁴

Baker was the catalyst for a set of momentous 1963–1964 reapportionment decisions in which the Warren Court exhibited very little Frankfurterian judicial restraint. Rather than simply decide that legislative apportionment was a justiciable issue (as it had done in *Baker*), the Court decided to pass judgment on the merits of specific state apportionment plans. Most notably, in six cases, headlined by *Reynolds v. Sims*, the justices held that the Constitution required that the boundaries of districts for elections for both houses of every bicameral state legislature be drawn based upon population.⁵⁵

Bickel foresaw, and warned against these developments—devoting the end of *The Least Dangerous Branch* to a discussion of *Colegrove* and *Baker*.⁵⁶ Intervention in *Baker* had been necessary but, as he had observed in his Yale article (from which he drew liberally for the book), it was a decision that should “be read as holding no more than that the situation in Tennessee . . . is the result not of a deliberate if imperfect present judgment of the political institutions, but merely of inertia and the abdication of political responsibility.”⁵⁷ He did not want it to be what it did indeed become, namely a vehicle for much more active and aggressive (rather than passive) judicial involvement in the ultimate “*political thicket*.” In unfortunately apocalyptic terms, he described what might happen in “some future case.” The justices, he worried, would:

⁵⁰ Helen J. Knowles, *May it Please the Court? The Solicitor General's Not-So-“Special” Relationship: Archibald Cox and the 1963–1964 Reapportionment Cases*, 31 J. SUP. CT. HIST. 279 (2006).

⁵¹ Memorandum from Archibald Cox to Robert F. Kennedy (Feb. 4, 1964) (on file with author).

⁵² Knowles, *supra* note 50, at 282.

⁵³ Brief for the U.S. as Amicus Curiae at 10, *Baker v. Carr*, 369 U.S. 186 (1962) (No. 6), 1961 WL 101892, at *16. This brought acrimony to the previously warm relationship between Cox and Frankfurter. See KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 166 (1997).

⁵⁴ Bickel, *supra* note 23, at 78.

⁵⁵ 377 U.S. 533 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964); Md. Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964); *Davis v. Mann*, 377 U.S. 678 (1964); *Roman v. Sincock*, 377 U.S. 695 (1964); *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713 (1964).

⁵⁶ See BICKEL, *supra* note 1, at 194–97.

⁵⁷ *Id.* at 44.

perhaps in order to correct misreadings by lower courts of its present rather enigmatic pronouncement . . . see it as its function, not merely to let an apportionment be, but to legitimate it. This[] . . . would be a grave error. If one may use proper nouns to name judicial errors, as is sometimes done with diseases, we should call this *Plessy v. Ferguson's* Error⁵⁸

In *The Least Dangerous Branch*, Bickel described the political question doctrine as the holy grail of the Court's passive virtues. It represented "[t]he culmination of any progression of devices for withholding the ultimate constitutional judgment of the Supreme Court—and in a sense their sum. . . ." ⁵⁹ As Bickel believed it should be read, therefore, *Baker* was the judicial epitome of both the "progression" and "sum" of the "passive virtues." Judicial review, but not judicial supremacy.

VI. CONCLUSION: STILL IMPORTANT AFTER ALL THESE YEARS

When it was published in 1962, Alexander Bickel's *The Least Dangerous Branch* contained a "framing device . . . that caught the attention of the ages."⁶⁰ As Barry Friedman observes, the academy has long been "obsessed" with the "countermajoritarian problem" of which Bickel wrote.⁶¹ Consequently, it is "[t]oo easily forgotten" that the book actually provided "a defense of judicial review" ⁶² Friedman is right that the "defense" was "especially attuned to the circumstances of the time in which Bickel wrote."⁶³ Conceptually, however, that "defense" is of timeless relevance. Throughout the history of the United States, the populace has (in various forms) engaged in contemplative constitutionalism. That dialogue has often debated the proper scope of judicial review without advocating its eradication.

In recent decades, the modern "popular constitutionalism" movement has been a prominent (even if primarily academic) contributor to that dialogue. Properly understood, that dialogue revolves around a belief that the courts should not have "normative priority in the conversation" about the meaning of the U.S. Constitution.⁶⁴ As this Article has shown, "popular constitutionalism" has much in common with the views that form the intellectual heart of *The Least Dangerous Branch*. There is agreement that judicial review plays an important role in a constitutional democracy—the Supreme Court does expound upon the meaning of the U.S. Constitution, and

⁵⁸ *Id.* at 197.

⁵⁹ *Id.* at 183.

⁶⁰ Friedman, *supra* note 22, at 201.

⁶¹ *Id.* at 159.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Tushnet, *supra* note 7, at 999.

that is entirely legitimate.

However, none of us (especially the members of the Court) should ever forget that sometimes that which is done best is actually that which is not done. From this perspective, there is considerable virtue in judicial passivity, or so Alexander Bickel would have wanted us to believe.

