THE SCHOLARLY TRADITION REVISITED: ALEXANDER BICKEL, HERBERT WECHSLER, AND THE LEGITIMACY OF JUDICIAL REVIEW

William Haltom *
Mark Silverstein **

The greatness of a scholarly work cannot be measured simply by the accolades it receives in contemporaneous reviews. The true test is its power to shape debate among future generations of scholars; obsolescence in the academy is not the result of criticism but rather of neglect. That a work continues to evoke comment years after its publication is the highest form of scholarly commendation.

By this measure Herbert Wechsler's lecture, *Toward Neutral Principles of Constitutional Law*,[1] published in 1959, and Alexander Bickel's 1962 book, *The Least Dangerous Branch*, surely rank as two of the most important works in constitutional scholarship of the last fifty years. In the wake of Legal Realism and amid waves of vitriolic criticism of the Supreme Court, Professors Wechsler and Bickel sought to redirect thinking about the role of judicial review in a democracy.[2] They were the most prominent and successful of those attempting to ground constitutional analysis on an understanding of democratic theory and institutional technique.

Our purpose in revisiting their jurisprudence is to offer some empirical evidence about the validity of its underlying political assumptions. It will be helpful, especially to those who are not familiar with their writings, to begin with a brief summary of the theses.

I

Although they emphasized the significance of the written opinion, and particularly the courts' obligation to supply plausible, principled reasons for decisions, neither Wechsler nor Bickel believed in

* Assistant Professor of Political Science, University of Puget Sound.
** Assistant Professor of Political Science, Boston University.

1. 73 Harv. L. Rev. 1 (1959).

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

the myth of a mechanical jurisprudence. They understood that judicial decisionmaking often requires difficult choices among contending values and principles. Their goal was to reconcile the inevitability of political choice with the demands of the judicial role. To apostles of judicial abnegation, they replied that judicial review is extremely valuable in a constitutional democracy. They believed that the day-to-day compromises of democratic politics should be balanced by an institution concerned with enduring principles. In response to Judge Hand's negative view of the judiciary as an aristocratic anomaly barely sufferable in a democracy, they proclaimed a positive role for judges as articulators of the ultimate values of the citizenry. In their view, the necessity of giving good reasons for decisions served not only to limit the independent will of the judiciary but also uplifted political debate and reminded citizens of their own constitutional traditions. In response to those who viewed the process of legal reasoning as a façade for rule by robed aristocrats, Wechsler and Bickel offered a vision of the judiciary educating a politically aware and attentive citizenry on the meaning and relevance of lasting principles.

In short, Wechsler and Bickel aimed to resolve the Realists' dichotomy between law and politics. Good law could be good politics. Judicial limitations, wisely employed, could be political resources because those limitations legitimized judicial choices and distinguished them from the decisions of other political actors. Although they are mistakenly characterized simply as proponents of judicial restraint, both men eschewed a negative view of judicial power in favor of an appreciation of the judiciary's potential to facilitate progressive reform while maintaining a profound sensitivity to the tenuous nature of its claim to such a role. In a nation devoted to majority rule, they regarded popular consent as the foundation of judicial power.

At the outset, Professor Wechsler faced the task of distinguishing judicial decisionmaking from decisionmaking in the popularly elected branches. Principles employed in politics, he noted, "are largely instrumental . . . in relation to results that a controlling sentiment demands at any given time."[3] In contrast to this,

> the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved. To be sure, the courts decide, or should decide, only the cases they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is

3. Wechsler, *supra* note 1, at 14.

> it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?[4]

This standard, he believed, must govern *both* the Court's critics and the Court itself; throughout the lecture, Wechsler derided "result-oriented" criticism as well as adjudication. Simply put, the Wechsler thesis demanded a judiciary and a citizenry appreciative of the significance of principle and generality in the law.

A neutral principle, according to Wechsler, is a legal reason that a jurist is willing to apply beyond the circumstances of the case at bar and without regard to the identity of the litigants.[5] Because the opinion itself must attest to judicial competence, it should clearly and unequivocally articulate the neutral principle that disposed of the case. Post facto rationalization via newly discovered neutral principles does not fulfill the judicial obligation to supply good reasons. By insisting that "the virtue or demerit of a judgment turns . . . entirely on the reasons that support it,"[6] Wechsler sought to shift judicial and public attention from the courts' results to their reasoning. This was a critical step in the Wechsler thesis, for his response to the Realist challenge was to devise (or revise) decisional techniques that would command consent from lay observers.

Indeed, the central theme of *Neutral Principles* is that judicial technique is required if the courts are to secure their title to decide constitutional cases.[7] Hence the demands of a jurisprudence grounded in neutrality are rigorous. Wechsler eschewed manipulation to achieve satisfying judgments. He reluctantly criticized the Court for what he took to be its failure in *Brown v. Board of Education* (*Brown I*) to provide neutral principles for a result Wechsler applauded as politics but doubted he could defend as law. His willingness to confront the Court over an enlightened, redemptive decision gave his piece a measure of intellectual honesty that itself

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4. *Id.* at 15.

5. Wechsler did not, of course, deny that subsequent judgments of circumstances or litigants' characteristics might modify the principle in particular cases. Nor would he hold that judges may not notice extenuating or mitigating circumstances. Thus, critics who take Wechsler merely to revive legal formalism are misreading him. Rather Wechsler is proposing a mild version of Kant's categorical imperative or a practical operationalization of several of Lon Fuller's desiderata (specifically, that legal rules be general, publicized, and reckonable). *See* L. FULLER, THE MORALITY OF LAW 38-41, 46-51, 79-81 (1969). Wechsler is demanding that jurists fend off ad hoc or "private" decisionmaking by undertaking to generalize rulings and to systematize rules. For a perspicuous account of Wechsler's meaning, see Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978).

6. 73 HARV. L. REV. at 19-20.

7. *See* H. WECHSLER, *The Nature of Judicial Reasoning*, in LAW AND PHILOSOPHY: A SYMPOSIUM 290 (S. Hook ed. 1964).

reinforced the neutrality thesis.[8]

Wechsler's distinction between adjudication and politics achieved the seemingly contradictory ends of providing a dynamic conception of judicial review while at the same time constraining the judicial will. Neutrality marked the limits of the legitimate use of judicial power; yet at the same time Wechsler augmented judicial power by "channeling" it within the bounds of neutrality. Once it satisfied the neutrality requirement, a court was free to exercise fearlessly the great power of judicial review.

By demanding that courts base decisions on reasons to which impartial audiences might consent, Wechsler tried to reconcile judicial review with majority rule. Principled decisions could withstand political criticism if courts and critics were compelled to reason publicly and neutrally. A principled court earns public confidence because its decisions are not based on personal whim and discretion. This does not mean that idiosyncrasy and ideology are absolutely eliminated from the judicial process; it does mean, however, that the citizenry may be confident that the vagaries of personal will have been reduced to the extent humanly possible. Technique, in short, legitimates judicial review.

Wechsler insisted that neutrality was necessary at each stage of the adjudicatory process lest obvious exercises of discretion undermine the Court's authority. He extended this standard even to the control the Court exercised over its docket, observing that "much would be gained if the governing statutes could be revised to play a larger part in the delineation of the causes that make rightful call upon the time and energy of the Supreme Court."[9] Indeed, he suggested that the absence of discretionary jurisdiction during the Marshall era protected that Court from charges of arbitrariness.[10] In the Wechslerian scheme, the only powers safely exercised by the courts are those defensible in public by judicial reasons based on neutral principles.

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8. Unfortunately it also encouraged a misunderstanding of his central point. Wechsler found deviations from the "separate but equal" rule unobjectionable if neutral principles supported a reexamination of the original reasoning of the Court. Thus Miller and Scheflin err in claiming that Wechsler represented a resurrection of mechanical jurisprudence or a call for strict adherence to precedent. Miller & Scheflin, *The Power of the Supreme Court in the Age of the Positive State*, 1967 DUKE L.J. 273. Within the Wechsler thesis, doctrinal change is always possible as long as neutral and general reasons are provided to support the new rule. Furthermore, Professor Wechsler was *not* writing the brief for extreme judicial deference to either the other branches of government or public opinion. As Greenawalt has noted, *supra* note 5, at 993, Wechsler was quite prepared to defend the duty and power of the Court to proceed without popular consent and in the face of resistance *if* the Court could construct a judicial justification for so doing.

9. Wechsler, *supra* note 1, at 10.

10. *Id.*

If Wechsler anathematized judicial discretion, Bickel very nearly canonized it. Bickel shared with Wechsler the belief that the judiciary is the institution best equipped to articulate and apply the fundamental principles of American government. Furthermore, he agreed that judicial review must be a principled exercise. Where the two differed was over what Bickel termed "expediency." Wechsler allowed no leeway for the courts to avoid the demands of principle; to do so would seriously compromise the legitimacy of judicial review. Professor Bickel, however, feared that unrelenting devotion to principle would place the judiciary on a collision course with political reality. He encouraged the Justices to use pragmatic and prudent discretion in deciding whether to hear a case or reach a constitutional issue. Such decisions, he urged, should be grounded on expediency:

> The essentially important fact, so often missed, is that the Court wields a threefold power. It may strike down legislation as inconsistent with principle. It may validate . . . legislation as consistent with principle. *Or it may do neither.* It may do neither, and therein lies the secret of its ability to maintain itself in the tension between principle and expediency.[11]

When cases were not appropriate for principled disposition, or when principles would lead to decisions that would be ignored or attacked, Bickel urged the expedient use of what he termed the "techniques of avoidance."

Bickel thus neatly merged the Realists' belief that politics motivates judicial decisions with the traditionalists' norm that politics should never affect the process of adjudication. He embraced both sides of the debate by insisting that the Justices blend politics with law and balance principle with expediency. As the means of accomplishing this feat of judicial statesmanship, Bickel proposed "the passive virtues." These were tools by which the Court could exercise the third, neglected option—the option of doing nothing. Expedient use of the standing requirement, mootness, abstention, or even simply denial of certiorari enabled the Court to pursue a "mediating way" between legitimation and invalidation. The passive virtues provided a tactical escape from the Hobson's choice of invalidating legislation on principles considered unacceptable by the populace or abandoning principle to the transient will of the people. Armed with the passive virtues, a principled Court could also be a political Court.

Moreover, creative use of the techniques of avoidance might strengthen the democratic process. By dismissing cases with appropriate hints to the majoritarian institutions, the Justices could stir

11. A. BICKEL, THE LEAST DANGEROUS BRANCH 69 (1962) (emphasis in original).

debate within the community, leading the politicians to rectify the problem. In this way, the Court could minimize meddling in the democratic process while husbanding its authority for cases where intervention in defense of principle was unavoidable. Even when the representative branches failed to respond or acted irresponsibly, the debate might generate conclusions that the Court could then legitimate. At the very least, this "continuing colloquy with the political institutions and with society at large"[12] would be far more compatible with the demands of democracy than a counter-majoritarian Court unleashing thunderbolts of principle from on high.

II

The contentions of Wechsler and Bickel have been evaluated thoroughly from jurisprudential perspectives.[13] Little has been said, however, about the validity of their empirical assumptions concerning the effect of "bad" decisions on public attitudes toward the Court. Is it true, as they suggested, that "neutral principles" and "passive virtues" make controversial decisions more acceptable to the public?

There are grounds for suspecting that neutral principles have little or nothing to do with public reactions to the Court's decisions. For example, congressional attempts to punish the Court for unwelcome decisions are often unrelated to whether the decisions were principled and cogently justified in the opinions.[14] Social scientists have demonstrated the obvious fact that most citizens lack the minimal prerequisities for thoughtful assessment of judicial opinions.[15] Even among sophisticated observers, result-oriented appraisals are far more common than Wechsler acknowledged.[16]

If we turn from Wechsler to Bickel, we again find grounds for

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12. *Id.* at 240.

13. *E.g.*, Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968); Greenawalt, *supra* note 5; Gunther, *The Subtle Vices of the "Passive Virtues,"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960); Miller & Scheflin, *supra* note 8; White, *supra* note 2.

14. C. LYTLE, THE WARREN COURT AND ITS CRITICS 29-49 (1968); W. MURPHY, CONGRESS AND THE COURT 127-241 (1962).

15. Murphy & Tanenhaus, *Public Opinion and the United States Supreme Court*, in FRONTIERS OF JUDICIAL RESEARCH (1969); W. MURPHY, J. TANENHAUS & D. KASTNER, PUBLIC EVALUATIONS OF CONSTITUTIONAL COURTS: ALTERNATIVE EXPLANATIONS (1973).

16. *See* Dolbeare & Hammond, *The Political Party Basis of Attitudes Toward the Supreme Court*, 32 PUB. OPINION Q. 16 (1968); Nagel & Erikson, *Editorial Reaction to Supreme Court Decisions on Church and State*, 30 PUB. OPINION Q. 647 (1966-1967).

doubting key, empirical assumptions. For the passive virtues to perform the mediating function that Bickel assigns to them, two of his assumptions must be valid: (1) that lay publics can differentiate decisions on the merits from decisions not to hear or not to decide on the merits of a constitutional claim; and (2) that the public will accept, with no political cost to the Court, the avoidance of substantive, principled conclusions to cases.

Professor Gerald Gunther has stated the case against the first assumption:

> It *is* true, of course, that rulings of "nonunconstitutionality" are often viewed as approvals of the legislative policy. But that, as Bickel recognizes, is the result of popular misinterpretation of the Court's actions. . . .
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> . . . If, despite the Court's reminders that failure to invalidate a law is not approval of its wisdom, mistaken impressions persist, can we really expect to be substantially better off if the Court "stays its hand, and makes clear that it is staying its hand and not legitimating?" A Court "staying its hand" is, after all, failing to invalidate; and a public so inattentive to the Court's reasons as to confuse wisdom with constitutionality is not likely to perceive that "staying its hand" falls short of "legitimation."[17]

Is Bickel's assumption as unreasonable as Gunther asserts? Can the attentive public distinguish between decisions on the merits and those that avoid the merits?

And what about Bickel's other assumption? When the Justices duck an alleged "duty to decide," do many observers object? Bickel did anticipate that a number of observers might prefer to lose a substantive decision than to endure the uncertainties of a "judicial misfire."[18] Was he wrong? Does the Court reap more opposition by avoiding a decision than by reaching the merits with an unprincipled decision?

To examine the empirical basis for assumptions underlying the theories of Professors Bickel and Wechsler, we studied the reactions of editorialists for major American daily newspapers to several landmark decisions of the Supreme Court.[19] First, we tested Wechsler's assumption by examining editorial reactions to the three decisions explicitly criticized in *Neutral Principles*: *Brown I*;[20] *Shelley v. Kraemer*[21] (invalidating racially-restrictive land cove-

17. Gunther, *supra* note 13, at 7 (footnote omitted).

18. A. BICKEL, *supra* note 11, at 112-13.

19. For all cases from 1944 to 1955, editorials were sought from forty-three major newspapers available on microfilm in Washington, D.C. This sample included five papers with predominantly black readership and twenty-two dailies from cities that mandated segregated schools as of May 1954. For responses after 1969, we supplemented this original sample with data from Editorials on File, a service that collects editorials on major topics of the day.

20. 347 U.S. 483 (1954).

21. 334 U.S. 1 (1948).

nants); and *Smith v. Allwright*[22] (invalidating the white primary). We found little evidence that neutrality and generality are necessary for widespread acceptance by the editorialists of a constitutional decision. Then we considered editorials written in response to *DeFunis v. Odegaard*,[23] a famous recent example of judicial avoidance. Reaction to this case illustrates the serious costs incurred through the use of the passive virtues in cases where the public expects a decision on the merits. While these reactions do not wholly invalidate the Bickel thesis, they do suggest that the efficacy of the techniques of avoidance may be limited to less visible and less salient cases.

Editorialists provide an excellent audience for testing the political assumptions of Bickel and Wechsler. Because both men articulated ways to manage the "amorphous power of public reaction"[24] we must evaluate the political advisability of their techniques with reference to an audience. It would be foolish, however, to focus on mass audiences, because ample research attests to the inattention of the average citizen. Editorialists, in contrast, are sophisticated enough to appreciate or deprecate the reasoning of the Court while at the same time considering the political, social, and cultural concerns of their readers. Disciplined by the demands of their employers and their readers, editorialists' opinions are likely to reflect the standards and capabilities of their most informed readers. Certainly the editorialists are likely to be more sophisticated than most citizens, and thus we may interpret their responses as the most we can expect from the citizenry at large; indeed, many citizens probably gain their opinions of the work of the Supreme Court from the writings of editorialists. Finally, editorials—unlike the responses of most other publics—are available without obtrusive surveying, and in a format fairly comparable from respondent to respondent.

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22. 321 U.S. 649 (1944).

23. 416 U.S. 312 (1974). In *DeFunis*, the petitioner, a white male, contended that he had been unconstitutionally denied admission to the University of Washington Law School as a result of the law school's affirmative action admissions program. A five-man majority of the Court held the case moot because the petitioner, who had been attending the law school during the pendency of the action as the result of a lower court order, would graduate from the law school regardless of the outcome of the case. Justice Douglas was the only dissenter who stated his view of the merits of the claim.

24. D. GREY, THE SUPREME COURT AND THE NEWS MEDIA 3 (1968). Wechsler was less explicit about this, but his goal of discovering standards of legal argument that would guide and bind judges and their critics would only make "democratic" sense if those standards satisfied those who were not experts. Bickel clearly anticipated the efficacy of the passive virtues beyond lawyers and judges. Indeed, Gunther observed that if Bickel did not intend the passive virtues to "work" on attentive lay observers, their function was unclear. Gunther, *supra* note 13, at 7.

If, indeed, neutral principles are a minimal prerequisite for legitimation of judicial decisions, we should expect editorialists to bridle at decisions identified by Wechsler as deficient in neutrality or generality. If editorialists failed to discern the absence of principle or at least failed to object to the flaws cited by Wechsler, then it is hard to maintain that neutral principles are actually necessary for public acceptance of decisions. Table 1 reveals that the flaws in three landmark decisions that Wechsler singled out for criticism did not lead to greater disapproval among editorialists than the opinions in two contemporaneous landmarks that Wechsler did not criticize.[25] In each of the five cases, a majority of the editorialists supported the decision of the Court. Although responses to both *Allwright* and *Brown I* were somewhat less approving than the responses to *Sweatt v. Painter* (which Wechsler did not single out for criticism), the responses to *Shelley* (which Wechsler specifically found wanting in neutrality) were roughly the same as those to *Sweatt.* Surprisingly, the greatest percentage of approving editorials greeted *Brown I*, a decision seldom cited as a paragon of neutrality.

Focusing on explicit approval alone actually understates the difficulties with Wechsler's assumption. If neutral principles are politically essential rather than marginally helpful or occasionally advisable, then this sophisticated audience presumably would explicitly disapprove of decisions that lack neutrality. If we take the absence of explicit disapproval to betoken acquiescence, the row percentages in Table 1 are damning evidence. Acquiescence (i.e, approval and neutrality combined) overwhelms disapproval and ambivalence combined by more than three to one in *Allwright* and by more than four to one in *Brown I.* In response to *Shelley*, twenty out of twenty-one editorials available were either approving or neutral.

Many of the editorialists may have so welcomed the results of these cases that they were loath to be too critical of the Court's reasoning. Needless to say, such acceptance does not bode well for the Wechsler thesis because it suggests that substantive agreement with the Court suffices to ensure popular approval of a decision.

25. In addition to the cases cited in notes 17-19, we examined editorials discussing Sweatt v. Painter, 339 U.S. 629 (1950) and Brown v. Board of Education (Brown II), 349 U.S. 294 (1955). Both of these are racial discrimination cases that Wechsler did not expressly criticize in his article.

Three coders judged the evaluation of the landmarks by each editorial. Editorials were coded "approving" if they expressly lauded the decision of the Court and did not expressly criticize the decision. Editorials that criticized without any express praise were coded "disapproving." If the editorial expressed both criticism and praise its was coded "ambivalent." If no explicit evaluation was forthcoming, it was coded as "neutral." The judgment of two of the three coders was sufficient to overrule the third coder.

TABLE 1
Editorial Reactions to Selected Racial Justice Cases, by Region

DECISION	EDITORIAL REACTION	REGIONS "NORTH" N	"NORTH" %	"SOUTH" N	"SOUTH" %	TOTAL N	TOTAL %
Smith v. Allwright	Disapproval	0	0	5	31	5	18
	Neutrality	3	25	4	25	7	25
	Ambivalence	0	0	1	6	1	4
	Approval	9	75	6	38	15	54
		12	100	16	100	28	101
Shelley v. Kraemer	Disapproval	0	0	1	8	1	5
	Neutrality	2	25	5	39	7	33
	Ambivalence	0	0	0	0	0	0
	Approval	6	75	7	54	13	62
		8	100	13	101	21	100
Sweatt v. Painter	Disapproval	0	0	2	12	2	7
	Neutrality	2	14	6	35	8	26
	Ambivalence	0	0	2	12	2	7
	Approval	12	86	7	41	19	61
		14	100	17	100	31	101
Brown v. Bd. of Educ. I	Disapproval	1	5	4	20	5	12
	Neutrality	2	10	9	45	11	27
	Ambivalence	0	0	1	5	1	2
	Approval	18	86	6	30	24	59
		21	101	20	100	41	100
Brown v. Bd. of Educ. II	Disapproval	3	17	1	5	4	11
	Neutrality	2	11	7	35	9	24
	Ambivalence	1	6	0	0	1	3
	Approval	12	67	12	60	24	63
		18	101	20	100	38	101

KEY:

"North" = Newspaper published in state that did *not* mandate segregation.

"South" = Newspaper published in state that mandated segregation in schools in May, 1954.

Neutrality = Editorial took no explicit stance on decision.

Ambivalence = Editorial explicitly approved and disapproved of decision.

Moreover, if we find that those editorialists with reason to condemn the results of the three decisions were nevertheless disposed to accept them, then neutral principles will not have been necessary to induce acceptance even among expected critics. Table 1 shows that among editorialists for newspapers in states that mandated segregated schools there was far less opposition to the decisions than we might expect. If, as above, we count as acquiescent all editorialists who did not express disapproval of any aspect of the decision, every decision expressly criticized by Wechsler elicited acquiescence from at least sixty percent of the southern and border-state editorialists. Given Wechsler's conclusion that these opinions lacked both neu-

trality and generality, the fact that we get so little criticism of any kind from this particular audience raises serious doubts about the Wechsler thesis.

A brief review of the reasons that editorialists gave for their reactions undermines Wechsler's contentions still further. In response to *Allwright*, supporting editorials tended to emphasize the justice of the holding while underemphasizing the opinion's reasoning.[26] One would expect opponents of integrated primaries to point to any presumed weaknesses in the Court's reasoning. Instead, criticisms were almost entirely result-oriented.[27] Editorial responses to *Shelley v. Kraemer* displayed a similar willingness to accept the Court's reasoning. Approving editorialists applauded the common-sense realism of the Court; once again the moral rectitude of the decision was central and the reasoning of the opinion peripheral.[28] The only opponent of *Shelley* objected to the result and not the reasoning.[29]

Wechsler made *Brown I* the prime example of lack of neutrality in judicial decisionmaking and one would expect the reaction to *Brown I* to illustrate the wisdom of the Wechsler thesis. Only five newspapers, however, explicitly opposed the decision; four of the five attacked neither the reasoning nor the neutrality of the Court.[30] Only the New Orleans *Times Picayune* argued with the logic of *Brown I*.[31] Professor Wechsler's criticism notwithstanding, the

26. *See, e.g., The Supreme Court Puts "Real Democracy" Up to the American People*, Cleveland Call and Post, April 15, 1944, at 8; *Truth, Logic and Justice Win in Court*, Louisville Courier J., April 5, 1944, at 6; *A Victory for Democracy*, St. Louis Post Dispatch, April 4, 1944, at 28; *Political Equality Upheld*, Cleveland Plain Dealer, April 4, 1944, at 6.

27. The *Memphis Commercial Appeal* found an absence of neutrality but not of the type that concerned Wechsler: "The Court's decision is right down the alley of the New Deal and in thorough consonance with the Communist-inspired policy of ruling through balancing minorities." April 5, 1944, at 6. The *Dallas Morning News* disagreed with the Court's conclusion that political parties were agents of the state while admitting that the policies of the state of Texas might have abetted that finding. April 5, 1944, § II, at 2. Only the *Charleston (S.C.) News and Courier* even approximated Wechsler's concern. April 4, 1944, at 1.

28. *See, e.g., A New Emancipation Proclamation*, Pittsburgh Courier, May 22, 1948, at 4; *Equal Protection*, Wash. Post, May 6, 1948, at A8; *Restrictive Deed Given Highest Court Kayo*, Dallas Morning News, May 5, 1948, § IV, at 2; *Voluntary Housing "Segregation" Okayed*, Atlanta Constitution, May 5, 1948, at 8; *No Standing in Court*, Wash. Star, May 4, 1948, at A8; *An Equal Rights Victory*, St. Louis Globe Democrat, May 4, 1948, at 2C.

29. Charlotte Observer, May 6, 1948, at 12A.

30. The *Los Angeles Times* described the practical problems entailed by the ruling but allowed that the Court hardly could have reasoned otherwise on the legal issues. May 19, 1954, § II, at 4. The *Atlanta Constitution* was utterly result-oriented in deploring the decision for the practical difficulties it raised. May 18, 1954, at 4. Both the *Birmingham News*, May 18, 1954, at 10, and the *Charleston (S.C.) News and Courier*, May 18, 1954, at 1, preferred separate but equal, but neither questioned the reasoning of the Court.

31. May 18, 1954, at 8.

opinion in *Brown I* drew relatively little negative comment; it is hard to see how "neutral principles" could have worked any better.

Evidence from the editorial reaction to these "flawed" opinions does not, of course, rebut every aspect of Wechsler's advice to judges.[32] It does, however, suggest that the legitimacy of the Court is hardly as precarious as Wechsler assumed. Certainly the evidence justifies a healthy skepticism about the proposition that neutral principles are necessary to ensure public acceptance of judicial decisions. Before an audience of judges and lawyers, these decisions might be condemned for their lack of neutral principles. By a sophisticated lay audience, however, the Court's efforts seem to be appraised with essentially political criteria.

Bickel assumed that lay observers could distinguish judicial avoidance from judicial disposition on the merits. He also assumed that the avoidance of some decisions would generate more public acceptance—or at least less public criticism—than disposition on principled grounds. We test these assumptions below with reference to *DeFunis v. Odegaard*, a landmark of judicial avoidance. We would prefer to test a variety of decisions employing the passive virtues, but such cases rarely evoke editorial comment. Because Bickel's argument would make little sense if he were counseling avoidance of minimally visible cases, we restrict ourselves to consideration of the impact of the techniques of avoidance in a highly visible, much-awaited decision.

Gunther criticized Bickel for assuming that the public can distinguish decisions avoided from decisions on the merits. For the mass public such skepticism may well be warranted. Bickel's position may be saved, however, by limiting his assumption to the abilities of relatively attentive and sophisticated laypersons such as editorialists. Only one of the responses to the *DeFunis* decision that we collected mistook it for a ruling on the merits.[33] The evidence, while hardly compelling, does suggest that the editorialists can make the distinction so necessary for the Bickel thesis.[34]

On the other hand, as Table 2 indicates, a plurality of editorialists explicitly disapproved of *DeFunis*. Contrary to what a reader of

32. See Greenawalt, *supra* note 5, for a discussion of the many virtues of the Wechsler thesis.

33. Atlanta Daily World, April 26, 1974, at 4.

34. Moreover, Editorials on File, 1970-1984, contains ten sets of editorials on cases in which the Supreme Court avoided determination on the merits (mainly denials of certiorari). In eight of the ten instances, editorials correctly perceiving the action of the Court outnumbered those that did not by more than two to one. While there does seem to be some relationship between the visibility of the litigation and the perception of avoidance, we conclude that editorialists, for the most part, are capable of making the necessary distinctions.

Bickel might suppose, opposition to *DeFunis*, in fact, exceeded opposition to the *Bakke* decision in which the Court first grappled with the issue of constitutionality of affirmative action in admissions to professional schools.[35] Opposition to *DeFunis* exceeded that to *United Steelworkers of America v. Weber*,[36] in which the Court upheld an affirmative action plan negotiated by a private employer and a union against a challenge based on Title VII of the 1964 Civil Rights Act. From the figures set forth in Table 2, it is difficult to see what the Court gained politically by mooting *DeFunis*, particularly in light of the fact that it hardly could be said that in the years between *DeFunis* and *Bakke* the community reached a consensus on the resolution of the affirmative action question. Only three newspapers in the sample explicitly endorsed the outcome in *DeFunis*; ten times that many endorsed the results in *Bakke* and *Weber*. *Swann v. Charlotte-Mecklenburg Board of Education*[37] and *Milliken v. Bradley*[38] are also included in Table 2 to provide further basis for comparison.

TABLE 2
Editorial Reactions to Recent Racial Justice Decisions

	Decision	NE	Explicit Approval	Inexplicit Position	Explicit Disapproval
1971	Swann v. Charlotte-Mecklenburg	65	32.5%	50.8%	16.9%
1974	DeFunis v. Odegaard	33	6.1	42.4	51.5
1974	Milliken v. Bradley	36	52.8	16.7	30.6
1978	Regents v. Bakke	69	42.0	47.8	10.1
1979	Steelworkers v. Weber	45	66.7	4.4	28.9

KEY:

NE = Number of editorials that responded to ruling.

Disagreements with the Court's action in *DeFunis* were often salty, as headlines from several critical editorials make clear:[39]

"DUCKING A DIFFICULT CASE"
"DODGING AN IMPORTANT ISSUE"
"SIDESTEPPING THE QUOTA ISSUE"

35. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
36. 443 U.S. 193 (1979).
37. 402 U.S. 1 (1971).
38. 433 U.S. 267 (1977).
39. Headlines respectively from Charleston (S.C.) News and Courier, April 27, 1974, at 10A; Memphis Commercial Appeal, April 26, 1974, at 4; Dallas News, April 26, 1974, at 2D; Milwaukee Sentinel, April 26, 1974, at 18; Rocky Mountain News, April 25, 1974, at 66; San Francisco Chron., April 25, 1974, at 38; Detroit News, April 25, 1974, at 10B; St. Petersburg Times, April 24, 1974, at 22A.

"THE SUPREME COURT DUCKS"
"MISSED OPPORTUNITY"
"HIGH COURT DUCKS"
"THE COURT DODGES A CASE OF BIAS"
"A NEEDLESS DELAY"

These headlines reveal the dismay of many editorialists that a much-anticipated articulation of constitutional standards was not forthcoming. Needless to say, this reaction undermines Bickel's assumption that the passive virtues bolster the Court's legitimacy.

Although evasion in *DeFunis* was costly, the cost of avoidance may have been less than the cost of decision. To shed some light on this intriguing problem, we cross-tabulated responses to *DeFunis* with reponses to *Bakke* and *Weber*. In response to both of the decisions on the merits, at least half of the critics of *DeFunis* expressed approval of the rulings. Seven of the nine editorialists who took no position on *DeFunis* explicitly endorsed *Weber*. Of the 12 newspapers coded as inexplicit on the *DeFunis* case, four explicitly approved the disposition in *Bakke* and none disagreed explicitly. Thus *DeFunis* elicited disapproval from newspapers that, as best we can surmise, would have approved of—or at least acquiesced in—a decision on the merits.

What is perhaps most striking about the editorialists' reactions to *DeFunis* is that it was not the specific use of the mootness doctrine that provoked criticism but rather the avoidance of the decision per se. That is, most criticism of *DeFunis* was not based on a perception that this was a particularly inept use of the passive virtues. Table 4 allows us to compare the two major reasons the editorialists gave for their reactions to *DeFunis*.[40] Acquiescence and opposition to the decision are cross-tabulated with evaluations of (1) the specific use of the mootness doctrine in *DeFunis*, and (2) the duty of the Court to decide important constitutional issues. Less than half of the disapproving editorialists name the misuse of mootness as cause for disapproval while all of these editorialists cited the unacceptability of avoidance. Of the editorialists who acqiesced in the decision, five were moved to lament the absence of a decision on the merits.

40. Table 3 dichotomizes the variables for interpretive convenience. Hence editorialists are divided into explicit opposition (to the holding, to the use of mootness, or to avoidance) and "non-opposition" (explicit approval or inexplicitness). We tabulate in this way because the success of Bickel's passive virtues, in our judgment, requires only that the Court secure acquiescence. The Court does not need the outright, expressed approval of its publics for the hypothesized legitimation to occur. Silence is sufficient and thus in Table 3 we treat silence as assent.

TABLE 3
Editorial Evaluations of *DeFunis v. Odegaard* Cross-Tabulated with Evaluations of *Regents v. Bakke* and *Steelworkers v. Weber*

	Explicit Disapproval	Inexplicit Position	Explicit Approval	Total
BAKKE				
Explicit Disapproval	1	0	0	1
Inexplicit Position	4	8	0	12
Explicit Approval	5	4	2	11
Total	10	12	2	24
WEBER				
Explicit Disapproval	2	1	1	4
Inexplicit Position	0	1	0	1
Explicit Approval	4	7	1	12
Total	6	9	2	17

TABLE 4
Explicit Grounds for Opposition and Acquiescence in *DeFunis*

	EDITORIAL STANCE ON *DEFUNIS*	
	Opposition	Acquiescence
This Use of Mootness Incorrect	8	0
This Use of Mootness Correct	9	16
"Nondecision" Unacceptable	17	4
"Nondecision" Acceptable	0	12

KEY:

Opposition = Explicit disagreement with Court's ruling.

Acquiescence = Explicit agreement with Court's ruling *or* inexplicit position.

This Use of Mootness Incorrect = Explicit statement that *DeFunis* was not technically moot.

This Use of Mootness Correct = No explicit statement concerning the technical mootness of *DeFunis or* explicit statement that *DeFunis* was moot.

"Nondecision" Unacceptable = Explicit opposition to postponement of decision on affirmative action issue.

"Nondecision" Acceptable = No explicit opposition to postponement of decision on affirmative action issue, *or* explicit approval of postponement.

The data point to the conclusion that avoidance is a political problem for the Court. Indeed, it is a problem of sufficient magni-

tude that one wonders whether the cost of avoidance in highly visible cases exceeds the cost of an unpopular decision on the merits. At the very least these data may suggest that an important, sophisticated, segment of the lay public lacks the patience so necessary to Bickel's theory of judicial review.

III

The controversy over the legitimacy of judicial review in a constitutional democracy has been characterized as the "central problem of contemporary constitutional theory."[41] There is, perhaps, no more fitting tribute to the enduring influence of Bickel and Wechsler than the accuracy of this statement. Without question, they were among the most eloquent and persuasive of those who considered the examination of the "counter-majoritarian difficulty"[42] to be the essential task of constitutional scholars. Moreover, and perhaps most importantly, they recognized the question of legitimacy to be one of practical politics as well as democratic theory. Regardless of the intent of the framers or the demands of the separation of powers, Bickel and Wechsler understood that in the final analysis judicial review is dependent on the will of the citizenry.

The effort to reconcile the tension between judicial review and majority rule in terms of both practical politics and democratic theory led Wechsler and Bickel to an emphasis on judicial technique and the role of principle. If judicial decisions could be shown to be based on desirable qualities normally absent from democratic politics, then judicial review was defensible despite its undemocratic character. Furthermore, adherence to certain techniques, be they of avoidance or neutrality, would facilitate public acceptance of judicial actions. In short, principle and technique, properly employed, would result in a powerful and politically acceptable Supreme Court.

In joining practical politics with democratic theory, Bickel and Wechsler defined the boundaries of normative constitutional scholarship for a generation of scholars. The data presented here are not intended to disparage their work but rather to suggest the difficulties inherent in such an approach. Although legitimacy is a pri-

41. M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 6 (1982); *see also* Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981); Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and A Different Perspective*, 44 OHIO ST. L.J. 93 (1983).

42. The phrase is Bickel's. *See* A. BICKEL, *supra* note 11, at 16.

mary topic in current normative constitutional scholarship, we know strikingly little about how publics comprehend, or even learn of judicial decisions.[43] Focusing on the reactions of selected editorialists is an admittedly imperfect method of approaching the problem. Nevertheless, the data suggest that the techniques proposed by Bickel and Wechsler are, at best, ineffectual and, at worst, actually lessen public support of judicial action. Phrased in more general terms, they suggest that the two dimensions of the legitimacy question—public acceptance and democratic theory—often work in opposite directions. This possibility did not appear to affect Bickel and Wechsler and it certainly has not deterred those who followed their lead. The result is that modern, normative constitutional scholarship often consists of finely tuned, eloquently argued theories of judicial review in which respected scholars simply assert that their theory will result in enhanced legitimacy for the Court. Unfortunately, minimal attention has been directed to the question of whether these assertions are grounded in anything firmer than the faith of their authors.

Recently Professor Paul Mishkin has written in praise of the Court's disposition of the *Bakke* case.[44] He did not attempt to defend *Bakke* in terms of principle; indeed, he acknowledged that the outcome could not be justified by any notion of principle. Rather he found the ambivalent posture of the Court "to be a wise and politic resolution of an exceedingly difficult social problem."[45] In effect, the Court's "unprincipled" stance in *Bakke* recognized deeply held beliefs on both sides of the issue and, as a result, diffused the intensity of the debate surrounding the issue of race-conscious affirmative action. One survey of editorialists suggests that Mishkin is correct in his assessment of *Bakke*.[46] *Bakke* worked because it appeared to provide a reasonable solution to a seemingly intractable problem. Wechsler and Bickel, and their successors in the tradition of normative constitutional scholarship, have failed to provide coherent theories that account for the public success of decisions like *Bakke*. Until we do, the crucial link between public consent and judicial power will remain obscured. As long as we proceed to think and write about judicial legitimacy without

43. *See, e.g.* L. BERKSON, THE SUPREME COURT AND ITS PUBLICS (1978); C. JOHNSON & B. CANON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT (1984).

44. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907 (1983).

45. *Id.* at 929.

46. *See* W. HALTOM, VIRTUES PASSIVE AND ACTIVE: SUPREME COURT OPINIONS AND THE ATTENTIVE PUBLIC (1985) (unpublished paper, American Political Science Association).

grounding theories in the attitudes and evaluations of the actual audiences of the judges, legitimacy will remain "a symbol without content that plugs a hole in an argument."[47]

47. L. CARTER, CONTEMPORARY CONSTITUTIONAL LAWMAKING: THE SUPREME COURT AND THE ART OF POLITICS 56 (1985).