Maryland Law Review

Volume 24 | Issue 3 Article 8

Book Reviews

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The Least Dangerous Branch; The Supreme Court at The Bar Of Politics. By Alexander M. Bickel, Bobbs-Merrill, Indianapolis: 1962. Pp. 272. $2.95.

Within recent years there has been a plethora of books, articles and commentaries on the role of the Supreme Court in democratic theory. Some of these works have added little or nothing to our understanding of the unique position occupied by our Highest Tribunal. Correlatively others have produced needed insight into the situation and have opened up paths for future investigation. Professor Alexander M. Bickel's latest addition to the field, *The Least Dangerous Branch; The Supreme Court at the Bar of Politics,* would certainly fall into the second category. Professor Bickel has openly stated his disillusionment with the quality of much current literature in the field of public law. His volume is, in some sense, an attempt to bring qualitative order out of quantitative chaos.

While the Supreme Court has drawn a great deal of attention within the past two decades or so, its work obviously did not go uncommented upon earlier in our history. Indeed, the initial and publicity accepted stance of the Court, established by John Marshall in *Marbury v. Madison,* has elicited throughout the years extended scrutiny. It is to this case that Professor Bickel first directs attention in his search for the sources of conflict now swirling around the Supreme Court. The doctrine of judicial review therein enunciated, with all its modifications and amendments, he finds to be a "counter-majoritarian form in our society", "a deviant institution in the American democracy", and a theory which may "weaken the democratic process."

Judicial review is uncontrovertibly with us. And so is Professor Bickel's estimate thereof. Consequently the burden of *The Least Dangerous Branch* is to reconcile, where possible, these two factors; in other words, to integrate democratic theory with judicial practice. For aid and comfort in this endeavor, the author begins by looking to other writers whose works appear doctrinally congenial. In particular, Herbert Wechsler's recent contribution of the "neutral principles" concept is examined at some length.[1] Professor Bickel characterizes a "neutral principle" as "an

[1] Herbert Wechsler, *Principles, Politics and Fundamental Law* (Cambridge: Harvard University Press, 1961).

intellectually coherent statement of the reason for a result which in like cases will produce a like result, whether or not it is immediately agreeable or expedient." He finds that, in a vacuum, "neutral principles" may carry the day. In the world of practical reality, however, agreeableness and expediency also have their place, for "when values conflict — as they often will — the Court must proclaim one as overriding, or find an accommodation among them."

The author certainly does not advocate acceptance of what he calls the neo-realist position. According to the neo-realists, among whom Professor Bickel includes Justice Hugo Black, the prime admonition to the Court would be, "Don't just sit there; do something. Anything." This activism, joined to absolutism in constitutional interpretation, would assuredly destroy the peculiar function of the Supreme Court, for "one point is, in any event, of transcendent importance. The role of the Court and its *raison d'être* are to evolve 'to preserve, protect and defend' principle."

What criteria may be used to judge when compromise is necessary and expediency must be reconciled to principle? The author addresses himself to this query in two chapters, "The Passive Virtues" and "Neither Force nor Will", chapters which seem to contain the crux of much of his argument. Often the Court can avoid engrafting unprincipled or expedient limbs to the trunk of constitutional law merely by following certain negative tactics so that it will not be forced immediately to make a general pronouncement which will have side-effects far outreaching the consequences of the particular litigation. As Professor Bickel indicates, "the matrix paradox of all paradoxes concerning the Court is . . . that the Court may only decide concrete cases and may not pronounce general principles at large; but it may decide a constitutional issue only on the basis of general principles." Therefore the Court must be wary before it allows itself to be faced with a constitutional issue.

The negative tactics open to the Court are myriad and run the gamut from the traditional doctrine of political questions and considerations surrounding *certiorari* to more evanescent declarations of vagueness in drafting, delegation of powers, and the like. Several quotations from the author will give meaning to his point. "[T]he office of the Court, even in a perfectly real, concrete, and fully developed controversy is not necessarily to resolve issues on which the political processes are in deadlock; it may be wise to wait till the political institutions, breaking the

deadlock, are able to make an initial decision, on which the Court may then pass judgment." Or again, "However much judicial review may always — but uncertainly, inconclusively and unavoidably — 'dwarf the political capacity of the people', it should surely not do so knowingly, demonstrably, avoidably." And, Professor Bickel believes, the Court can avoid thrusting itself into the vortex of politics if it will but use a little ingenuity in controlling its own docket and decisions. Not every litigant, not even every deserving litigant, should be allowed to make his cause the precipitative element forcing a statement of constitutional principle from the Court.

When, then, may the High Tribunal speak out in its prophetic voice? The answer seems to come down to this, that ". . . the Court should declare as law only such principles as will — in time, but in a rather immediate foreseeable future — gain general assent." With this understanding, the Supreme Court was justified in ruling on a constitutional issue in the *School Segregation Cases.* Just so, it was wise in avoiding the constitutional issue in *Poe v. Ullman,* the Connecticut birth-control case. The crucial point here for Professor Bickel seems to be his belief in the ability of the judiciary to divine the correct time when general value pronouncements should be made. Given all the tactical advantages of the Court and even given its desire to remain above the smoke of political battle, it is difficult to account for so many of the Court's self-inflicted wounds if this timing mechanism is in operation.

One further and more fundamental *caveat* should be entered. Professor Bickel was not thoroughly enthusiastic about Mr. Wechsler's formulation of "neutral principles" because these "neutral principles" somewhat sidestepped the central issue and allowed the most difficult question still to be raised. In sum, "which values, among adequately neutral and general ones, qualify as sufficiently important or fundamental or what have you to be vindicated by the Court against other values affirmed by legislative acts?" One may ask Professor Bickel the same question.

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West's Maryland Law Encyclopedia, Procedural Forms For Maryland Rules And Practice With Commentaries. By Melvin J. Sykes and Neil Tabor. Washington Law Book Company, 1964. Vol. 1 — Pp. LXVIII, 578. Vol. 2 — Pp. XLV, 645. Tables of cases, Statutes and Court Rules, Index.

The members of the Maryland Bar will greet these two volumes with appreciation. The work is aimed at filling a void in the literature available to the Maryland lawyer — a comprehensive treatment of the Maryland Rules of Procedure. The emphasis is on the practical, rather than the theoretical. The authors state their objective as being "to assist counsel in determining what to do next, and in doing a professionally creditable job when he does it."[1] It is made clear that "[t]he primary object of the authors has been to keep the practical needs of the lawyer in mind."[2] There is no doubt that they succeed in achieving these objectives.

The heart of the work is, of course, the forms. The style of the forms is simple and direct without the formalities and prolixities which too often characterize the lawyer's work-product. The content of the forms helps to achieve an understanding of the rules by concrete illustrations of various situations to which a particular rule applies.

In addition to the forms, the work contains short and concise introductory notes to each topic and explanatory comments to each form. Also included are references to local and general encyclopedias and texts for further research into particular subjects. The functions of the notes and comments are two-fold. First, that of exposition — the explanation of the rules. Second, that of tactical investigation — the examination of the alternatives available in any situation and the advantages and disadvantages of each.

In their task of exposition, the authors, one a member of the Court of Appeals Standing Committee on Rules of Practice and Procedure and the other the assistant reporter of the Committee, are aided by their first hand knowledge of the genesis of the various rules, and their answers to doubtful questions and interpretations of difficult provisions in the rules can be regarded as carrying a great measure of authority.

Typical of the authors' approach to the interpretation of the rules is their treatment of the very basic question of what form of pleading should be used in raising inter-

[1] SYKES and TABOR, M.L.E. *Procedural Forms* (1964) (the work will be cited hereinafter as SYKES and TABOR).

[2] *Ibid.*

locutory questions for court decision. The Maryland rules vary in their nomenclature, sometimes using the term "petition",[3] sometimes "application",[4] at other times "application by motion",[5] and there are rules which do not specify how the question is to be presented to a court.[6] The authors, finding that "the intent of the framers of the rules was to promote uniformity in the type of pleading raising interlocutory questions for action or ruling by the courts"[7], conclude that the simple motion form is to be used for such pleading[8] except where the rules prescribe the specific form and contents of certain types of petitions. Scattered throughout the two volumes are numerous other instances where the authors utilize their expert knowledge in explaining rules raising difficult problems of interpretation.[9]

Tactical advice is of particular value to younger lawyers and to those who find themselves faced with a procedural situation for the first time. Examples of this aspect of the work are discussions on the advantages and disadvantages

[3] *E.g.*, Rule 203d.

[4] *E.g.*, Rule 205e2.

[5] *E.g.*, Rule 208c1.

[6] *E.g.*, Rule 209b.

[7] SYKES and TABOR § 794.

[8] Thus, even where the rules use the term "petition" as in Rule 203d, the form is essentially the simple motion form. SYKES and TABOR § 132.

[9] The following are illustrations taken at random:

Rule 282 — Omission of reference to corporations under Rule 106. SYKES and TABOR § 148.

Rule 343a — Question of responsive pleading to counterclaims and omission of reference to Rule 342c. *Id.* at § 700.

Rule 314a3 — Problem of inconsistency with Rule 314d2. *Id.* at § 748. The origin of the problem probably arises from the fact that Rule 314a3 follows the language of Fed. Rule 13(e) and under the Federal rules the time for serving a counterclaim does not extend beyond the time for serving the answer.

Rule 421 — Whether objections to requests on the grounds that they are improper or irregular are permitted. *Id.* at § 1015.

Rule 558d — Problem of the type of deposition covered by the rule. *Id.* at § 1202.

Rules 535 and 552 — Comparison of the motion to dismiss in nonjury cases and directed verdict motion in jury cases as affecting the interpretation of the rules. *Id.* at § 1214.

Rule 610c — Question of time within which a motion for summary judgment may be heard where based on a counterclaim or crossclaim. *Id.* at § 1394.

Rule BT7 — The time for filing motion and order for judgment of fiat absolute after the writ of scire facias is twice returned nihil. *Id.* at § 1475.

Rule 628d — Problem of whether the injunction rules under Subtitle BB apply to injunctive relief in connection with supplementary proceedings. *Id.* at § 1515.

Rule 623 — Content of the writ of attachment on judgment and question of whether the writ is directed to the sheriff or to the person who has the attached property. *Id.* at § 1613.

of proceeding by special case by consent,[10] filing a demurrer,[11] amending against a third party,[12] using a special verdict,[13] and choosing between supplementary proceedings and discovery in aid of execution.[14]

Many of the forms also provide checklists that can be referred to at various stages of the litigation. Some of these forms are those for interrogatories,[15] plaintiff's requested instructions,[16] defendant's requested instructions,[17] instructions of the court,[18] objections of counsel,[19] examination in supplementary proceedings,[20] and interrogatories in aid of execution.[21] Valuable advice is given on the writing of briefs on appeal[22] and complete briefs for both appellant and appellee furnish actual models.[23]

A distinct asset to these volumes is their topical organization. In distinction to the arrangement found in such outstanding works as those of Professor Moore and Barron and Holtzoff on the Federal Rules of Procedure whose divisions correspond directly to the numerical order of the rules, Sykes and Tabor have adopted a logical or functional arrangement based on the steps in the litigation process. One benefit resulting from this organization is the opportunity it presents to bring together in one place numerous rules scattered throughout the rule book but dealing with a single topic, for comprehensive discussion at the appropriate place. Examples of this technique are the discussions concerning protective orders in connection with various discovery devices,[24] default judgments,[25] costs,[26] and execution.[27]

There is an additional benefit, though indirect, to be gained from the arrangement employed by Sykes and Tabor. It has been pointed out that the numerical order arrangement of Moore and Barron and Holtzoff results in a "decentralized" point of view which "makes it mechani-

[10] SYKES and TABOR § 492.
[11] *Id.* at § 553.
[12] *Id.* at § 773.
[13] *Id.* at § 1243.
[14] *Id.* at § 1504.
[15] *Id.* at § 962.
[16] *Id.* at § 1227.
[17] *Id.* at § 1229.
[18] *Id.* at § 1231.
[19] *Id.* at § 1232.
[20] *Id.* at § 1511.
[21] *Id.* at § 1521.
[22] *Id.* at § 1782-90.
[23] *Id.* at § 1797-99.
[24] *Id.* at § 1021-24.
[25] *Id.* at § 1341.
[26] *Id.* at § 1441.
[27] *Id.* at § 1532.

cally difficult to formulate and to develop integrating concepts that cut across the categories of the Rules."[28] Sykes and Tabor, in writing for the practicing attorney, were, of course, directing their efforts to the essentially reportorial task of describing the manner in which the courts and legislative bodies have conceived the problems presented in the various situations and the answers that they gave to the problems. However, in affording an integrated view of the litigation process, Sykes and Tabor have provided a framework for investigation of the further question: can the problems be conceived of in a different and more satisfying way and, if so, what other answers can be provided than those which have been given?[29]

One of the problems discussed in detail in Sykes and Tabor, whose solution might well be advanced by taking such an over-all view, is whether a plaintiff can obtain Particulars of the defendant's general issue plea.[30] Basing their opinion upon a literal reading of Rule 346 and the Editor's note to the rule, Sykes and Tabor conclude that a Bill of Particulars of a general issue plea may be obtained.[31] On the other hand, former Chief Judge Niles of the Supreme Bench of Baltimore City held that a Bill of Particular of a general issue plea should not be granted, unless there were special circumstances, and that the information should be obtained by means of interrogatories under Rule 417.[32] The Court of Appeals has not yet given a definitive answer to the question. A rational final decision, it would seem, would be aided by focusing upon the scope and function of the two devices to determine which of the two is better suited to lead out of the pleading stage and into the prepa-

[28] HAZARD, RESEARCH IN CIVIL PROCEDURE, WALTER E. MEYER RESEARCH INSTITUTE OF LAW 50 (1963).

[29] From this point of view, it might have been of greater benefit to have the topics of Class Actions and Intervention (which comes at the end of Part 2 — Parties) and the Topics of Joinder of Parties and Claims and Third-Party Practice (which are in Part 3 — Pleadings) together with Interpleader and Necessary Parties treated in a single section.

[30] SYKES and TABOR § 503.

[31] The Editor's note to Rule 346 is, without doubt, somewhat cryptic. Sykes and Tabor state that the change in language from the prior statute was meant to broaden the scope of Bills of particulars. On the other hand, the note is subject to the interpretation that the change was meant to confine bills of particulars to situations where disclosure was necessary for pleading purposes rather than for disclosure of "evidence" for trial preparation. Under this view, bills of particulars would still be available to plaintiffs where defendant pleads a dilatory plea or a special plea if too general to give notice of the defense.

[32] Broady v. Baltimore Transit Co., Daily Record, April 27, 1956. J. Prendergast, however, has required such a bill of particulars. Ranger Bowling and Chemical Co. v. Bank, Daily Record, May 4, 1964.

ration for trial phase of the case with maximum effectiveness and minimum delay.[33]

A fairly new device which may be understood better when placed in perspective is the pre-trial conference. Maryland lawyers have, up to now, not been enthusiastic about the adoption of the pre-trial conference as a part of Maryland practice.[34] Objections by the practicing bar have generally been based upon the grounds that preparing for the conference entails an unnecessary duplication of the work involved in preparing for the trial, and there is certainly some merit to this contention. Sykes and Tabor place the topic of pre-trial conference in the section on Trials under the hearing, "What is to be Tried and When?"[35] Viewed in this context, it can be safely conjectured that although many cases would not benefit from a pre-trial conference, the ultimate disposition of many other cases will be advanced by such a conference. The problem, therefore, is not whether there should be such a thing as pre-trial conferences, but of determining which cases should be pretried and which should not.[36] It may also be possible to use the pre-trial conference at other points in the litigation process, *e.g.*, after the pleadings and prior to discovery in complicated cases to limit the issues in order to avoid unnecessary discovery.[37]

These two volumes cover the subject of General Proceedings, except for Chapter 700 (Criminal causes). The subsequent volumes dealing with Juvenile causes and Special Proceedings will complete the treatment of Civil Proceedings under the Rules. Perhaps, at some time in the future, a companion work dealing with the substantive allegations necessary to state the various types of claims and defenses will be forthcoming.

For every Maryland practitioner and anyone desiring a knowledge of Maryland procedure, these two volumes are an absolute must.

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[33] Of course, one possible solution to the problem would be to make Rule 372 applicable to both law and equity. Sykes and Tabor make a similar recommendation as to Rule 375 — Replications. SYKES and TABOR § 692.

[34] *Id.* at § 1071.

[35] *Id.* Part 5, Chapter 53.

[36] See the suggestions advanced in Comment, *California Pretrial Action*, 49 CAL. L. REV. 909, 927 (1961).

[37] See MOORE'S FEDERAL PRACTICE ¶ 16.08 (2d ed. 1963).

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The Supreme Court On Trial. By Charles S. Hyneman, Atherton Press, New York: 1963.

This is a difficult work to review or appraise. Based on a set of lectures originally delivered at the State University of Iowa in 1961, it retains some of the flavor and informality of the oral presentation. Consequently its chapters are uneven in quality and its organization somewhat diffuse. Its avowed "purpose is to examine critically the place of the Supreme Court in our political system", and it doubtless represents another contribution to the now substantial scholarly literature critical of the performance of the Warren Court. Yet Hyneman does not often specify precisely what he finds deficient in the Court's record. The contemporary debate as to the feasibility and desirability of a judicial articulation of "neutral principles" of constitutional law goes unmentioned in the text, though Herbert Wechsler's seminal article-lecture is cited in the fairly good bibliography at the back of the volume.[1] Nor does Hyneman ever allude to Professor Henry M. Hart's contention that the Court's work load is so massive that it is unable to accord to the often subtle and complex litigation with which it is confronted the kind of thoughtful consideration and mature collective deliberation demanded by the nature of its responsibility.[2]

The author, a distinguished political scientist who has long been a member of that department at the University of Indiana and was president of the American Political Science Association in 1961-62 focuses his attention upon the decisions of the Court relating to racial segregation. (Although he refers briefly to the 1957 Congressional campaign spearheaded by Senator Jenner to restrict the appellate jurisdiction of the Court and to the hostile report of the Conference of State Chief Justices filed in 1958, which were inspired primarily by Court decisions involving national security and state-federal relations, respectively, he finds it "not practicable to discuss those cases here, for they are too many in number and too varied in character.") He approvingly characterizes the opinions in *Brown*[3] and *Bolling*[4] as "to the point" and "readily comprehensible to the layman" and believes that they adequately "related"

[1] *See* Herbert Wechsler, "Toward Neutral Principles of Constitutional Law" 73 HARV. L. REV. 1 (1959).

[2] *See* Henry M. Hart, Jr., "The Supreme Court, 1958 Term: Foreword: The Time Chart of the Justices" 73 HARV. L. REV. 84 (1959).

[3] Brown v. Board of Education, 347 U.S. 483 (1954).

[4] Bolling v. Sharpe, 347 U.S. 497 (1954).

the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth "to public education." Yet, he notes, the Court there eschewed adumbrating the broad principle that the Constitution categorically precludes "any legal recognition of racial difference." Thus he sharply criticizes the Court's practice in subsequent cases of prohibiting segregation in other public facilities, *e.g.*, public transportation, parks, golf courses, and beaches, merely on the basis of a series of *per curiam* opinions citing the School Segregation cases rather than on the basis of an independent examination of the relevant issues.[5] He further alleges that the Court "lifted itself to a new peak of judicial power" when, in the *Little Rock* case,[6] it boldly asserted for the first time in its history — *Marbury v. Madison*[7] notwithstanding — "that the federal judiciary has authority superior to that of the other branches of the government in deciding what the Constitution requires, permits, or forbids."

The hostile reaction generated by these decisions — led, though not exclusively dominated, by Southerners — Hyneman concedes was often "sullen" and "stubborn" but nonetheless had "rich precedent in all formative periods of American history." Moreover, while many of the charges levied against the Court were "imprecise" and "extravagant", and while many statements by politicians rejecting the legitimacy of the Court's authority to render constitutional pronouncements often reflect simply a strong opposition to the substantive policies embodied in specific decisions, he warns that the so-called Southern Manifesto issued by ninety-six members of Congress in 1956 cannot be summarily "dismissed as the petulant complaint of petty men." The manifesto instead represented "a statement of personal conviction" by a group of men many of whom possessed "considerable renown in the study and practice of law" and were "stalwart defenders of liberal causes" except on the question of race relations. Similarly, as to the attempts by several Southern state legislatures to revive the doctrines of nullification and interposition[8] — though they

[5] *See, e.g.*, New Orleans City Park Improvement Assn. v. Detiege, 358 U.S. 54, *affirming per curiam*, 252 F. 2d 122 (1958); Gayle v. Browder, 352 U.S. 903, *affirming per curiam*, 142 F. Supp. 707 (1956); Holmes v. City of Atlanta, 350 U.S. 879, *reversing per curiam*, 223 F. 2d 93 (1955); Mayor & City Council of Baltimore v. Dawson, 350 U.S. 877, *affirming per curiam*, 220 F. 2d 386 (1955); and Muir v. Louisville Park Theatrical Assn., 347 U.S. 971 (1954), *reversing per curiam*, 202 F. 2d 275 (1953).

[6] Cooper v. Aaron, 358 U.S. 1 (1958).

[7] 1 Cr. 137 (1803).

[8] For a sympathetic modern consideration of these doctrines, *see* James Jackson Kilpatrick, *The Sovereign States: Notes of a Citizen of Virginia* (Chicago: Henry Regnery Co., 1957).

refrained from using the former term — Hyneman states that these views have enjoyed "a hardy existence." One must applaud Hyneman's willingness to give a thoughtful hearing to the arguments of the Southern critics of the Court, for "liberal" intellectuals too often fail to examine carefully the reasons advanced in support of certain propositions (especially "conservative" positions), cavalierly dismissing them as mere "rationalizations" impelled or determined by the speaker's economic interests. However, normative judgments cannot be derived from history, *i.e.*, from "rich precedent," or from the fact that people in the past sometimes acted as some people do today.

Is there not then any factor which might tend to lend support to or establish the validity of the Southern attack on the segregation decisions — if not the *substantive content of those charges,* then at least the right of the South to make such allegations and to refuse to heed the Court's edicts? Hyneman turns to the constitutional text, more particularly the Supremacy Clause, and discerns therein a crucial ambiguity as to the obligation of state officials to yield to assertions (and exertions) of federal authority. He suggests that the two sentences of the Supremacy Clause[9] read together may indicate that "The lawmakers and the executive officials of the state are not required . . . to take an oath to support the laws and treaties of the national government. Only the judges of a state are explicitly declared bound by national law subsidiary to the Constitution." One wonders if Hyneman is implicitly including decisions of the Supreme Court on questions of constitutionality among such "national law." After a cursory examination of the admittedly "meager report of debate" on this provision in the Philadelphia Convention, Hyneman refuses to conclude that the evidence adduced "forces a conclusion that the framers of the Constitution wished to allow for state nullification of national law." Yet he makes emphatic that:

> "the Constitution as finally phrased and adopted does not clearly, definitively, incontrovertibly state what

[9] Const., Art. VI, sections 2 and 3: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.

"The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation; . . ."

> the citizen may do — by individual action or in concert through his state government — when convinced that his national government has exceeded the authority conferred on it by the Constitution. There is no language in the Constitution which clearly specifies the final recourse in orderly protest before angry citizens assert their naturally endowed capacity to rebel against a government they are no longer willing to put up with."

Can this ambiguity of language be resolved by the authoritative gloss of history? Is the issue between Hayne and Webster still open? Or, to state the question more bluntly, can this nation afford that that issue still be open? Can we afford more Virginia and Kentucky Resolutions, more Hartford Conventions, more Expositions of '32? Hyneman in effect also dodges these questions, noting only that the three Civil War amendments:

> "contained no language designed to settle the question as to where authority to fix the meaning of the Constitution lies and added nothing to make it clear that the elective branches of state government, like the judges, are required to recognize the laws of the national government as supreme and subordinate their own policies and actions to them."

Does such an explanation serve to justify or excuse resistance to the Court? Left hanging in this manner, a strong argument can be made that it does. Grant the validity of Hyneman's argument that there is no explicit or wholly unambiguous or unequivocal solution in the constitutional text itself, still one is compelled to ask by what objective standard, may, "neutral principle", one may evaluate the propriety of particular resistance to the Court? It is submitted that, once the textual equivocation is conceded, this question *necessarily* arises and that it is of supremely practical (as well as putatively academic) significance.

Since Hyneman centers his attention upon the segregation controversy and (as indicated above) casts only a casual glance at other aspects of the current constitutional debate, it may at first impression be difficult to discern the pertinence of his inquiry into the legitimate scope of the Court's authority to pass upon the constitutionality of acts of Congress. For present purposes it is sufficient to say that Hyneman, drawing upon the work of other scholars,

especially Corwin,[10] concludes (1) that there is considerable doubt that the framers intended to vest in the federal judiciary the power of judicial review over congressional legislation and (2) that Marshall's "reasoning" in *Marbury* may justly be deemed "unconvincing and his conclusion unsound." But upon closer analysis this latter inquiry manifests its relevance to the segregation controversy; in both instances Hyneman believes that a strong case can plausibly be made against the existence of judicial power. As to judicial review over national laws, for example, he observes both (1) a long-established and still lingering "significant social doubt" that the Court legitimately acquired this awesome power and (2) "a persisting supposition that the Supreme Court, even if authorized to nullify legislation, has repeatedly exceeded its authority in doing so."

Hyneman gives the impression that he substantially overestimates the degree of public uncertainty (presumably that is what he intends by "social doubt") on this matter. The average citizen is not seriously concerned with this question in this formulation, as such it is almost uniquely academic. This reviewer must apologize for belaboring what seems obvious, namely, that the average citizen does *not* read the Court's *opinions* and that his antipathy, when aroused, is directed toward what he conceives to be certain undesirable practical consequences of the Court's *decisions*. Surely the academic critic — be he lawyer or political scientist — who genuinely expects or demands any other kind of popular response betrays an amazing lack of familiarity with the realities of democratic politics. Whether this hostility is "well-founded" is not immediately pertinent; prudence dictates, however, that the Court attempt to anticipate the likely reaction to its judgments. Although such calculation may be of crucial significance in determining the particular character and structure of the written opinions filed (*e.g., Marbury* or *Morgan v. Virginia*[11]), it should weigh particularly heavily in the Court's preliminary decision as to whether or not to grant *certiorari*. Once the Court agrees to hear the case, room for maneuverability with regard to the substantive holding will to some extent be diminished, though here too judicious application of, say, Brandeis' *Ashwander*[12] tenets

[10] *See* Edward S. Corwin, *The Doctrine of Judicial Review* (Princeton, Princeton U. Press, 1914); and his *Court over Constitution* (Princeton, Princeton U. Press, 1938).

[11] 328 U.S. 373 (1946).

[12] Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 (1936) (concurring opinion).

should help keep open a substantial area of flexibility and discretion. Generally speaking, however, it seems fair to argue that the opinions have considerably less public significance than the decisions of the Court. To be sure, the scholarly critic should subject the opinions of the Court to meticulous scrutiny and the professional bar should demand consistently tightly-reasoned performances. Vastly diminished confidence in the institutional integrity of the Court by such persons is bound to be ultimately reflected in its enjoying a lessened prestige and respect among the public at large. Yet if Hyneman is correct in his contentions (1) that the judicial orders in cases involving racial segregation in public facilities "have required a basic revision of social structure and a root change in human relationships," (2) that such "nonsegregation orders are without precedent for comprehensive and deep-cutting social consequences and for application of judicial method to issues of obligation arising directly out of constitutional language," and (3) that the struggle in which the Court is presently engaged will be resolved "by due process of politics rather than due process of law," of how much practical significance was the Court's tendency to resort to the shorthand practice of *per curiam* opinions in various cases after *Brown*? Surely no one will suggest that the resistance of those parts of the community that believed itself most directly affected would have been materially attenuated had the Court grounded those holdings in enduring and disinterested principle.

In the concluding portions of the book, by far the best organized and most impressive sections, Hyneman sketches the debate between the proponents of judicial restraint and the advocates of judicial activism — both admittedly overly simple and imprecise designations — and, without assuming an unalterably committed stance, seems to exhibit a definite preference for the former alternative, *i.e.*, for resolution of the most exigent questions of public policy through what he characterizes as a "responsive political process." This is the essence of democratic government, he asserts, a theme he has previously developed with great deftness and from a somewhat different perspective in *Bureaucracy in a Democracy*,[13] which stands as a major contribution to the literature of the academic study of public administration. The latter, not constitutional law, is Hyneman's particular field of competence and this reviewer's concluding judgment may be unduly harsh to this

[13] New York: Harper & Bros.

scholar who has courageously (given current trends in academe) dared to venture outside the bounds of his speciality. But on the whole *The Supreme Court on Trial* does not display the level of sustained and systematic analysis of the current conflict over the Court offered in recent volumes by Wallace Mendelson,[14] Charles Black,[15] Eugene Rostow,[16] and Alexander Bickel.[17]

LEONARD G. MILLER*

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[14] *Justices Black and Frankfurter: Conflict on the Court* (Chicago, U. of Chicago Press, 1961).

[15] *The People and the Court* (New York: Macmillan, 1960).

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