

Book Review

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Book Review

The Supreme Court And The Idea Of Progress. By Alexander M. Bickel. Harper & Row: New York, Evanston, and London, 1970, pp. 210. \$6.50.

THE SUPREME COURT AND PROGRESS? THE IDEA!

An innocent, not at all hostile, might ask Professor Bickel why he chose to write about the Supreme Court and the idea of progress. Most of the Court's work is deciding what the Constitution and federal statutes, all written by others, mean. Why should the Court be praised if the objective reading the Justices are sworn to give to such laws seems to favor progress and blamed if it does not? And besides, who is to say what progress is anyway?

Professor Bickel has his answers, and he makes them clear, although sometimes only after seeming to raise a doubt whether his central inquiry, however brilliantly executed, is worth the trouble. Thus, despite the title, he devotes fifty-six of his hundred and eighty-one pages to an appraisal of the opinions of the Warren Court on criteria unrelated to the idea of progress, to wit: objectivity of judgment, analytical tautness, intellectual coherence, and, where history is to be relied upon to illuminate the meaning of ambiguous statutory or constitutional language, insistence on verifiable rather than imagined history.

"Why not stop there?" our innocent may ask in all respect, even in awe — so masterful is Professor Bickel's review of fifteen years of the Court's work on the standards just listed, standards everybody can accept as basic and relevant. If, by and large, the Court has met these standards, which together amount to a requirement of adjudicating, in the words of the judicial oath, "agreeably to the Constitution and laws of the United States," but still the net effect of the decisions is against progress (assuming for the moment we know what progress is), must we not rate the Court high and the Constitution or the laws of the United States low? If, on the other hand, the Court has by and large failed to meet these standards, must we not rate it low, even if we are sure its decisions are overwhelmingly on the side of progress?

Professor Bickel says no to both questions in many ways: in general, by writing this book with its conspicuous acceptance of the idea of progress as a test for judging the Justices; and in particular by measuring the Court's performance in specific cases more in terms of consequences to the nation than in terms of judicial validity of decision. Especially in his treatment of two of the most momentous lines of cases decided during the Warren Era, those on legislative apportionment and desegregation, does Professor Bickel lay bare the

whole structure of his critical machinery. Whatever else this exposure does, it shows our innocent to be most innocent indeed.

For Professor Bickel argues to his conclusions about the Court's handling of these cases with hardly a mention of issues less sophisticated critics might take to be the *only* ones by which to determine how well Chief Justice Warren and his brethren served their true Constitutional function — exercise of the judicial power conferred upon the Supreme Court by article III. For example, he announces, with no apparent lack of self-confidence, a comprehensive appraisal of the Court's one-man-one-vote decisions without considering the questions which most commentators, not to mention the lawyers involved in the cases and the Justices themselves, viewed as determinative: whether the contests presented were justiciable cases or controversies; and if so, whether a State would be denying equal protection of the laws if it failed to make over a system of representation not apportioned to the geographical spread of population, even though, at the time the fourteenth amendment was adopted, that system may have been in common, continual, and accepted use in the United States and England for centuries and may have been in use in the very State now before the Court.

Professor Bickel censures the Warren Court for what he calls its "one-man, one-vote simplicities" (page 174) on quite different grounds. He sees the Court's ultimate choice as one between "populist majoritarianism" and a "complex checked and balanced Madisonian adjustment among countervailing groups and factions" (page 110); and he finds the Court's basic error in its opting for the former as the governing principle of apportionment. If Professor Bickel believes this is an error because it is at odds with Constitutional or statutory requirements, he does not say so. His reasons, which he spells out more or less explicitly, are even more fundamental. One-man-one-vote, with its tendency to deprive minorities of representation, is in "conflict with democratic theory" (pages 34-35); enhances the tyranny of the majority (page 115); and blurs the individuality of smaller communities, thereby reducing the diversity of American life (page 116). It is unnecessary for present purposes to decide whether Professor Bickel is right or wrong as a political scientist. Conceding *arguendo* that he is right, our innocent may still ask why that should count against Chief Justice Warren and his brethren *as a court*.

Professor Bickel's analysis of the desegregation cases provides similar answers and leaves a similar question. The ultimate Constitutional issue of *Brown v. Board of Education*¹ — whether substantially equal separate facilities afford the kind of equality required by the equal protection clause — gets as little attention as the corresponding issues in the one-man-one-vote cases. But there is a difference. Here, the extraconstitutional and extrastatutory criteria by which he measures the Court's performance never bring Professor Bickel to speak ill of the Court's central holding itself as he does of the holdings on legislative apportionment. Apparently, the Justices do not fall short of filling the role Professor Bickel assigns to them, "the

1. 347 U.S. 483 (1954).

role of statesmen discharging a responsibility for the progress of society" (page 39), when they insist that a State may not affirmatively provide for segregation in public schools, but do fall short when they insist on one-man-one-vote.

If he tolerates or even commends the Court for striking down State-supported segregation, Professor Bickel nevertheless gives it a poor grade on its total effort in the public-school cases. Of that totality, the holding of *Brown*, which he early takes to calling the "minimum rule" of the case (*see, e.g.*, pages 126, 127, 150, 165) as if to reduce its significance, counts for much less in his evaluation than two other elements: a "body of law, flowing naturally out of [the decision] broadly conceived" (page 141), and a "nationalizing, egalitarian, assimilationist conception of the public schools' mission" (page 137). Again, it is unnecessary for present purposes to decide whether these are fairly imputable to the Court and if so whether they are sound on the merits and proper subjects for the Court to explicate. Professor Bickel again makes it plain that he condemns the Court not for engendering bad law, not for adopting a mistaken conception or improperly furthering a sound one, but for failure to "identify the course of progress" (page 174). "If my probe into a near-term future is not wildly off the mark," he concludes after as thoughtful a review of the aftermath of *Brown* as can be found anywhere, "the Warren Court's noblest enterprise — school desegregation — [is] heading toward obsolescence, and in large measure abandonment" (page 173).

If our innocent remains unconvinced by all this, the book presents a more general justification of relying heavily on what seem like extra-constitutional standards in appraising the Warren Court. Once the Supreme Court concluded, as it did long before the Warren Era, that the due process clauses apply to substantive as well as procedural matters, the Justices were compelled, in words of Felix Frankfurter which Professor Bickel quotes with approval, "to gather meaning not from reading the constitution but from reading life."²

Mentor and disciple — Professor Bickel was Mr. Justice Frankfurter's law clerk in 1952-53 — carry this idea further:

Better to recognize candidly that judicial judgment was statesmanship superimposed on the democratic political process, and its final test was the future. So Frankfurter taught. The judge, he wrote in 1954 — albeit extra-judicially, not in an opinion — had to be historian, philosopher, and prophet. Even though ill equipped to do so (the task requires "poetic sensibilities" and "the gift of imagination"), he must "pierce the curtain of the future . . . give shape and visage to mysteries still in the womb of time" (page 38).

And on his own, Professor Bickel adds that the judge must also maintain an attitude of "pragmatic skepticism" and remain constantly aware of "the realities on which [the Court is] imposing its law" (page 174).

2. "Supreme Court, United States," 14 *Encyclopedia of Social Science* 474, 480 (1934).

If the Constitution itself, mainly through the due process clauses, calls upon the Justices to possess attributes such as these and to exercise the vast latitude of choice they imply, an objective test of judicial excellence based on compliance with the Constitutional text must be illusory. This is not to say that the Justices are not often stopped in their tracks by plain words of the Constitution, stopped before they can take off as statesmen, historians, philosophers, prophets, poets, soothsayers, skeptics, or realists. But for many cases — and Professor Bickel apparently puts the most important decisions of the Warren Court in this category — the Constitution itself is either an inadequate guide or not a guide at all.

The task of deciding such cases calls for supraconstitutional judgment and suprajudicial talents of the kind Mr. Justice Frankfurter and Professor Bickel describe. One cannot take a measure of the Court's real merit, then, without determining how much and how well it has brought these qualities to bear. Perhaps Professor Bickel would not consider himself misunderstood if his readers were to conclude that this is what he had in mind in taking the idea of progress as the pivot of his critique of the Warren Court.

Our inquiring innocent may still be troubled. "Supraconstitutional and suprajudicial indeed —" he is likely to say — "superhuman is more like it. If you are right, Professor, our Constitution is much less than I have always thought it was, especially the due process clauses and the Bill of Rights. I have always believed that they protected me against certain actions of my governments, federal, state, and local, whether those actions advanced somebody's idea of progress or not.

"I have always recognized that the boundaries of unpermitted governmental action were sometimes unclear, and had to be defined by the Supreme Court, often with very little textual guidance. But it never occurred to me that the Constitution itself requires the judges to go so far beyond the text to do their job well.

"If the substantive content of the due process clauses is mainly responsible, I am against them. I can see now why it was nearly always in connection with a due process case that Felix Frankfurter came out for judicial self-restraint and, like you, I applaud him for it. But I do not applaud him, as you seem to (page 34), for 'refin[ing] and invent[ing] techniques' for avoiding decision on what the substantive content of the due process clauses is. That, it seems to me, is more than judicial self-restraint and less than magnanimous acceptance of a Justice's duty to decide the issues properly presented to him.

"By the way, why haven't you explained why words which have such a procedural ring as 'due process of law' can legitimately be read as the Supreme Court (and you, too, apparently) read them?"

Professor Bickel no doubt has answers to these questions, but this book does not give them.

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