

REVIEW ARTICLE

THE AMBIGUITY OF JUDICIAL REVIEW: A RESPONSE TO PROFESSOR BICKEL

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In the past two decades, we have witnessed the flight of system from law, the decline of precedent, and the use of litigation for broad social, rather than traditional private, purposes. For some, the new social cutting edge of judicial process is a matter of regret. For others, the same phenomenon is hailed as a means to stabilize the political order and to energize the moral order.

How did the American judiciary come to be a front line of social revolution? Partially the answer lies in the desperate quality of contemporary protest, in its sense of the futility of expecting much from other branches of government. But partially the answer lies in the very ambiguity of the judicial process itself. Imprecise lines demarcate the jurisdiction of courts. There is an abundance of alternative doctrine in American case law which makes generalized prediction hazardous. The variable reactions of acceptance and defiance which characterize public response to judicial decisions have become tools to equip the courts for a heightened political role.

The ambiguity which characterizes the judicial process generally is shown in sharper focus in the Supreme Court's role of passing on the constitutional validity of governmental action and legislation—the act of judicial review. Today when the Court postpones judicial review or when it exercises it, the Court affects the entire political system. Despite this effect, it is nearly impossible to generalize about constitutional law at the present time in the manner of nineteenth century constitutional law writers such as Story, Willoughby, or Cooley. But the decline of the general theorem in constitutional law has paradoxically proven to be a source for the Court's power to act individually, extra-bureaucratically, and creatively.

Increasingly, the use of law in courts to achieve social reform

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and even social revolution in the United States has undermined the traditional associations the courts have had with the ideals of neutrality, objectivity, and detachment. In his Holmes lecture at Harvard in 1959, Professor Herbert Wechsler said that the Supreme Court should not use political methods but instead neutral principles of constitutional law. It is true, he said, that the approach to politics by most of us is essentially instrumental. But however tolerant we might be of such an approach to politics we expect something else from courts.¹

How can neutral constitutional principles be developed? Not many would suggest that these principles be gathered from an effort to historically ascertain what the Framers intended by a given phrase in the Constitution. History is as much art as science. Similarly, history is mischievous. Moreover, even if capturing the historical understanding were less elusive a task than it is, obviously we could not be bound by even the most accurate reading of history. The meaning of constitutional language, in a vital and restless constitutionalism such as ours, cannot be deciphered forever by an eighteenth century glossary. Similarly, case law or precedent cannot be a very adequate or productive guide to the development of principles by which to decide new issues presented to courts. Many of the problems presented today either have never been judicially resolved or, if they have arisen in the past, were considered not to be judicially determinable.

Order and system, form and structure have either fled or been banished from the university, the Church, and ordinary life. Resort to the individuated approach, to the single context, parallels a development in law similar to that found in existentialism and in the New Theology. The phenomenon which is known as Naderism, and which speaks so vividly to the idealism of the young, obtains its principles from the urgencies of the moment. Certainly, the social necessities of the inner city exert more urgency, more vibrant reality, than can possibly be commanded by appeals to adherence to the traditional conceptions of the judicial process.

The Supreme Court has been the most visible example of the use of judicial process as an energizing source of social change. But the Supreme Court's example has been mirrored by lesser courts

1. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 14-15 (1959).

throughout the country. When Kruschchev told the Soviet people that Stalin was not a hero, iconoclasm did not stop in Russia with that exposure. Similarly, the iconoclasm practiced by the Supreme Court has been imitated by other tribunals.

Professor Alexander Bickel of Yale, in a more recent Holmes lecture at Harvard in 1969, has suggested that the dominant motif of constitutional interpretation during the life of the Warren Court was the Idea of Progress. In his lecture, Bickel chronicles the disappointing (to him) consequences of the Warren Court's endeavor to achieve social progress through the process of constitutional interpretation.²

When courts approach politics, should they use principles which have a life apart from the political problem which is being litigated?³ If principles are selected to meet the exigencies of a moment we should not be startled to have that principle come back to haunt us. A principle of law should not be created for a specific case but the specific case should be susceptible to a general principle. Certainly, this is classic and beguiling doctrine. It has the impartial sound of justice. But can the problems we really care about be solved without reference to the problems? Is it possible, or desirable, to create principles apart from specific problems? John Dewey condemned for an earlier generation of philosophers the mischief done by the assumption of classical philosophy that the world of thought occupied a separate and higher plane than the world of practical concern.⁴

We see, and we continue to see, both the de-intellectualization of law and a decline in the ideals of impartiality and generality. Judicial integrity in Anglo-American law, in the past, could be defined as the measure of the impartial distance between the problem at hand and the principle applied to resolve it. If even-handed principle is the measure of decision rather than the result to be obtained, reason rather than will shall have prevailed. But judicial integrity is a fragile

2. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970).

3. Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960), made a penetrating legal realist critique of the difficulties in a completely principled approach to judicial problem-solving:

The point emphasized here is that there are no facts apart from a theory, and that accordingly, a person's view of the facts is unavoidably colored by the nature of that theory. Neutrality, thus, is unattainable in the constitutional adjudicative process, both on the level of [legal] principle and on the level of the facts of the dispute before the Court. *Id.* at 681-82.

4. JOHN DEWEY'S PHILOSOPHY, *The Quest for Certainty*, 301 (Ratner ed. 1939).

and subtle thing. Suspicion always endures that it was some submerged preference which in the last analysis really selected the even-handed principle. Chief Justice Taft did not think he was using an even-handed principle when he found the child labor tax beyond the taxing power of Congress.⁵ If a statute was a real taxing measure Taft said he would uphold it; if it was not a real tax he would strike it down. Our contemporary suspicion is that what Taft cared about was not the creation of a calculus to isolate true taxes from false taxes but to restrain social legislation of which he disapproved.

Constitutional philosophies have more than superficial resemblance to theological speculation. In the United States, natural law problems are subsumed within the text of the fundamental law itself. They surface in judicial opinions which flesh out constitutional phrases such as due process, liberty, and equal protection.

What usually unites Supreme Court critics is an intrepidly rationalistic approach. They demand a certain standard of judicial performance, a certain deference to the formalisms of constitutional litigation. In that sense they are aestheticians in their criticism. As one of their number, Professor Kurland, puts it, they are Jobbists.⁶ They see carved out for the Court a little job, not a large one, but a manageable one, a task capable of standards.

Bickel and Wechsler want to depoliticize the Court. They seek to tame it; they wish its subject-matter to be defined rather than open-ended. Professor Wechsler demands that the Court's doctrines be principled in the sense that they have a logical coherence, a coherence that makes the Court's operations capable of withstanding the rigors of logical analysis. Alexander Bickel's tool for depoliticizing the Court has a quite different emphasis—an emphasis on abstinence.

Wechsler argues for a methodology which transcends politics. Bickel's approach is easier to implement and therefore, not surprisingly, more revolutionary. He doubts that politics can be expelled from constitutional litigation which is conceived in politics. Not content to banish a political approach to constitutional cases, he wants to banish political cases. Bickel doubts the possibility of a

5. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

6. Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143, 144-45 (1964).

“pure” theory of judicial review. Therefore he urges the cultivation of what he calls the passive virtues.⁷

Wechsler’s approach like most ideal theories is somewhat too ethereal for the real world of American judicial review. But Bickel’s critique cuts far deeper. If political cases are to be avoided, the Supreme Court, as the political institution it has become, is challenged root and branch. That challenge requires us to look at what politically the Court does before we can assess the wisdom of such pessimism.

Like the New Critics in literature, Bickel and Wechsler predicate their criticism in the text and structure of judicial literature itself. The difficulty with this approach is that it enormously decreases the role of the Supreme Court in American life. Bickel is really making a radical request: if the great political cases are incapable of principled resolution, then the Court ought to decline decision of such cases. But it is the great political cases which have made the Supreme Court, historically and now, a branch of government.

What is the meaning of this desire for depoliticization? On one level, it is an anguished plea for the self-restraint which, it is argued, ought to animate a formally undemocratic institution. On another level, it reflects a sense of outrage that one’s discipline is in the hands of the unworthy. But this aesthetic and intellectual *cri de coeur* is, from a historical point of view, somewhat surprising. The Supreme Court has always played a double-faceted role: a role both political and legal. In cases displaying social tension and ambiguity, it is inevitably a political body. It is this political fact which some critics and some politicians are determined to expel.

Like the eighteenth century rationalists, the Supreme Court critics posit some Golden Age where a truly objective constitutionalism flourished. In this imaginary Golden era, which is presumably the American past, judicial decisions were reached with a detachment and disinterestedness entirely apart from politics and the intimidating considerations of the moment.

Judicial review was conceived in 1803 while Marshall was rendering a political slap at the new Jefferson Administration.⁸ It was a prologue which set the mold. Even those of the Court’s famous cases which manage to present a “principled” aspect are

7. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 113-18 (1962).

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

easily shown to be political at base. In the *Dred Scott* case in 1857, Chief Justice Roger Taney said for the Supreme Court that the constitution would not allow slavery to be kept out of the newly settling West.⁹ The decision is an excellent illustration of the limitations of "principled" decision-making and of "passive virtues" as well.

Taney's view that slaves were property and therefore assured to their owners by the fifth amendment had textual support beyond the fifth amendment. Taney pointed out that specific provisions of the Constitution demonstrated that the words of that document were not intended to embrace the slaves. The Constitution signed by the Framers contained a clause reserving to the original thirteen states the power to import slaves until 1808. In another clause, the states pledged themselves to maintain the right of property of the master by delivering up to him any slave who may have escaped from slavery if he is found within their respective territories.¹⁰ Superficially, the *Dred Scott* case is a good sample of the art of principled decision-making. Professor Edward Corwin wrote of the case: "[I]n asserting for slave property a position within the Constitution equal to that of any other kind of property, the Chief Justice was entirely within the right, his Free Soil and Republican critics to the contrary notwithstanding."¹¹

But, politically, the *Dred Scott* case had the "earmarks of a southern tour de force." The situation was so vividly political that, as Corwin reminds us, Mr. Justice Grier, a Pennsylvanian, was prevailed upon by President-elect Buchanan to join the "majority of his bretheren."¹² The plea was designed to underplay southern affiliations of the justices who comprised the majority. What then was the source of decision in *Dred Scott*? Political expediency or constitutional principle?

Bickel's response to the *Dred Scott* case is entirely consistent with the emphasis he places on abstaining from the political. He quotes Professor Maurice Finkelstein who said of *Dred Scott*: "'A question which involved a Civil War can hardly be proper material for the wrangling of lawyers.'"¹³ Apparently, Bickel would deal with

9. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

10. *Id.* at 411.

11. E. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW* 145-46 (1914).

12. *Id.* at 132.

13. A. BICKEL, *supra* note 7, at 184-85.

Dred Scott not by a vain effort to apply "neutral principles" but by wresting the case away from the "wrangling of lawyers" entirely. This distaste for lawyers' wrangling is rather pointlessly squeamish. *Dred Scott* was a significant factor in legitimizing the expansion of slavery. The case furnished a new source of legitimacy to the advocates of slavery and new proof of the insolubility of the problem as far as secessionist sentiment was concerned. For Bickel an issue so tensely political as the constitutionality of the Missouri Compromise reflects the inherent "strangeness of the issue and its intractability to principled resolution."¹⁴

Bickel asserts as a reason for adherence to the political question doctrine "the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be."¹⁵

Dred Scott, it is true, was a tragic decision and a portent of more tragic things to come. Perhaps *Dred Scott* illustrates that the Court has occasionally chosen the wrong politics. Can that kind of error be avoided merely by asking the Court to shun political choices? Suppose the Court had said that the Constitution did not prohibit slaves from becoming citizens. Perhaps then the "wrangling of lawyers" would have saved a war. If the Supreme Court in *Dred Scott* expedited the coming conflict, a different choice might have defused it.

The criticism that there are some questions too political for the wrangling of lawyers makes an interesting contrast when counterpoised against remarks of the late Mr. Justice Jackson. In his book about judicial review which he wrote while he was Solicitor-General, Jackson pointed out that "struggles over power that in Europe call out regiments of troops, in America call out battalions of lawyers."¹⁶ Jackson wrote of Chief Justice Taney that "he, more than any other" had played "the tragic part" in causing the conflict. Jackson believed that the *Dred Scott* case was a factor in "precipitating the Civil War."¹⁷

In 1803, in *Marbury v. Madison* Chief Justice Marshall asserted for the Supreme Court the power to exercise judicial review; a section of the Federal Judiciary Act of 1789 was declared unconstitutional. Until *Dred Scott* in 1857, no other federal statute

14. *Id.* at 184.

15. *Id.*

16. R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* xi (1941).

17. *Id.* at 327.

was annulled by the Supreme Court. Jackson said of this experience: "The first step was as shrewd and successful as the second was reckless and disastrous."¹⁸

What in the balance of history does the Court's experience with judicial review actually teach? The Court's political achievement should be weighed with that historical detachment which should be used to assess all social and political institutions. The Court's failures, contemporary and past, should not be used to disparage present and prevent future successes.

Are judicial process and political strategy incongruous? Lon Fuller has written that one of the criteria which operate to place the moral force of a judgment at its maximum is where "the judge confines his decision to the controversy before him and attempts no regulations of the parties' relations going beyond that controversy."¹⁹ This also is the objective of those who seek a principled approach to law.

The price of a possible judicial success is bought at an exchange of briefs and arguments. As against the matching of guns and blood, it is a slight expense. If in addition to that expense some damage is done to the harmony of an aesthetically satisfying constitutional methodology, that again is not an intolerable burden. But critics of the political uses of judicial review are not willing to tolerate the burden. Why? They believe that having yielded the integrity of their craft the political solution may fail as well. Judges in our system do not determine whether slavery can be expanded to the western territories but whether the slave, Dred Scott, shall be returned to his master.

But is there not an approach that lies between choosing a politics indifferent to principle or divorced from life? The Supreme Court is only occasionally a political forum. The Court, like the other branches of government, may occasionally be the means of successful politics. Sometimes it will happen that the Court will have to do what the frankly political branches are unable to do.

The exploitation of a judicial process which cleaves to principle but which has an eye on life is the distinctive contribution of America to politics. The Supreme Court of the United States is not just another high court of a federalist state such as the Supreme

18. *Id.* at 24.

19. L. FULLER, *THE PROBLEMS OF JURISPRUDENCE* 706 (temp. Ed. 1949).

Court of Canada. The Supreme Court of Canada is in the main concerned with matters of private law, questions of tort, contract, and estates. Relatively little of its total caseload has reference to the basic instrument of Canadian federalism. Most important, the Supreme Court of Canada certainly does not regard itself as a co-equal branch of the federal government of Canada.

But the Supreme Court of the United States has had a political role from the beginning. The Court's political weapon is "the law," and particularly the Constitution, just as the weapon of the Congress is the purse, and that of the Executive, its monistic unity. But acknowledgment of the Court's political task is resisted. A stubborn insistence on certainty, the quest for which has been largely abandoned in other disciplines, survives in constitutional law. The Nixon administration has introduced as its nominees for the Supreme Court men the President describes as "strict constructionists." Burger, Haynesworth, Carswell, and Blackmun have each been defended by the Administration on the ground that they would read the Constitution as it was. It is a strange survival, this quest for certainty in constitutional interpretation. President Nixon stated that the Supreme Court justices he most admires were Holmes, Brandeis, and Cardozo. But these justices would have been the last to have insisted on unchanging rules of constitutional construction.

Holmes, for example, viewed the judicial process itself with a biting realism. In 1896, while still a justice on the Supreme Judicial Court of Massachusetts, he expressed his skepticism: "The true grounds of decision are considerations of . . . social advantage and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes."²⁰

The grievance that Holmes had against the Court of his day was that it had set itself up against popular will and against the future. He thought it inevitable that the Court should reflect contemporary social realities. What he could not fathom was the pretension that it could be otherwise. Holmes is revered by those who have watched with some anxiety the Supreme Court's ascent to a position as a major force for social change. Holmes has been admired by such different men as Mr. Justice Frankfurter and President Nixon. The reason for this appeal is a judicial mind which is not in the service

20. *Vegelahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077 (1896).

of any ideology but which nevertheless grasps the essence of each passing ideal with trenchancy and detachment. For Holmes it was inevitable that the Court would reflect the dominant politics of the moment.

Usually what is being praised in Holmes is the possession of temperament for judging. When as a Supreme Court Justice he was called to review the case of the Communist, Benjamin Gitlow, he wrote to this friend Harold Laski of the "drool about proletarian dictatorship,"²¹ but he also wrote in the *United States Reports* that there was nothing in the Constitution to prevent the dictatorship of the proletariat if that is what the people wanted.²² For Holmes, neutrality was not a judicial ideal, nor an ideological imperative, it merely was the consequence of a profound skepticism. That the Court should or could transcend the rising ideologies of an epoch was something Holmes as a judge neither expected nor required.

Dred Scott is not the only illustration of the abiding tension between law and politics which has been displayed across the docket of the Supreme Court. There are other examples as well of the advantages a political approach will always have over an aesthetic one. In 1941, the Supreme Court at last decided what previously the Court had denied: federal wage and hour legislation could constitutionally be applied to the manufacture of goods in interstate commerce.²³ Alpheus Mason writes that Archibald Lovett, one of the lawyers in the case, had waggishly remarked that if the Court had decided the matter one hundred years earlier it might have avoided the Civil War.²⁴ What he meant was that if it had been constitutional for Congress to prohibit the traffic in slave-made goods in interstate commerce, then slavery as an institution might have died a more natural death. It is an intriguing thought. It suggests once again that the political capacities of Supreme Court decisions should neither be scorned nor denied.²⁵

Henry Steele Commager was one of the students of American history who have given particular attention to the work of the

21. HOLMES-LASKI LETTERS, 1916-1935, at 752 (M. Howe ed.).

22. *Gitlow v. New York*, 268 U.S. 652, 673 (Holmes & Brandeis, J.J., dissenting) (1925).

23. *United States v. Darby*, 312 U.S. 100 (1941).

24. A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 554 (1956).

25. For a survey of the range of views and debate concerning contemporary judicial review, giving particular attention to political science criticism, see Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968).

Supreme Court. His complaint is not that the Court is in politics and should not be. His attack is broader. From the point of view of what Ralph Gabriel called America's democratic faith, the Court has too often been on the wrong side. Commager hits judicial review where it lives. He argues that judicial review has simply not justified itself in the protection of minority rights from majority action.²⁶

As the advocate of the people's liberties, how distinguished a record does the Court have? Commager argued that the idea of the Court as the tribune of the people is not historically justified. The cases he relies on are cases where an illiberal legislature infringed on civil liberties and was either upheld or only mildly chastised by the Court. But the historical achievement of the Warren Court, however, was not secured by assaults rendered by a radical judiciary on a tory legislature but by its capacity to create and develop doctrine and policy which the legislature was either unable or unwilling to affirm or deny. By refusing in 1948 to allow the courts to enforce a restrictive covenant against a willing white seller and a willing Negro buyer, the Supreme Court established a national policy that the state could not submit its institutions to racist uses.²⁷

Commager thought that individual liberties were too precious to be dependent on the ability of litigants to surmount the technical rules of constitutional law.²⁸ Yet in recent years the Supreme Court has become remarkably adept at dealing with the ingenuity of state legislators. The Court has managed to bring private action—theoretically outside the fourteenth amendment—within its mandates.²⁹ In 1959, five years after the school desegregation case, the public schools in Prince Edward County, Virginia were closed. In 1960-61, the Virginia legislature established a program of tuition grants to be used by children attending private schools. At the same time, the Prince Edward County Board of Supervisors provided for property tax credits for contributions to any nonprofit, nonsectarian private schools in the county. The public schools elsewhere in Virginia were open.

The school officials in Prince Edward County read the School Desegregation Case closely: The enforcement of segregation in the public schools through law was forbidden. Suppose there were no

26. See generally H. COMMAGER, *MAJORITY RULE AND MINORITY RIGHTS* (1950).

27. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

28. H. COMMAGER, *supra* note 26, at 72.

29. *Cf. United States v. Guest*, 383 U.S. 745 (1966).

public schools at all? Would the School Desegregation Case then have no subject upon which its hated command could work? The Supreme Court pierced the subterfuge and held that when a state permitted a county to abandon public schools and to operate private schools with state and county assistance for the sole reason of ensuring that white and colored school children in Prince Edward County would not attend the same school, such state behavior amounts to state action prohibited under the fourteenth amendment.³⁰

Professor Commager believed that judicial invalidation of state legislation should not be undertaken by the Court because it is largely a technical exercise which the states can just as well technically circumvent. In the fall of 1969, the Supreme Court declared in a stern decree that enforcement of the School Desegregation Case of 1954 could no longer be denied.³¹ Throughout the South today, variations on the Prince Edward County theme are to be found. This despite the existence of the Prince Edward County case. Isn't Professor Commager's point therefore particularly cutting? Heavy reliance on judicial process is not wrong as a philosophic or legal or an institutional matter but simply—and there is no criticism more fundamental—because it doesn't work.

For Commager, American government is the record of a tradition of faith in majority rule. Over-frequent recourse to the courts to heal tormenting social problems is in defiance of that tradition. Commager concedes that the history of Negro rights has been the great reproach to the utility of reliance on the tradition of majority rule. But nevertheless he says the solution does not lie in the courts. The racial problem is in his view a matter for "the processes of education." But to say that "the procedures of education have not gone far enough" implies that judicial decisions and popular education are mutually exclusive.³² The lesson of the School Desegregation Case is that the law is a teacher. The southern reaction to the Supreme Court School Decree of 1969 is far quieter, less aggressive, and more reserved than it was to *Brown I* in 1954. The judicial ban on legal segregation has been itself a major determinant in affecting social attitudes as the enactment of the most

30. *Griffin v. School Bd.*, 377 U.S. 218 (1964).

31. *Alexander v. Board of Educ.*, 396 U.S. 19.

32. H. COMMAGER, *supra* note 26, at 61.

significant body of federal civil rights legislation since Reconstruction illustrates.

The schools of a Virginia county went "private" and thereby hoped to escape constitutional duty under the fourteenth amendment. But a revolution in judicial response to problems of constitutional law has weakened the feasibility of such avoidance. This indifference to the formal structure of a discipline is an illustration of a general pattern of skepticism about received traditions in our contemporary culture. The creative force of American constitutional law is not toward recreating some vanished legal world of form, order, coherence and neutrality. Rather it is motivated by an instinctive feel for resolving the concrete problem. American constitutional law has gone existentialist. There is a new candor about the human essence of constitutional interpretation and a new awareness and avowal of the delusive character of quests for transcendence or objectivity.

But this new candor may make it easier for the Supreme Court to switch back to judicial conservatism. The radical thrust of the present Supreme Court seems to be losing its intensity. Warren Burger has replaced Earl Warren. Abe Fortas has resigned and been replaced by Harry Blackmun. Some of the other sitting Justices are elderly and will soon be replaced. The Warren Court of the sixties may prove to be only a radical interlude. Similarly, Congress may yet erase some of the work of the Warren Court in racial matters and criminal procedure as an earlier Court erased the civil rights legislation of the Reconstruction Congress.

Whether this relapse occurs or not the history of the American Supreme Court demonstrates that judicial review is ideologically hospitable to the reality not only of reform but of reaction. The unnerving theme in the record of American judicial review is its ambiguity. From Alexander Hamilton to William Howard Taft, the idea that the judiciary should be the brake on the future is something that has been embedded in American conservative thought. But in recent years the judiciary has acted as a spur to the future.

Professor Bickel argues that "the Court is the place for principled judgment" or else "its insulation from the political process is inexplicable."³³ It is my suggestion that the political process and the judiciary are not like Hindu castes forever barred

33. A. BICKEL, *supra* note 2, at 87 (1970).

from contact with each other in our system. Nor are they assigned to caste functions which prohibit the assumption of new tasks or the abandonment of old procedures. Rather the judiciary is designed to have occasional political uses. The divorcement that Professor Bickel seeks would remove a forum for social change too useful and too important to justify limitation of the work of the Supreme Court to matters always susceptible to and always governed by principled judgment "disciplined by the method of reasoning familiar to the discourse of moral philosophy."³⁴ Such an approach assigns to the Supreme Court a task at once too grand and too trivial. Constitutional law of all things should not be fitted into an atavistic, platonic dichotomy between the real and the ideal.

Ambiguity should not be thought of as an indication of a new failure of integrity in the practice of constitutional law. A concern for integrity, both for the survival of the basic political structure, and for the explication of basic constitutional themes, free expression and racial equality, are stamped in much of the contemporary work of the American judiciary, particularly the Supreme Court and the lower federal courts. In the borderland, between law and politics, new uses for the corrective capacities of courts continually arise. But there are uses for uncertainty. As the public becomes more acquainted with the uses of judicial process for radical social change, public awareness increases that the paths a court can travel in decision are not set by a very clear compass. A new candor arising from the tension in the political and social order has destroyed the old apparatus of legal and constitutional certainty. But integrity is apparent amid the rubble.

The enormous resiliency, the constant possibilities for modest advance and subtle retreat, makes the Court one of the most sensitive sources for social change in the United States.

34. *Id.*