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Alexander Bickel's Philosophy of Prudence

Anthony T. Kronman†

INTRODUCTION

Six years after Alexander Bickel's death, John Hart Ely described his former teacher and colleague as "probably the most creative constitutional theorist of the past twenty years."¹ Many today would concur in Ely's judgment.² Indeed, among his academic peers, Bickel is widely regarded with a measure of respect that borders on reverence. There is, however, something puzzling about Bickel's reputation, for despite the high regard in which his work is held, Bickel has few contemporary followers.³ There is, today, no Bickelian school of constitutional theory, no group of scholars working to elaborate Bickel's main ideas or even to defend them, no continuing and connected body of legal writing in the intellectual tradition to which Bickel claimed allegiance. In fact, just the opposite is true. In the decade since his death, constitutional theory has turned away from the ideas that Bickel championed, moving in directions he would, I believe,

† Professor of Law, Yale Law School.

1. J. ELY, *DEMOCRACY AND DISTRUST* 71 (1980).

2. See B. SCHMIDT, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910-21* (pt. 2) 722 (1984) (describing Bickel as "the most brilliant and influential constitutional scholar of the generation that came of age during the era of the Warren Court"); Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013, 1014 (Bickel "revered as spokesman-in-chief for a school of thought that emphasizes the importance of judicial restraint").

3. One notable exception is Judge Robert Bork. See, e.g., R. BORK, *TRADITION AND MORALITY IN CONSTITUTIONAL LAW* (1984) (judges should pay particular attention to tradition). It is perhaps symptomatic of Bickel's lack of continuing influence that his masterpiece, *THE LEAST DANGEROUS BRANCH* (1962) [hereinafter cited as *LEAST DANGEROUS BRANCH*], is currently available only in an expensive collectors' edition.

have criticized vigorously. Given the reverence for Bickel himself (attributable in part, perhaps, to his early death and the sense of unfulfillment one inevitably feels surveying his brief but remarkable career) and the universal regard for his intellectual and literary skills, it is surprising that his influence has remained so limited—so limited, in fact, that today, a little more than ten years after his death, we are in danger of forgetting what it was that he believed and taught.

Bickel's ideas on law and politics have lacked influence in part because they have not generally been seen to constitute a coherent political philosophy.⁴ Bickel had views on many subjects, views associated with well-known phrases like "the counter-majoritarian difficulty," "the passive virtues," and "the morality of consent." It is unclear, however, whether these different views are connected by a common theme or what that theme might be. Indeed, after reading Bickel's popular and scholarly works, one may be inclined to think that he did not have any political philosophy at all, but only a collection of opinions loosely linked by rhetoric and sentiment. Moreover, it is widely believed that toward the end of his life, Bickel's views changed significantly, moving in a more conservative direction. This, too, suggests that his work, taken as a whole, lacks the consistency implied by the claim that he had a political philosophy. If he did not, it is less surprising that Bickel should have many admirers but few followers, for only those with a guiding vision of the world can provide direction as well as win acclaim.

In this Article, I shall attempt to show that Bickel did in fact have a political philosophy that remained unchanged throughout his career, a consistent outlook that connects all of his most important ideas on the role of the Supreme Court, the nature of democratic government, and the tendencies of modern political thought. In claiming that Bickel did have a unified political philosophy, I mean to deny, in particular, that his later views were in any significant way discontinuous with his earlier ones. Bickel's critics and supporters alike have maintained that his final essays, and especially his late essay on Edmund Burke,⁵ marked a shift in

4. For an interesting recent attempt to show that Bickel's views did in fact have an underlying unity, see Moeller, *Alexander M. Bickel: Toward a Theory of Politics*, 47 J. POL. 113 (1985). Moeller's argument, in many ways complementary to my own, stresses the importance for Bickel of what Moeller calls "a theory of politics." *Id.* at 114. According to Moeller, Bickel's political theory is a blend of Burkean conservatism and Madisonian liberalism. Moeller sees an inherent tension between these two components of Bickel's thought, and concludes that it is "hard to know" whether "we should praise him for his integrity in attempting to give us a unified theory that reconciles the open society and the good society, or . . . chastise him for a failure of nerve that leaves us hopelessly confused and vague." *Id.* at 137. The more traditional view that Bickel's thought shifted in a conservative direction toward the end of his career is exemplified by Purcell, *Alexander M. Bickel and the Post-Realist Constitution*, 11 HARV. C.R.-C.L. L. REV. 521, 554 (1976) (in late 1960's "Bickel's primary goal shifted from achieving moral reform to ensuring social tranquility").

5. A. BICKEL, *Constitutionalism and the Political Process*, in THE MORALITY OF CONSENT 3,

Bickel's thinking. I shall argue that Bickel's "Burkean ending"⁶ was entirely consistent with the basic intellectual outlook that dominated his work from its beginning and gave it its distinctive shape.

The most important element in Bickel's political philosophy, and the key to understanding his work as a whole, is his belief in the value of prudence as a political and judicial virtue. By prudence I mean a trait or characteristic that is at once an intellectual capacity and a temperamental disposition. A prudent judgment or political program is, above all, one that takes into account the complexity of its human and institutional setting, and a prudent person, in this sense, is one who sees complexities, who has an eye for what Bickel called the "unruliness of the human condition,"⁷ but is nevertheless able to devise successful strategies for the advancement (however gradual or slow) of his own favored principles and ideals. A prudent person is also one with a distinctive character—a person who feels a certain "wonder"⁸ in the presence of complex, historically evolved institutions and a modesty in undertaking their reform; who has a high tolerance for accommodation and delay and is able to accept the final incommensurability between any system of ideas and the world as it is given to us with all its raggedness and inconsistency; who values consent but is not demoralized by the process of irrational compromise that is often needed to achieve it. In the prudent person these qualities of intellect and character are joined. It was Bickel's view that prudence is an indispensable condition for success in the activities of both the politician and judge; indeed, Bickel believed prudence to be the defining excellence of their respective crafts. By the same token, he considered the impatient, uncompromising, and overly philosophical insistence on principles for their own sake, which he regarded as the antithesis of prudence, to be a disabling vice in both statecraft and adjudication.

One should not infer from this that Bickel believed either law or politics to be unprincipled. On the contrary, it was Bickel's emphatic view that "we cannot live, much less govern, without some 'uniform rule and scheme of life,' without principles, however provisionally and skeptically held."⁹ Only insofar as our institutional arrangements are broadly referable to principles of enduring value can we view them as accomplishments of moral worth, as something more than the product of a momentary and expedient compromise between conflicting interests. "A valueless politics and valueless institutions are shameful and shameless and, what is more,

11-25 (1975) [hereinafter cited as *MORALITY OF CONSENT*].

6. J. ELY, *supra* note 1, at 71.

7. *MORALITY OF CONSENT*, *supra* note 5, at 11.

8. A. BICKEL, *REFORM AND CONTINUITY* 2 (1971) [hereinafter cited as *REFORM AND CONTINUITY*].

9. *MORALITY OF CONSENT*, *supra* note 5, at 25.

man's nature is such that he finds them, and life with and under them, insupportable."¹⁰ But although Bickel believed that no good society can be unprincipled, he believed with equal conviction that "no viable society can be principle-ridden."¹¹ Abstract theories and moral imperatives, he maintained, have a "tyrannical tendency"¹² and while it is "suicidal" to think that we can have a meaningful politics without them, it is equally self-destructive to insist on an uncompromising fidelity to ideals which dismisses, out of principle, any consideration of the practical realities that may stand in the way of their realization.

What we require, if we are to remain both a good society and a viable one, are "the arts of compromise," the "ways of muddling through"¹³ that permit us to reach an accommodation between our principles and the complex, murky, and often resistant reality on which these principles operate. This is the business of politics, and politics requires in its practitioners not "theory and ideology"¹⁴ but prudence, what Bickel calls "good practical wisdom"¹⁵—the ability to "resist the seductive temptations of moral imperatives,"¹⁶ to live with the disharmony between aspiration and historical circumstance, and to search with "balance and judgment"¹⁷ for those opportunities that permit the marginal and evolutionary reconciliation of our principles and practices.

In purely intellectual endeavors, an unwillingness to tolerate inconsistencies and a demand for principles of the greatest possible precision may be virtues, but in law and politics, Bickel claimed, they are vices that are likely to lead, if they lead anywhere at all, to "a dictatorship of the self-righteous."¹⁸ To be sure, a successful politician must understand the principles that guide him¹⁹—he must know what these principles are and how to defend them—or else his actions will be directionless and blind. At the same time, however, he must also know how far these principles can be realized under prevailing conditions and how best to prepare the way for their eventual acceptance by society at large (a necessary condition for the effective establishment of any principle, regardless of its content).²⁰

10. *Id.* at 24.

11. LEAST DANGEROUS BRANCH, *supra* note 3, at 64.

12. MORALITY OF CONSENT, *supra* note 5, at 12.

13. LEAST DANGEROUS BRANCH, *supra* note 3, at 64.

14. MORALITY OF CONSENT, *supra* note 5, at 19.

15. *Id.* at 23.

16. *Id.* at 142.

17. *Id.* at 137.

18. *Id.* at 142.

19. Terms such as "him" and "he" should be understood, throughout this Article, as abbreviations for "him or her," "he or she," and so forth.

20. In this sense, a politician requires not only a knowledge of principles but also the capacity for applying these principles *in concreto* by means of something analogous to what Kant called "the

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Although this latter sort of knowledge—which a politician must have but a moral philosopher need not—is concerned with principles, it is not itself principled in the way we expect the arguments of moral philosophers to be. The wisdom of the politician is pragmatic and contextual, attentive to the particularities of time and place, attached to established institutions and procedures and accepting of the need for compromise; from a more theoretical perspective these may seem like indefensible restrictions, but without them politics could not do the work of accommodation that is its special office.

I began by noting the puzzling disproportion between Bickel's influence and his reputation, and suggested that this might in part be explained by the difficulty of identifying a unifying theme in Bickel's work. Since Bickel himself never attempted to draw his own ideas on law and politics together in a comprehensive way, it is understandable that there should be some doubt as to whether he had any coherent political philosophy at all. It is my belief, however, that Bickel's lack of influence is primarily attributable not to interpretive doubts of this sort (however reasonable they may be), but to the specific content of the political philosophy that does in fact connect his views on various subjects.

Prudence is today an unfashionable virtue; to many, its invocation will seem a mask for reactionary interests and the illiberal privileges of the status quo. More important, given the rationalist ethos of our times, prudence is likely to appear a hopelessly old-fashioned and indeed obscurantist virtue. We are used to thinking of our society (including our legal system) as a great blank tablet on which to inscribe whatever principles of justice and programs of reform we wish. We are confident in our power to discover the norms that ought to govern us through an abstract philosophical reflection untainted by experience or historical fact, and equally confident in our ability to implement whatever norms we choose through the systematic and self-conscious reconstruction of existing institutions from the bottom up. We believe, too, that the established order can have no claim to our obedience or respect until it has been shown to conform to

schematism of the pure concepts of the understanding.”

[P]ure concepts of understanding being quite heterogeneous from empirical intuitions, and indeed from all sensible intuitions, can never be met with in any intuition. For no one will say that a category, such as that of causality, can be intuited through sense and is itself contained in appearance. How, then, is the *subsumption* of intuitions under pure concepts, the *application* of a category to appearances, possible? A transcendental doctrine of judgment is necessary just because of this natural and important question

Obviously there must be some third thing, which is homogeneous on the one hand with the category, and on the other hand with the appearance, and which thus makes the application of the former to the latter possible. This mediating representation must be pure, that is, void of all empirical content, and yet at the same time, while it must in one respect be *intellectual*, it must in another be *sensible*. Such a representation is the *transcendental schema*.

I. KANT, CRITIQUE OF PURE REASON §§ B177, A138, at 180–81 (N. Smith trans. 1929).

some independent scheme of values based only upon reason and a few elementary propositions regarding the nature of the human species.²¹ These are all dominant themes in contemporary legal scholarship, central to the work of such writers as Bruce Ackerman,²² Roberto Unger,²³ and Judge Richard Posner,²⁴ whose views are otherwise so different. Nothing could be more alien to the rationalism that permeates the main schools of legal theory in America today than Bickel's idea of prudence. Prudence requires—or more exactly, it consists in—a skeptical suspicion of abstract arguments and an affectionate (though not uncritical) regard for the organic mysteries of established institutions. Those who believe that the processes of social and political life are transparent to human reason—as, for example, Ackerman, Unger, and Judge Posner all do—are likely to view prudence not as a virtue, but a vice. The controversies in which legal scholars are today engaged and the research programs that adherents of the prevailing schools pursue are largely set within a rationalist milieu inhospitable to the Bickelian idea of prudence. It is this dominant climate of opinion, and not any incoherence or inconsistency in his views, which best explains Bickel's lack of influence: If we are in danger today of forgetting what it was that Bickel had to say, it is because we no longer wish (and increasingly are unable) to hear him.

In this Article, I offer an account of Bickel's political philosophy. The interpretation I present is a selective one, as any interpretation must be; there are certain aspects of Bickel's work that I touch on only lightly and others to which some readers may feel I give undue attention. As will be obvious, my interpretation is also a sympathetic one. While there is some value merely in clarifying the foundations of Bickel's political philosophy, my main aim in writing this Article has been to restore to a position of intellectual respectability a view that has largely disappeared from the

21. For a cogent description, and critique, of these rationalist dogmas, see 1 F. HAYEK, *LAW, LEGISLATION AND LIBERTY* 8-34 (1973), and M. OAKESHOTT, *RATIONALISM IN POLITICS* 1-36 (1962).

22. See B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 28-37 (1984) (describing methods of factual analysis and normative judgment appropriate in an "activist state").

23. See Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 570-73 (1983) (arguing need for highly generalized "background prescriptive theory" in order to resolve more specific doctrinal and policy disputes within the law, and ridiculing "analogy-mongering" and "unreflective common sense of orthodox lawyers").

24. See Posner, *Volume One of the Journal of Legal Studies—An Afterword*, 1 J. LEGAL STUD. 437 (1972) (urging that those engaged in study of law strive for same scientific rigor as biologists and astronomers); Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 287 (1979) (defining positive economic analysis of law as study of "behavior regulated by the legal system and even the behavior of the system itself through the methods of economics viewed as a science rather than as an ideology or ethical system"). In one of his articles, Judge Posner does emphasize the value of more traditional doctrinal forms of legal argument, but adds that "[w]hen doctrinal analysts stray from the narrow path of doctrinal clarification and enter the realm of policy analysis, their lack of social science training may lead them into error." Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1115 (1981).

repertoire of academic legal argument. I have made the effort to do so because I believe, as Bickel did, that prudence—"good practical wisdom"—is and will continue to be the lawyer's distinctive virtue, however sophisticated moral philosophy and the social sciences become.

I. JUDICIAL REVIEW

The distinction between prudence and its opposite—an abstracted indifference to the intransigent complexities of the world—provides the unifying theme in all of Bickel's work and represents the core of his political philosophy. This distinction is developed most fully and presented most forcefully in his last book, *The Morality of Consent*.²⁵ It is, however, a dominant theme in Bickel's earlier writings as well, including, in particular, those that deal with the Supreme Court and the problem of judicial review.

Although Bickel himself formulates the problem of judicial review in terms of what he calls the "counter-majoritarian difficulty,"²⁶ this well-known phrase conveys only an oblique sense of his distinctive contribution to constitutional theory. What does in fact distinguish Bickel's theory of judicial review from the many competing theories that have been offered both before and since is its emphasis on the political function of the Supreme Court, understanding politics in the sense defined above, as an ensemble of prudential techniques "that allow leeway to expediency without abandoning principle" and thus "make possible a principled government."²⁷ It is from the perspective of this prudentialist conception of politics that Bickel sought to understand the nature of the Supreme Court and its place in our system of government.

A. *Principle and Expediency*

*The Least Dangerous Branch*²⁸—Bickel's first booklength statement of his own theory of constitutional law²⁹—offers a defense of the peculiarly American institution of judicial review. Bickel's argument begins with the now-famous assertion that constitutional review by the Supreme Court of

25. MORALITY OF CONSENT, *supra* note 5.

26. LEAST DANGEROUS BRANCH, *supra* note 3, at 16.

27. *Id.* at 71.

28. LEAST DANGEROUS BRANCH, *supra* note 3.

29. Bickel wrote one earlier book, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS (1957). Hints of Bickel's later views may be found here, in his introductions to the eleven Brandeis opinions collected in the volume. See, for example, Bickel's reference to Brandeis' special concurrence in *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (1936), articulating what Bickel describes as "one of the truly major themes in Brandeis' judicial work: the conviction that the Court must take the utmost pains to avoid precipitate decision of constitutional issues, and that it must above all decide such issues only when it is absolutely unable otherwise to dispose of a case properly before it." A. BICKEL, *supra*, at 2-3.

the actions of the other branches of government is a "counter-majoritarian force in our system"³⁰ and hence "a deviant institution in the American democracy."³¹ By this Bickel means that when the Supreme Court holds an executive or legislative act unconstitutional, "it thwarts the will of representatives of the actual people of the here and now" and "exercises control, not in behalf of the prevailing majority, but against it."³² Of course, one can always say that the Court speaks for the people in some higher or more abstract sense³³ but the fact remains, according to Bickel, that the Supreme Court's power of judicial review gives a present minority (and a very small one at that) an effective veto over a present majority. "That, without mystic overtones, is what actually happens."³⁴

Judicial review is not, however, the only feature of our constitutional scheme that poses a countermajoritarian difficulty of the general sort that Bickel describes. The presidential Electoral College, the Senate, and the demanding super-majority requirements mandated by article V for amending the Constitution³⁵ all also have the potential to frustrate the clearly expressed will of a present majority and at points in our political history have done precisely that.³⁶ Judicial review may exert a stronger and more pronounced countermajoritarian influence than these other elements in our system of government, but the difference between them, in this respect at least, is one merely of degree and not of kind.

Any general theory which purports to explain the entire range of American institutions, political as well as judicial, that are inconsistent with a commitment to pure majoritarian self-rule must therefore be cast at a level of abstraction that is likely to obscure the distinctive aspects of judicial review. Accordingly, although Bickel begins his account of judicial review by describing the countermajoritarian difficulty in general terms, he immediately shifts from this problem and the question it impliedly raises (how is *any* countermajoritarian institution to be justified in a

30. LEAST DANGEROUS BRANCH, *supra* note 3, at 16.

31. *Id.* at 18.

32. *Id.* at 17.

33. This is the view, Bickel reminds us, that Alexander Hamilton defended in THE FEDERALIST No. 78.

34. LEAST DANGEROUS BRANCH, *supra* note 3, at 17.

35. *Cf.* Ackerman, *supra* note 2, at 1057-70.

36. It is also impossible to distinguish constitutional review of legislative actions from the Court's exercise of its more prosaic "general lawmaking function," *see* LEAST DANGEROUS BRANCH, *supra* note 3, at 20, solely on the grounds of countermajoritarianism. When the court merely supplies an "interstitial," *id.*, interpretation of a vague or incomplete statute in order to effectuate the statute's purpose, its decision is of course reversible by a legislative majority. But, as Bickel rightly points out, "the legislature's freedom of action" is often "qualified by an inertia that constitutes a major force in our busy modern representative bodies." *Id.* at 206. *See* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 6 (1982) ("[G]etting a statute enacted is much easier than getting it revised."). Constitutional review and more ordinary forms of lawmaking thus appear quite similar, if we consider them only from the standpoint of the countermajoritarian difficulty.

regime premised on majoritarian democracy?) to a different and more limited one: What valued function are courts—and, above all, the Supreme Court—uniquely qualified to perform? “The search,” Bickel declares, “must be for a function which might (indeed, must) involve the making of policy, yet which differs from the legislative and executive functions . . . [and] which is peculiarly suited to the capabilities of the courts”³⁷

Since it does not by its own terms suggest what the special function of judicial review might be, the broad formulation of the countermajoritarian difficulty with which *The Least Dangerous Branch* begins is therefore of only slight importance to Bickel's overall argument. To the question, “what is judicial review?” it is no answer—or more precisely, it is only the beginning of an answer—to say, “a deviant countermajoritarian institution in a majoritarian regime.” To be at all illuminating, this reply must be supplemented by an account of what Bickel calls the special “office” or “function” of judicial review.³⁸ The effort to give such an account, and not his more general remarks concerning the countermajoritarian difficulty, represents the real point of departure for Bickel's analysis of the role of the Supreme Court in our system of government.

According to Bickel, it is the special responsibility of the Supreme Court (and, to a lesser degree, of inferior courts) to act as “the pronouncer and guardian” of our society's “enduring values.”³⁹ To some extent, of course, these same values enter into the deliberations of the executive and legislative branches, but here, “when the pressure for immediate results is strong enough and emotions ride high enough, men will ordinarily prefer to act on expediency rather than take the long view.”⁴⁰ In fact, Bickel suggests, this is not only inevitable but desirable: “[T]he desires of various groups and interests concerning immediate results . . . [should] be heard clearly and unrestrainedly in one place . . . at some stage in the process of law-making”⁴¹ At the same time, however, it is “a premise we deduce not merely from the fact of a written constitution but from the history of the race, and ultimately as a moral judgment of the good society, that government should serve not only what we conceive from time to

37. LEAST DANGEROUS BRANCH, *supra* note 3, at 24. For a similar view, see Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 246–47 (1973). This passage in *The Least Dangerous Branch*, and the argument that follows it, show, perhaps more clearly than anything else in Bickel's writings, the influence on him of the so-called “legal process” school dominant at the Harvard Law School during the years that Bickel was a student there. One of the main features of this school of thought was its emphasis on the importance of institutional competence in the allocation of lawmaking powers. See, e.g., H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 179–89 (unpublished tent. ed. 1958).

38. LEAST DANGEROUS BRANCH, *supra* note 3, at 24, 30.

39. *Id.* at 24.

40. *Id.* at 25.

41. *Id.*

time to be our immediate material needs but also certain enduring values."⁴² In Bickel's view, only courts, which stand "altogether aside from the current clash of interests"⁴³ and are composed of human beings with "the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government,"⁴⁴ are well-fitted to articulate these values in a continuous and consistent fashion; hence it is to the courts--and, above all, to the Supreme Court--that the principal responsibility for doing so must be assigned.⁴⁵

Bickel expresses this conception of the Supreme Court's special function by distinguishing "principled" judgments from "expediential" ones. Expediential decisions are entirely appropriate in the executive and legislative domain; here there is nothing wrong with expediency *per se*, although in any particular decision considerations of principle may also play a significant or even determining role. But a judgment by the Supreme Court that an action of one of the other branches of government either is or is not constitutional cannot, in Bickel's view, legitimately be based, even in part, on considerations of expediency; constitutional judgments must rest upon principle alone.⁴⁶

Though it plays an important role in his defense of judicial review, the distinction that Bickel draws between judgments of expediency and principle is never adequately explained. When he first introduces these terms, Bickel uses them to mark the difference between short- and long-term perspectives on the interests of society: Judgments of expediency are said to be concerned with "immediate results";⁴⁷ judgments of principle, by contrast, emphasize interests of a more "general and permanent"⁴⁸ sort "which may have been forgotten in the moment's hue and cry."⁴⁹ This way of characterizing the distinction suggests that judgments of principle and of expediency are both about the same sort of thing--the interests of society--and differ only in the kind of interests they take into account or treat as primary. In a very general sense this is undoubtedly true since almost anything can be characterized as an interest of society--from improving our balance of foreign payments to vindicating the First Amendment's guarantee of free expression. But merely defining the interests with

42. *Id.* at 24.

43. *Id.* at 25.

44. *Id.* at 25-26.

45. For a sharply contrasting view, denying that courts have, or may rightly assert, a special responsibility of this sort, see Cover, *The Supreme Court, 1982 Term--Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

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

47. LEAST DANGEROUS BRANCH, *supra* note 3, at 24, 25 (emphasis added).

48. *Id.* at 24.

49. *Id.* at 26.

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which judgments of principle are concerned as the "long-term" interests of society is misleading because it fails to identify what Bickel regarded as the most salient feature of such judgments—their emphasis on moral values rather than material needs.

According to Bickel, it is the office of judicial review to articulate and renew what he calls (in a phrase borrowed from Louis Hartz) the "moral unity"⁵⁰ of the nation. In an important sense, judicial review is always idealistic, for it is essentially concerned with the interpretation and implementation of moral ideals. Our ideals are aspirational goals; they define the kind of people we would like to be. In this respect, they differ from our needs, which also signify some lack or incompleteness but imply nothing certain about our moral betterment (which may or may not be promoted by their satisfaction). Of course, needs influence ideals and vice-versa, but it is both possible and important to distinguish between them, as we do whenever we assert that a person's (or a nation's) existing needs may be critically assessed from the standpoint of his (or its) ideals, and that such an assessment may provide the grounds for suppressing certain of these needs or acquiring other, as yet non-existent, ones (a process which in the case of both individuals and nations often requires the deliberate acquisition of new habits through, for example, a program of psychoanalytic therapy or large-scale institutional reform like school desegregation).

In our system of government, the executive and legislative branches are largely concerned with the satisfaction of existing needs, although each also plays a role in shaping our moral self-consciousness as a people. The important point, however, is that we do not think it in any way illegitimate for executive or legislative decisions to be founded on considerations of expediency. By contrast, when the Supreme Court exercises the power of judicial review, it is centrally concerned with the definition and evolutionary refinement of our aspirational ideals and we think it inappropriate for constitutional judgments of this sort to be based on the same considerations of need that figure, quite properly, in the decisions of the other branches.

There is, therefore, a sense in which our social ideals, the "enduring values" we aspire to attain despite their occasional conflict with our existing needs, are in the special, though not exclusive, custody of the Court—the "pronouncer and guardian of such values."⁵¹ This is, I think, the main point that Bickel means to emphasize when he describes the process of judicial review as one of principle and contrasts it with the

50. *Id.* at 30.

51. *Id.* at 24.

largely expediential deliberations of legislative assemblies. Although the difference between principle and expediency can be defined as a difference between the long and short term, it is more revealingly described as the difference between ideals and needs. This latter distinction, I believe, best expresses Bickel's own understanding of the office of judicial review and his conception of the special function of the Supreme Court.

The distinction between principle and expediency—ideals and needs—is important to Bickel because it gives him the maneuvering room he requires to solve, or, more exactly, to dissolve, the countermajoritarian difficulty. This difficulty arises because judicial review appears inconsistent with “[t]he heart of the democratic faith,” the belief that legitimate government must be “by the consent of the governed”⁵² and that only self-rule can sustain a sense of engagement in a “common venture.”⁵³ According to Bickel, however, a commitment to self-rule is “not incompatible” with the “further premise . . . that the good society not only will want to satisfy the immediate needs of the greatest number but also will strive to support and maintain enduring general values.”⁵⁴ The American people, on Bickel's view, might therefore be said to have not one but two basic “faiths”—faith in the principle of government by consent, and faith in a process of continuing moral reform that seeks to bring the existing social order more completely into alignment with a scheme of “enduring general values.” The first of these faiths finds expression in our central reliance on electoral institutions premised upon the idea “that the majority has the ultimate power to displace the decision-makers and to reject any part of their policy.”⁵⁵ The second finds expression in the institution of judicial review, or more precisely, in our acceptance of the legitimacy of judicial review.

One way of solving the countermajoritarian difficulty is to argue that the only legitimate function of judicial review is to promote the operation of other, more representative institutions; this is John Ely's approach in *Democracy and Distrust*.⁵⁶ Bickel's solution is strikingly different: Instead of attempting to reconcile judicial review with the theory of democratic majoritarianism, he embraces a more complex and ambivalent conception of government in which a legitimacy independent of the basic premises of

52. *Id.* at 27.

53. *Id.* at 20, quoting L. HAND, *THE BILL OF RIGHTS* 73-74 (1958).

54. LEAST DANGEROUS BRANCH, *supra* note 3, at 27. Bickel's view does not presuppose an objectively determinable order of values, a “natural law” that is “out there,” see J. ELY, *supra* note 1, at 52. More precisely, it does not assume that moral controversies can be cleanly resolved simply by pointing to some fact about the world, man, or even a particular political culture, for the moral implications of all such facts will always be controversial—which is not to say that ethical judgments based upon them must therefore be arbitrary.

55. LEAST DANGEROUS BRANCH, *supra* note 3, at 27.

56. See J. ELY, *supra* note 1.

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majoritarianism itself can be ascribed to judicial review. This solution, unlike Ely's, dissolves the countermajoritarian difficulty by denying the assumption on which it rests—the assumption that our commitment to democratic self-rule is limitless and unqualified and that judicial review must therefore be legitimated in terms of this commitment or not at all.⁵⁷

As Bickel recognized, however, dissolving the countermajoritarian difficulty in this way leaves the most interesting, and important, question unanswered. As a nation, we may be committed both to majoritarianism and to the search for “a system of enduring basic values,”⁵⁸ but there is clearly a tension or conflict between these two commitments. Merely asserting that the special function of the Supreme Court is to act as a “pronouncer and guardian” of our national ideals does not tell us how to accommodate this tension or what distinctive contribution the Court might make toward achieving such an accommodation.

[D]emocracies do live by the idea, central to the process of gaining the consent of the governed, that the majority has the ultimate power to displace the decision-makers and to reject any part of their policy. With that idea, judicial review must achieve some measure of consonance.

Democratic government under law—the slogan pulls in two opposed directions, but that does not keep it from being applicable to an operative polity. If it carries the elements of explosion, it doesn't contain a critical mass of them. Yet if the critical mass is not to be reached, there must be an accommodation, a degree of concord between the diverging elements.⁵⁹

Bickel's main concern in *The Least Dangerous Branch* is with this problem of accommodation and his analysis of it constitutes his most original contribution to constitutional theory.

B. *The Lincolnian Tension*

Many other constitutional theorists, both before and after Bickel, have accepted the idea that the Supreme Court is a “pronouncer and guardian” of basic values and, as such, must rest its constitutional decisions on considerations of principle rather than expediency.⁶⁰ These other theorists,

57. For a quite different attempt to dissolve the countermajoritarian difficulty, see Ackerman, *supra* note 2, at 1016 (“Rather than solving the countermajoritarian difficulty, I mean to dis-solve it, by undermining the vision of American democracy and American history that constitutional lawyers had developed by the Progressive era.”).

58. *LEAST DANGEROUS BRANCH*, *supra* note 3, at 51.

59. *Id.* at 27–28.

60. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 82–88 (1977); Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 517–18 (1981); Fiss, *The Supreme Court, 1978*

however, have been almost entirely interested in what might be called the "internal" aspect of judicial review, in the process of intellectual analysis that leads to and supports a judgment of constitutional validity or invalidity. The central questions for them have been, "What are the characteristics of a principled constitutional argument, and from what source or sources do the principles employed by such arguments derive?" Bickel also addresses these questions, but they are not his primary concern; his attention is focused instead on what might be called the "external" aspect of judicial review, the process through which the Court's idealistic search for enduring values is accommodated to the majoritarian elements in the general constitutional scheme of which judicial review is but a single part.⁶¹

Those who have been interested primarily in the internal aspect of judicial review have tended to neglect this political problem of accommodation and have, as a result, often come to view their own work as a branch of moral philosophy. This is entirely appropriate, so long as one wants only to define the constitutive elements and controlling methods of constitutional argument. But if one is attempting, instead, to explain how the principled arguments of the Supreme Court can be accommodated to the "theory and practice of democracy"⁶² in a regime that is largely majoritarian, moral philosophy cannot provide the same guidance. The heart of this latter problem is to show how moral philosophy itself (in the shape of judicial review) can be fit into a system of government that permits most issues to be decided by a majority of popularly elected representatives rather than Platonic Guardians. This is not a problem that philosophical argument can resolve. In a very specific sense, to which I shall return,⁶³ Bickel's theory of judicial review may therefore be said to be non- (or perhaps even anti-) philosophical.

According to Bickel, it is the responsibility of the Court to be the "shaper and prophet"⁶⁴ of a system of enduring values, one that does not

Term—Foreword: The Forms of Justice, 93 HARV. L. REV. 1, 13–14 (1979); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

61. Bickel's concern with the external aspect of judicial review, and his account of the passive virtues, are ably described and sensitively criticized in Deutsch, *Neutrality, Legitimacy and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 198–241 (1968) ("The starting point for any . . . [effort to define criteria for justifiable or legitimate decisions] must be the insight that underlies Bickel's development of the passive virtues: that the Court, as an institution, has certain institutional needs—for example, the needs to insure survival and to operate efficiently—and that those needs are necessarily reflected in the form and content of its work." *Id.* at 213). See also M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* 2 (1964) ("It is therefore impossible to speak in the abstract of the power or function of the Supreme Court. The Supreme Court, like other agencies, has different powers and different functions depending upon who wants it to do what, when, and in conjunction with or opposition to what other agencies or political forces.").

62. LEAST DANGEROUS BRANCH, *supra* note 3, at 28.

63. See *infra* pp. 1612–14.

64. LEAST DANGEROUS BRANCH, *supra* note 3, at 239.

merely reflect an existing national consensus but articulates a moral vision to which we may legitimately aspire. The vision, to be sure, must always be rooted in our moral and legal traditions, but it cannot simply restate them in unchanged form; it must carry these traditions forward, in a principled way, by identifying their moral trajectory and the aspirational ideals toward which they are tending. In this regard, as Bickel repeatedly says, the Court is an educator whose mission is to instruct and elevate, to bring out the best in us and show us where our own convictions lead.

At the same time, however, we are deeply committed as a nation to the principle of democratic self-rule; when a judgment of the Supreme Court overrides the will of a majority of our representatives we not only feel the resentment that students do when corrected by their teachers, but question the authority by which a few dictate principles to the many in a democratic government (which, after all, is not exactly a schoolhouse). Between the educative function of the Supreme Court—which requires it to act as our teacher “in a vital national seminar”⁶⁵—and our commitment to majoritarian rule, there is, rather obviously, a tension that must be ameliorated if we are to avoid the explosion Bickel describes.

This tension would not exist, of course, if the executive and legislative branches of government—those, broadly speaking, that act with the consent of the people—consistently adopted only those policies that coincide with the Court's aspirational vision of our evolving national morality. If they did, moral principle and consent—what in our better moments we believe we ought to do and what right now we want to do—would be the same. A tension arises only when the requirements of principle are unconsented to and must, as a result, be imposed (if they are to be imposed at all) against the will of those who disavow or refuse to recognize them. For an institution charged with responsibility for maintaining our commitment to principle, any situation in which principle diverges from consent is a danger to be avoided since even the truest principles cannot long survive unless widely accepted. Such an institution will therefore have the strongest possible motive to use whatever influence it possesses to bring principle and popular opinion into greater alignment. In our system of government this is most dramatically true of the Supreme Court, the “least dangerous” branch, whose expansive powers to define our moral course are matched only by its powerlessness to impose that course in the face of popular dissent.

Bickel calls the tension between principle and consent the “Lincolnian” tension. “The teaching of [Lincoln's] life,” Bickel writes,

65. *Id.* at 26, quoting Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952).

is that principled government by the consent of the governed often means the definition of principled goals, and the practice of the art of the possible in striving to attain them. The hard fact of an existing evil institution such as slavery and the hard practical difficulties that stood in the way of its sudden abolition justified myriad compromises short of abandoning the goal. The goal itself—the principle—made sense only as an absolute, and as such it was to be maintained. As such it had its vast educational value, as such it exerted its crucial influence on the tendency of prudential policy. But expedient compromises remained necessary also, chiefly because a radically principled solution would collide with widespread prejudices, which no government resting on consent could disregard, any more than it could sacrifice its goals to them.⁶⁶

It is in this Lincolnian tension, according to Bickel, that “[o]ur democratic system of government exists” and within it, too, that the institution of judicial review “must play its role.”⁶⁷

From Bickel’s characterization of the Lincolnian tension and his use of it to describe a significant though often overlooked dimension of judicial review, two important implications may be drawn. The first is that the definition and refinement of principles is only a part—the internal part—of judicial review, which also includes what Bickel calls “the practice of the art of the possible in striving to attain them.” This “art,” whose mastery is essential to the external aspect of judicial review, is a form of “wisdom”⁶⁸ or understanding that only some possess and which, in those that have it, provides tolerably reliable guidance in picking the strategies of accommodation most likely to succeed from one situation to the next. We may not know how to acquire or teach this art, but it is clearly distinct from the intellectual skills required in the “principle-defining process”⁶⁹ itself. The latter requires a familiarity with the moral tradition within which one is working and a talent for combining or extending the elements of this tradition in novel ways to cover previously unresolved (or nonexistent) problems. One may have the knowledge and ability to do this, however, but lack judgment in the choice of a program or strategy for promoting an accommodation between the principles one has arrived at and the nonconforming, perhaps resistant, attitudes of those whose behavior the principles are meant to regulate or constrain. It seems more doubtful that the reverse could be true—that one could possess such judgment without also having a fairly well-developed capacity for moral

66. LEAST DANGEROUS BRANCH, *supra* note 3, at 68.

67. *Id.*

68. *Id.* at 66.

69. *Id.* at 69.

reasoning—but this suggests, at most, that the latter is the former's precondition, not its equivalent.⁷⁰

A second implication of Bickel's description of the Lincolnian tension concerns the manner in which principle and consent, moral ideals and the declared needs of a popular majority, are to be accommodated. Principles may, of course, be complex—they may have exceptions, provisos, and qualifications, and be subject to higher-order norms for the resolution of conflicts between competing principles. But according to Bickel, every complexity *in* a principle must itself be principled,⁷¹ that is to say, it must have been introduced for a moral reason similar to the one that led to the adoption of the principle itself in the first place, and not simply because popular opinion requires it. Thus, it is never principled either to limit or extend a constitutional norm merely to reflect existing majoritarian views, even if the limitation or extension is cast in general terms that give it a principled appearance. This means that if the Court is to retain its commitment to principle, it cannot resolve the Lincolnian tension by the simple and convenient expedient of adjusting the principles it announces to fit the Court's own estimate of what most people want or are willing to accept. Were the Court to approach the task of judicial review in this spirit, it could truly be nothing more than a mirror (a distorted one perhaps) of existing attitudes.

In Bickel's view, the Court must never aspire merely to reflect; it must also lead or educate, and this requires it to find some way of lessening the Lincolnian tension without deliberately tailoring its principles in advance to ensure their acceptance. The educative value of a principle depends on its aspirational quality; if it makes no pretension to draw us forward or improve us, it has no power to instruct. This is, I believe, what Bickel meant when he said that Lincoln's principled opposition to slavery was a "goal" with "vast educational value" which "made sense only as an absolute,"⁷² as something that had to be defined independently of popular sentiment and "the marketplace of expediency."⁷³

70. It is in this light that we should understand Bickel's criticism of Wechsler's claim that judicial review has as its goal the articulation of a system of "neutral principles." See Wechsler, *supra* note 60; LEAST DANGEROUS BRANCH, *supra* note 3, at 49-65. Bickel of course agreed with Wechsler that the judicial process must be principled, though he thought Wechsler's notion of a neutral principle too broad to define the result at which the Court should aim in resolving a constitutional controversy. From Bickel's point of view, the real deficiency in Wechsler's argument is that it simply ignored the external dimension of judicial review—the search for means of accommodation as contrasted with the search for principles—and hence gave no weight at all to the distinctive art or wisdom which this dimension of the Court's work requires. See also Deutsch, *supra* note 61, at 197-213 (discussing Bickel-Wechsler debate).

71. LEAST DANGEROUS BRANCH, *supra* note 3, at 59.

72. *Id.* at 68.

73. *Id.* at 69. Here too, it should be noted, Bickel explicitly distinguishes his own position from Wechsler's, whose "rule" of neutral principles would, in Bickel's view, "require the Court to validate

If the Court is to fulfill its educative mission, then, it must follow the path of principle by attempting to discern which solutions to the problems it confronts are "rational" and "good,"⁷⁴ and any solution it proposes must possess these attributes—whether or not it is acceptable in the current climate of opinion. At the same time, however, the Court must exercise prudence in advancing principle, and this is a skill or capacity distinguishable from the talent for moral reasoning that the internal aspect of judicial review demands. Indeed, if the Court fails to act with prudence, in an important sense it neglects its educational responsibilities, as any teacher does who simply tells his students how they ought to behave without making an effort to ensure that his instructions are intelligible or his students disposed to follow them. A responsible educator will always take his students' attitudes and beliefs into account, for they represent the starting point from which any process of moral or intellectual development necessarily begins.⁷⁵ But these attitudes and beliefs cannot be taken into account merely by defining the relevant educational goals to conform to them. Precisely how to accommodate these beliefs without compromising the principled independence—the aspirational meaning—of the goals in question is a problem of pedagogy that every teacher, including the Supreme Court, must face, and the dilemma it poses, in the Court's case, is the heart of the Lincolnian tension.

C. *The Passive Virtues*

The key to understanding how the Lincolnian tension may be reduced to a tolerable level without either repudiating principle or renouncing all concern with worldly realities lies, according to Bickel, in the exercise by the Court of what he calls the "passive virtues."⁷⁶ In a narrow sense, the passive virtues are techniques of adjudication (or rather, of non-adjudication). More broadly understood, they are the forms of practical wisdom, the modalities of prudence, whose mastery and proper exercise are essential to the external aspect of the Court's work—its effort to ameliorate the Lincolnian tension by fashioning a continually improving accommodation between the claims of principle on the one hand, and the resistant pressures of existing beliefs and institutions on the other.

The starting point for Bickel's account of the passive virtues is his insis-

with overtones of principle most of what the political institutions do merely on grounds of expediency" and thus "depreciate the calling of the judges as 'teachers to the citizenry.'" *Id.*

74. *Id.* at 39.

75. Cf. ARISTOTLE, *NICOMACHEAN ETHICS* § 1095b (M. Ostwald trans. 1962) ("Now, we must start with the known. But this term has two connotations: 'what is known to us' and 'what is known' pure and simple. Therefore, we should start perhaps from what is known to us.").

76. LEAST DANGEROUS BRANCH, *supra* note 3, at 111.

tence on the fact, "so often missed," that "the court wields a threefold power." The Court, Bickel writes, may "strike down legislation as inconsistent with principle. It may validate, or, in Charles L. Black's better word, 'legitimate' 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."⁷⁷ The Court has many ways of "not doing": It may deny that it has jurisdiction to hear a case or assert that the plaintiff lacks standing to bring it; it may dismiss a case for lack of ripeness or refuse to hear it on the grounds that it raises a "political question"; and it may decide a case on some narrower basis than that proposed by the parties and thus avoid reaching any of the constitutional issues it would otherwise have to address. These techniques, together with some others, constitute the passive virtues, and a large part of *The Least Dangerous Branch* is devoted to a detailed survey of their various properties and the differences among them. From Bickel's wide-ranging and densely illustrated discussion of the passive virtues, two general propositions emerge.

First, when the Court "stays its hand" by "withholding constitutional judgment,"⁷⁸ even if it does so in order to avoid a clash with popular opinion and the majoritarian branches of government, it does not, for that reason alone, relinquish its role as the "pronouncer and guardian" of principles nor automatically become "a mere register"⁷⁹ of prevailing opinion. A decision may be put off if the Court fears that it will provoke fierce resistance, but this does not amount to a principled endorsement of the views of the resisters, though it is certainly a way of taking their views into account. The following term the Court may conclude that the time has come to address the issue squarely and adopt a principle disfavored by popular opinion, mobilizing what Bickel calls its "resources of rhetoric"⁸⁰ on behalf of the principle in question. So long as this remains an open possibility, one cannot say that the Court has abandoned the path of principle simply by doing nothing, by deciding not to decide: The passive virtues do not abolish the tension between principle and consent but merely postpone the time when it must be confronted directly.

Of course, if the Court always found some reason to postpone troublesome decisions—those that are likely to infuriate or offend—one might legitimately question whether the path of principle had not in fact been abandoned after all. From time to time, however, the Supreme Court does render decisions that it knows will be unpopular, and these stand as a

77. *Id.* at 69 (emphasis in original); see C. BLACK, *THE PEOPLE AND THE COURT* 56–86 (1960).

78. *LEAST DANGEROUS BRANCH*, *supra* note 3, at 70.

79. *Id.* at 24, 239.

80. *Id.* at 188.

kind of warrant for the Court's continuing commitment to principle. Indeed, in Bickel's view, the Court is more likely to keep this commitment if it has the freedom to avoid decision. The requirement to decide every constitutional question in a principled fashion must inevitably force many more conflicts between principle and opinion than the Court can tolerate, and thus gives it a powerful incentive to conform its principles to public sentiment—a tendency that in the long run is certain to deaden the Court's appreciation of its educative responsibilities. The passive virtues are therefore not only consistent with a continuing commitment to principle, they actually help to sustain this commitment by reducing some of the pressures that might otherwise make it impossible to maintain.

Second, by enabling the Court to postpone decision, the passive virtues allow it to exploit what Bickel, in a related context, calls "the marvelous mystery of time."⁸¹ The passive virtues give the Court additional time in which to decide; in this sense, they create a resource that would not otherwise exist, or would not exist as plentifully. One of the main themes of *The Least Dangerous Branch* is the nature of this resource and the uses to which it may be put.

Most obviously, additional time can be of value to the Court where public opinion, though at present opposed to the Court's own unexpressed view of some controversial constitutional issue, appears to be evolving toward acceptance of the same position. When the passive virtues are used to create the time for popular opinion to catch up before taking a principled stand, they serve the Court's educative mission by helping to facilitate the slow but deliberate reform of perception and attitude on which this (and every other) process of moral instruction depends. The gradual and tentative steps that the Court takes toward the definitive resolution of a constitutional problem may, however, reflect its own uncertainty rather than a strategy of slow persuasion designed to advance ideas that the Court has already articulated to itself in finished form. Indeed, it is quite often the case that the Court itself is doubtful as to what the controlling principle is or ought to be, and postponing the moment of final judgment allows it to test its own evolving sense of the matter against the concrete facts of a series of specific cases—"an extremely salutary proving ground for all abstractions"⁸²—and to assess the public and governmental reactions that its provisional formulations provoke.

These reactions are not simply stumbling blocks that the Court must somehow get around if it is successfully to impose its view of the Constitution on the rest of society (though of course they are sometimes that).

81. *Id.* at 26.

82. *Id.*

They are also contributions to what Bickel repeatedly characterizes as a conversation or "colloquy"⁸³ regarding matters of principle, contributions that may help the Court itself to a better understanding of the issues involved and a better resolution of them, and which must in any case be given the same sort of consideration that individual members of the Court give to one another in their collective deliberations. It is important to remember that the legislative and executive branches of government, and the public generally, are competent to speak on matters of principle even though they tend, more typically, to be preoccupied with questions of expediency. By offering a partial or reversible solution to a constitutional problem, a solution that bespeaks its own uncertainty regarding the principle or principles involved, the Court invites the other branches of government, and the public, to rise to a consideration of principle and address the problem in the same spirit. If the invitation is accepted, the Court may be instructed by the "responsive readings"⁸⁴ of the Constitution that these other actors offer in reply.

Regardless of its outcome, a collaboration of this sort has great educational value since it tends to confirm the importance of principle in institutions more typically oriented toward expediency. This in turn reduces the Lincolnian tension in what is perhaps the most desirable way—through the conversational evolution of principles rather than their unilateral imposition on a carefully cultivated public. Though the Court acts as convenor and ultimately as judge in this dialogue, other political and social institutions are encouraged to participate on a basis of mutual respect secured by the common commitment of all to the idea of a principled constitution. If the Court had no choice but "to do"—to decide the merits of every constitutional controversy brought before it—a conversation of this sort would be impossible, leaving the Court with the unsatisfactory alternatives of either imposing its own judgment by fiat or validating prevailing opinion "with overtones of principle."⁸⁵ The passive virtues create the time that such a conversation requires and thus provide a way out of the dilemma just described.

When at last the Court decides that 'judgment cannot be escaped—the judgment of this Court,' the answer is likely to be a proposition 'to which widespread acceptance may fairly be attributed,'

83. *Id.* at 70, 206, 240.

84. *Id.* at 261; *see also* Fiss, *supra* note 60, at 13 ("The judge is entitled to exercise power only after he has participated in a dialogue about the meaning of the public values."). Professor Burt has developed, along somewhat different lines, what might be called a "conversational" or "dialogic" conception of the Supreme Court's role in constitutional decisionmaking, *see* Burt, *Constitutional Law and the Teaching of the Parables*, 93 *YALE L.J.* 455 (1984); Burt, *The Constitution of the Family*, 1979 *SUP. CT. REV.* 329, 378-79.

85. *LEAST DANGEROUS BRANCH*, *supra* note 3, at 69.

because in the course of a continuing colloquy with the political institutions and with society at large, the Court has shaped and reduced the question, and perhaps because it has rendered the answer familiar if not obvious.⁸⁶

In its effort to manage the Lincolnian tension, nothing is of greater value to the Court than the temporal resources that the passive virtues, properly employed, put at its disposal.

This last reflection raises a fundamental question regarding the nature and status of the passive virtues as a whole: According to what standard or principle should the Court decide when to exercise one or another of the techniques of abstention that comprise the passive virtues, and when instead to render final judgment? Bickel's answer is: According to no standard or principle at all, if by "principle" we mean a firm rule or fixed procedure. "[T]he techniques and allied devices for staying the Court's hand, as is avowedly true at least of certiorari, cannot themselves be principled in the sense in which we have a right to expect adjudications on the merits to be principled."⁸⁷ The internal aspect of judicial review must be principled; the external aspect need and indeed should not be, for it is to a considerable degree a political process that demands neither reflective clarity nor scholarly wisdom but skill in the "arts of compromise" and a familiarity with the ruleless ways "of muddling through."⁸⁸ This is not to concede, however, that the passive virtues and the Court's management of the Lincolnian tension rest on "unchanneled, undirected, uncharted discretion"⁸⁹—as some "neo-realists" have suggested.⁹⁰ "It is not to concede decision proceeding from impulse, hunch, sentiment, predilection, inarticulable and unreasoned. The antithesis of principle in an institution that represents decency and reason is not whim or even expediency, but prudence."⁹¹

Prudence is a distinctive form of wisdom, and though it has certain qualities in common with the intellectual processes involved in the "formation of principled judgments"⁹² (the "quality of disinterestedness"⁹³ being chief among them), it is not itself a process of this sort nor can it be reduced to one. At one point, early in *The Least Dangerous Branch*, Bickel remarks that judges (and Supreme Court Justices in particular)

86. *Id.* at 240.

87. *Id.* at 132.

88. *Id.* at 64.

89. *Id.* at 132.

90. *See id.* at 75-84.

91. *Id.* at 132-33.

92. *Id.* at 197.

93. *Id.* For an account of the importance of disinterestedness in political judgment, see H. ARENDT, LECTURES ON KANT'S POLITICAL PHILOSOPHY 40-46 (1982).

"have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government."⁹⁴ It is clear, however, that Bickel did not consider the Justices of the Supreme Court to be mere scholars and also clear that he regarded the tendency toward an overly refined scholasticism in adjudication as a vice. A Justice of the Supreme Court has a different task from his academic counterpart, and the performance of the Justice's task requires a capacity which the moral philosopher may, but certainly need not, possess.

The Justice's aim is to reduce the Lincolnian tension by helping his society realize its aspirational ideals in a more complete and effective way. To do this, he needs perceptual and judgmental powers that the philosopher does not require—the ability to size up people and situations, to draw an estimate of their varying receptivity to different ideas, and to see, with a kind of bifocal vision, how general principles operate, or ought to operate, in the full complexity of particular cases.⁹⁵ A Justice must also possess considerable patience and be prepared to live with temporizing accommodations while the lines of a satisfactory arrangement gradually take shape; he must even be prepared to defer, in an ultimate sense, to the will of the people, for "on the supreme occasion when . . . [our system of constitutional government] is forced to find ultimate self-consistency, the principle of self-rule [and not the rule of principle] must prevail."⁹⁶ These qualities of mind and character—patience,⁹⁷ deference,⁹⁸ and the kind of trained sensitivity to the ways of the world that Karl Llewellyn called "situation-sense"⁹⁹—are indispensable in a Supreme Court Justice. Without this special combination of temperamental attitudes and intellectual capabilities, which together comprise the virtue of prudence, a Justice will lack guidance in the exercise of the passive virtues, and be unable to exploit the advantages of time which they confer; as a result, he is likely to fail in the search for a satisfactory accommodation between worldly reality and constitutional principle.

Prudence, then, is *the* distinctive judicial excellence, the special quality that Supreme Court Justices (and, to a lesser degree, all judges) must possess if they are to succeed in the one task that is most characteristically

94. LEAST DANGEROUS BRANCH, *supra* note 3, at 25–26.

95. Philosophers are, in popular imagination at least, notoriously lacking in the worldly talents that a Justice requires to succeed at his task. This is the point of the ancient story about Thales, the first Greek philosopher, who reportedly fell down a well while gazing at the heavens. See 1 H. ARENDT, *THE LIFE OF THE MIND: THINKING* 82–83 (1971).

96. LEAST DANGEROUS BRANCH, *supra* note 3, at 261.

97. Cf. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 105 (1970) (danger of "impatience to take charge of unruly affairs" in judges "who are in a position to work their will") [hereinafter cited as *IDEA OF PROGRESS*].

98. See *id.* at 29 (deferential approach of Brandeis and Frankfurter).

99. See K. LLEWELLYN, *THE COMMON LAW TRADITION* 59–61, 121–22 (1960).

theirs. In *The Least Dangerous Branch* and elsewhere in his writings, Bickel contrasts prudentialism with a quite different judicial attitude, one characterized by a blindness to complexity and an impatience with compromise, an attitude that he believed had been characteristic, in particular, of much of the work of the Warren Court.¹⁰⁰ The antithesis of prudence, as Bickel conceived it, is a kind of abstractedness, an insistence on principles without regard to the historically conditioned complexities of actual institutions, accompanied by a general disinterest in the processes of accommodation required to bring theory and practice into greater alignment and an intolerance of any gap (however partial or temporary) between them. In a philosopher such an attitude may be a virtue; when Socrates describes the true lover of ideas, and attempts to distinguish him from the lover of mere sights and sounds, it is just this abstracted indifference to the world that he praises.¹⁰¹ But in a judge, abstraction—understood both as an intellectual attitude and as a belief or conviction regarding the unworthiness of worldly things—is a fault or shortcoming. Indeed, if prudence is the pre-eminent judicial virtue, then abstraction may properly be said to be its correlative vice.

II. AMERICAN DEMOCRACY

The Least Dangerous Branch is devoted, almost entirely, to an analysis of the role of the Supreme Court and the nature of judicial review; it contains little discussion of other aspects of the American system of government, in particular those having to do with the mechanisms of political representation. Bickel was deeply interested, however, in the problem of democratic representation and had much to say about it in three of his other books—*Politics and the Warren Court*,¹⁰² *The Supreme Court and the Idea of Progress*,¹⁰³ and *Reform and Continuity*.¹⁰⁴ Just as Bickel sought to defend the uniquely American institution of judicial review, so too, he sought to defend those peculiar features of our American system of representative democracy which he believed to be the conditions for its successful operation. In ways I shall try to make clear, Bickel's view of American democracy was shaped by the same prudentialist outlook that

100. See *IDEA OF PROGRESS*, *supra* note 97, at 173–81:

Pragmatic skepticism is certainly an attitude of its Progressive realist progenitors that the gallant Warren Court emulated all too little. More careful analysis of the realities on which it was imposing its law, and an appreciation of historical truth, with all its uncertainties, in lieu of a recital of selected historical slogans, would long since have rendered the Warren Court wary of its one-man, one-vote simplicities.

Id. at 174.

101. See *PLATO, THE REPUBLIC*, §§ 475b–476c.

102. A. BICKEL, *POLITICS AND THE WARREN COURT* (1965) [hereinafter cited as *POLITICS*].

103. *IDEA OF PROGRESS*, *supra* note 97.

104. *REFORM AND CONTINUITY*, *supra* note 8.

informs his theory of judicial review, and thus represents an entirely consistent expression of his basic political philosophy.

In an indirect democracy, public business is conducted by popularly elected representatives and not by the citizens themselves, who participate only through their delegates. The representative assemblies in which the delegates of the people are gathered may be conceived as performing one of two quite different functions, and it is with this distinction that Bickel's account of the American system of representative democracy begins.

In the first place, representative bodies may be thought of as simply a conduit for the expression of the popular will; on this view, they "are something like animated voting machines, engineered to register decisions made by the electorate," a substitute "for a decision-making process that works by direct vote of the people."¹⁰⁵ Proponents of this view recognize, of course, that "occasional new matters will arise that were not settled at a prior election," in which case "the representative institutions are authorized, as delegates of the people, to dispose of such unforeseen matters. But these decisions are to be ratified or rejected at the next election, and if possible sooner"¹⁰⁶ by means of a popular referendum or similar mechanism. According to Bickel, if one adopts this view of the function of representative institutions, "the goal of absolute voting equality"—"one person, one vote democracy"¹⁰⁷—is likely to seem entirely appropriate, indeed, mandatory.

There is, however, a second view of the function of representative government and this is the view that Bickel himself adopts (following the lead of what he calls "modern political science").¹⁰⁸ In this second view, "representative institutions are to exercise a relatively independent, deliberate decision-making function"; elections do not—indeed, they cannot—dispose of "the common run of issues that governments are confronted with," and these issues must therefore be resolved by the elected delegates of the people in accordance with their own informed judgment and not some pre-determined mandate (as the first conception of representative government would have it).¹⁰⁹

In our democratic system, according to Bickel, most legislative judgments are formed and most issues resolved in a deliberative process that is only occasionally punctuated by popular elections. This being the case, it is of great importance that all groups in society be represented *in* the

105. POLITICS, *supra* note 102, at 183.

106. *Id.*

107. *Id.*

108. *Id.* Bickel was particularly influenced by the work of his Yale colleague, Robert Dahl. See *id.* at 182; IDEA OF PROGRESS, *supra* note 97, at 110; REFORM AND CONTINUITY, *supra* note 8, at 17.

109. All quotations in this sentence are from POLITICS, *supra* note 102, at 183.

deliberative process itself and not merely that their members be allowed to participate in the selection of delegates to the representative body. The latter is all that is required if we view representative institutions merely as "animated voting machines," but if we conceive them, instead, as deliberative bodies exercising an independent power of judgment and decision, it is just as important that every group or faction be able to express itself and wield its influence at *this* stage of the governmental process as at the earlier one of delegate selection.

"The problem," Bickel observes, "becomes one of access to, participation in, influence on the process of decision, and only ultimately and in necessarily attenuated fashion one of ensuring at election time the legislature's fidelity to the popular will."¹¹⁰ If such access is denied to any group or segment in society, then the legitimacy of governmental action must, for that group at least, be compromised.

[T]he heart of democratic government, and the morality which distinguishes it from everything else, is that it rests on consent. And the secret of consent is only in part a matter of control, of the reserve power of a majority to rise up against decisions that displease it. It is, perhaps more importantly, the sense shared by all that their interests were spoken for in the decision-making process, no matter how the result turned out. Government by consent requires that no segment of society should feel alienated from the institutions that govern. This means that the institutions must not merely represent a numerical majority, which is a shifting and uncertain quantity anyway, but must reflect the people in all their diversity, so that all the people may feel that their particular interests and even prejudices, that all their diverse characteristics, were brought to bear on the decision-making process.¹¹¹

To ensure that our representative institutions do reflect the diversity of "our great, heterogeneous Republic,"¹¹² we must first of all take account of the fact stressed by Madison (to whom Bickel refers often and always with approval) that "people tend to act politically not only as individuals, but in groups."¹¹³ As Justice Harlan observed in his dissent in *Reynolds v. Sims*, "people are not ciphers,"¹¹⁴ they are not fungible, juridical selves

110. *Id.*

111. *Id.* at 184. The right to effective participation in the deliberative processes of government is often described and analyzed in the language of the famous fourth footnote to *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). For a discussion of the *Carolene Products* footnote and its implications for the theory and practice of representative democracy, see J. ELY, *supra* note 1, at 75-88, and Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

112. POLITICS, *supra* note 102, at 195.

113. REFORM AND CONTINUITY, *supra* note 8, at 16.

114. *Reynolds v. Sims*, 377 U.S. 533, 623 (1963) (Harlan, J., dissenting).

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utterly indistinguishable one from another, but beings who, in addition to whatever universal rights and privileges they possess, also have specific local attachments, historical connections, and professional and other interests that unite them more or less closely to various other individuals with whom they often find it both useful and gratifying to collaborate for the attainment of some common good.¹¹⁵ If the groups that individuals form by virtue of their history, location, and interests are ignored in the design of a society's representative institutions—if, that is to say, these institutions are conceived as representing individuals in the abstract, shorn of all their more determinate social and economic relations so that the only thing that can possibly distinguish one group from another is its relative numerical size—then nothing can guarantee that the views of all of the relevant groups will be represented or given fair consideration in the deliberative processes of government.

Of course, even if one imagines society to be a collection of atomistic ciphers and organizes its institutions accordingly, it may work out, fortuitously, that all of the important groups in society are, in fact, adequately represented in its decision-making processes. But if this happens it will happen not because of, but despite, the mechanisms and procedures that have been employed. In Bickel's view, the likely result of ignoring the importance of groups or factions in American political life would be just the opposite—the exclusion of at least some groups from the process of self-government and their consequent disenchantment with it. Only a continual insistence on the importance of those intermediate communities of interest and opinion that stand, so to speak, midway between the individual and the all-embracing jurisdiction of the territorial state¹¹⁶ can ensure that we achieve a genuinely “participatory democracy, in which access to the process of government is continuously available to all groups.”¹¹⁷

For a democratic government to survive the stresses and strains of routine political conflict, there must be widespread belief in its legitimacy. Legitimacy, in turn, requires that the deliberative processes of government be open to all groups or factions. A second and equally important condition of stability, according to Bickel, is some accommodation to the fact that individuals and groups “have opinions, preferences, and interests which vary in intensity [and not merely in their content or subject matter], thus calling for varying degrees of respect and forbearance on the part of

115. See M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 179–83 (1982).

116. The function of these intermediate forms of association was analyzed in detail, and their importance particularly emphasized, by Tocqueville. See A. TOCQUEVILLE, *DEMOCRACY IN AMERICA* 189–95, 509–25 (G. Lawrence trans. 1969).

117. *REFORM AND CONTINUITY*, *supra* note 8, at 17; see also *IDEA OF PROGRESS*, *supra* note 97, at 112 (linking republicanism with forces of interest groups).

others, even if those others constitute a majority."¹¹⁸ If the political processes provide no mechanism for registering the intensity of competing preferences, those whose preferences are extremely strong, though in a minority, may feel that the full weight of their position has not been adequately brought home to their opponents and, in this specific sense, that their position itself has not been given a fair hearing—a conclusion which is likely to undermine the political morale of those who hold the view in question.

In order to take intensity of preference into account, however, one must make important adjustments in the position that Bickel disapprovingly calls "uncompromising majoritarianism,"¹¹⁹ just as one must make adjustments in this position to ensure that representative institutions reflect the factional nature of political action. To measure intensity of preference, we need to adopt some means of weighting votes, and any strategy of this sort necessarily compromises our commitment to the strict egalitarianism of the "one person, one vote" standard. Without some such compromise, however, the peace and stability of our political system will be jeopardized, for the consent on which the legitimacy of the system depends is likely, in the long run, to be withdrawn by any disaffected minority that feels it has not received the "respect and forbearance" to which it believes the special intensity of its preferences entitles it.

Many aspects of the American system of government (understanding this term, in a broad sense, to include both its formal constitutional structure and certain longstanding practices of a more informal sort) help to minimize the potential sources of disaffection that Bickel identifies and thus increase the likelihood that ours will remain a "legitimate and stable" government "to which general consent is given."¹²⁰ This is true, most obviously, of the division and multiplication of governmental powers established by the American Constitution, a complicated scheme that signifies "the intended inability of any group, including a majority, always to get everything it wants, and the intended ability of many groups, all of them minorities, to exercise vetoes."¹²¹ One great advantage of this arrangement, according to Bickel, is that it permits the expression, through an exercise of veto power, "not only of desires and preferences, but of intensities that no ballot can register."¹²²

For similar reasons, Bickel considered the practice of drawing legislative districts to ensure as full a representation as possible of the diversity

118. REFORM AND CONTINUITY, *supra* note 8, at 16; *see also* IDEA OF PROGRESS, *supra* note 97, at 116-17 (need to respect "intensities that no ballot can register").

119. REFORM AND CONTINUITY, *supra* note 8, at 16.

120. POLITICS, *supra* note 102, at 184.

121. IDEA OF PROGRESS, *supra* note 97, at 112.

122. *Id.* at 116-17.

of society's groups or factions an important contribution to the long-term stability of government. To be sure, directly structuring our representative bodies "in terms of clearly defined interests" raises "the specter of the corporate state."¹²³ But geographic districting can strike a "compromise between the symbolic undesirability of structuring politics in this fashion and the reality that the society does consist of identifiable ethnic and racial groups . . . and the compromise is meaningless if the geographic districts do not even approximately take account of the groups."¹²⁴

Such a compromise will often require some numerical malapportionment between districts, but as Bickel repeatedly states,¹²⁵ unequal districting can serve legitimate ends—though of course it need not always do so—and serve them better than proportional representation (which "encourages small parties and ends invariably in unstable or paralyzed multi-party government") or at-large elections (in which "the losing party loses everything, not only the power to make its views prevail in the national House but also the right to make them heard").¹²⁶ The practice of districting with an eye to the preservation of group power helps to ensure that "the largest possible variety of interests in this immense country [are] reflected in the House, have access to it, have some share, however small, of power, and thus gain, in the late Judge Learned Hand's phrase, a sense of common venture in government."¹²⁷

Something similar can be said, in Bickel's view, about the electoral college (or, more precisely, about the century-and-a-half old practice of calculating each state's vote in the college by the unit rule).¹²⁸ For reasons that Bickel explains,¹²⁹ the unit rule, too, represents a form of malapportionment, one whose effect is to give well-organized ethnic groups in the larger urban states a measure of political influence disproportionate to their numerical strength. But these are just the interests, according to Bickel, that are likely to be underrepresented in the legislative branch of government, where the representatives of ethnically homogeneous rural districts tend to exercise a disproportionate influence of their own by virtue of the committee system and the seniority rules that determine assignments within it. None of this, again, is required by the Constitution, and it would of course be possible to reform both Congress and the electoral college in the direction of what Bickel calls a more "obtrusively chaste"

123. *Id.* at 157.

124. *Id.* at 160.

125. *Id.* at 172; *POLITICS*, *supra* note 102, at 185.

126. *POLITICS*, *supra* note 102, at 194.

127. *Id.* at 194-95.

128. Under the unit rule, each state casts all of its votes for the candidate who received the most votes, in that state, in the popular election.

129. *REFORM AND CONTINUITY*, *supra* note 8, at 4-10.

majoritarianism.¹³⁰ Instead, Bickel argues, we should preserve the system of countervailing powers we currently possess, granting in different spheres to different and competing interests a measure of influence which a purer majoritarianism might deny to some groups entirely.¹³¹

The multiplication of powers, of opportunities to assert influence and control, brings with it a danger of deadlock and paralysis in the processes of government; this is particularly true if a number of different minorities each possess a veto power, so that actions can be undertaken only if there is consensus (or near-consensus) regarding their desirability. For the most part, however, we have been able to keep this danger within moderate bounds—largely, Bickel claims, because of our historically evolved two-party system. If we were to adopt, instead, a multi-party system (as we might, for example, by employing the principle of proportional representation both in the electoral college and, more generally, in the selection of delegates to our representative assemblies) the predictable result, according to Bickel, would be a shift to the legislature itself of that “initial coalition-building process that needs to have taken place before the legislature is formed, if effective government is to ensue”¹³² In a multi-party system, groups would of course continue to bargain, but only after the election, “having first offered the voter his choice among pure positions.”¹³³ In this way, Bickel claims, “[s]elf-contained ideologies” would “take root, and become hard-edged” and accommodation be made “more difficult, partial, grudging [and] short-lived.”¹³⁴ By contrast,

the dominance of two major parties enables us to achieve a politics of coalition and accommodation rather than of ideological and charismatic fragmentation, governments that are moderate, and a regime that is stable. Without forgetting that of all the mysteries of government the two-party system is perhaps the deepest, one can safely assert that each major party exerts centripetal force; that it ties to itself the ambitions and interests of men who compete for power, discouraging individual forays and hence the sharply defined ideological or emotional stance; that it makes, indeed, for a climate in-

130. IDEA OF PROGRESS, *supra* note 97, at 112.

131. “The question about the electoral college,” Bickel maintains, should not be whether it is inevitably and purely majoritarian. It is not, although it is very considerably more so than our other national institutions. The question should be whether or not the electoral college tends to enhance minorities rule [a phrase of Robert Dahl’s that Bickel quotes with approval]; whether it tends to include or exclude various groups from influence in the institution of the presidency, and whether if it assigns somewhat disproportionate influence to some groups, they are the ones which are relatively shortchanged in Congress, so that the total effect is the achievement of a balance of influence

REFORM AND CONTINUITY, *supra* note 8, at 17.

132. POLITICS, *supra* note 102, at 186.

133. REFORM AND CONTINUITY, *supra* note 8, at 22.

134. *Id.*

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hospitable to demagogues The [two-party] system, in sum, does not altogether take mind out of politics, but it does tend to ensure that there are few irreconcilable losers, and that the winners can govern, even though—or perhaps because—there are equally few total victories.¹³⁵

Taken together, the various practices and institutions that I have just described—the formal system of checks and balances established by our Constitution, malapportionment in the service of group representation, the employment of unit-rule voting in the electoral college, the organization of the congressional committee system, and a well-established tradition of two-party government—form a complex scheme whose elements sustain, through a subtle interaction, the conditions required for a stable democracy. In large part, the elements of this scheme are products “more of accident than of design;”¹³⁶ no supervising intelligence has overseen their establishment or given them their present shape. Furthermore, any attempt to reduce the scheme’s complexities to a single theoretical principle (such as “one person, one vote”) is certain to leave out of account much that is of use or value in our existing arrangements, and any effort to reconstruct its main features on the basis of such a principle is equally certain to upset the balance produced by the scheme’s mutually supporting parts.

There may be a time when societies can digest radical structural change, when they are young and pliant, relatively small, containable, and readily understandable; when men can see the scenery shift without losing their sense of direction. We are not such a society. We do well to remain attached to institutions that are often the products more of accident than of design, or that no longer answer to their original plans, but that challenge our resilience and inventiveness in bending old arrangements to present purposes with no outward change.¹³⁷

The view expressed in this last passage informs Bickel’s whole conception of American democracy, a conception that may rightly be called prudentialist in the sense defined above. To understand or successfully reform our system of government, one must, in Bickel’s view, appreciate the details of its institutional arrangements and take account of the social complexities in which these arrangements are embedded. Any theory that fails to do so will be hopelessly obtuse and, however powerful its philo-

135. *Id.* (footnote omitted).

136. *Id.* at 3.

137. *Id.*

sophic premises, a poor foundation for reform. "The institutions of a secular, democratic government do not generally advertise themselves as mysteries. But they are. . . . Their actual operation must be assessed, often in sheer wonder, before they are tinkered with, lest great expectations be not only defeated, but mocked by the achievement of their very antithesis."¹³⁸

To adopt such an attitude is neither to give a blanket endorsement to the status quo nor to abandon all critical ideals, but only to insist that reforms be implemented in small steps and with a tolerance for contingent, historically-evolved complexities (which often make structural change less desirable than it seems, as well as slowing its pace and deflecting its direction). Above all, political reform requires a certain "inventiveness in bending old arrangements to present purposes"¹³⁹ without wholesale change, coupled with a willingness to compromise if necessary; according to Bickel, the "secret"¹⁴⁰ of successful reform is a progressive gradualism of the same sort that has characterized the growth of the common law (or, one might add, the efforts of the Supreme Court to ameliorate the Lincolnian tension). The tolerance for compromise and emphasis on institutional detail that characterize Bickel's theory of democratic government rest, at bottom, on an attitude that he himself describes as one of "sheer wonder"—a fascination with the world, an appreciative grasp of its complexity and of the resistance it offers to ideas, that is shared by all "[p]ractical men interested in perfecting the American democracy."¹⁴¹ What these "practical men" possess, of course, is prudence—the pre-eminent judicial virtue and, we may now add, the pre-eminent political virtue as well.

Bickel dismisses as philosophical romantics those who promote sweeping institutional reforms for the sake of achieving a closer approximation to some ideal, and vastly simplified, conception of representative democracy. Several times he quotes Madison's disparaging reference to "theoretic politicians" who are motivated by a desire to reduce "mankind to a perfect equality in their political rights,"¹⁴² a program that ignores the realities of history and of social existence, especially the fact that men form factions or groups which cannot (and indeed ought not) be viewed simply as aggregations of otherwise identical individuals. At the center of

138. *Id.* at 2; cf. E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 152 (C.C. O'Brien ed. 1969) (1st ed. London 1790):

The science of government being . . . a matter which requires experience, and even more experience than any person can gain in his whole life, however sagacious and observing he may be, it is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society

139. REFORM AND CONTINUITY, *supra* note 8, at 3.

140. *Id.*

141. *Id.* at 17.

142. IDEA OF PROGRESS, *supra* note 97, at 166 (quoting THE FEDERALIST No. 10 (J. Madison)).

this more "chaste" conception of democratic government is the idea of the rights-bearing person—isolated, groupless, abstracted from the multiple overlapping contexts that give him or her a definite social presence and some measure of solidity in the world of human affairs,¹⁴³ a "cipher" in the words of Justice Harlan.

This extremely abstract view and "the romance of pure majoritarianism"¹⁴⁴ that gives it its appeal can be detected, according to Bickel, in the Warren Court's reapportionment cases¹⁴⁵ as well as in recent calls for reform of the electoral college and reconstruction of the two-party system.¹⁴⁶ All of this Bickel repudiates. Apportioning election districts and counting votes are not things that should be done on a mathematical basis alone (as might be appropriate if society were really a collection of atomistic ciphers); the groups that men form, the interests these groups have, the different ways in which different groups make their influence felt in the processes of government—all of this must be taken into account in the design and revision of our political institutions.

The abstract view of democratic government and of individual identity implicit in the slogan "one person, one vote" obscures these things or, more precisely, devalues them; it is a philosophical view in the sense described earlier, and those who profess it fail to see the complexity of the world and reveal their lack of interest in it. In a phrase of Edmund Burke's, which Bickel was fond of quoting, the constitution of a state is not a "problem of arithmetic"¹⁴⁷—nor, one might add, of philosophy. What is required for the successful maintenance of a mature constitution (and perhaps even for its foundation, although Bickel himself would have acknowledged that this is a more controversial proposition)¹⁴⁸ is neither arithmetic nor philosophy, but prudence—the bifocal wisdom that takes notice of the world and feels wonder in its presence, while at the same time pursuing a strategy for its gradual reform.

III. THE WHIG TRADITION

Toward the end of his life, Bickel came to conceive the idea of prudence in even broader terms, not merely as a precondition for responsible adju-

143. Kant described the moral person, understood in this abstract way, as both a dutybound member and lawgiving sovereign in what he called the "kingdom of ends." See I. KANT, *FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF ETHICS* 62–63 (T. Abbott trans. 1955).

144. *REFORM AND CONTINUITY*, *supra* note 8, at 17.

145. *IDEA OF PROGRESS*, *supra* note 97, at 151–81.

146. *REFORM AND CONTINUITY*, *supra* note 8, at 1–3, 90–91.

147. *Id.* at 15.

148. See H. ARENDT, *ON REVOLUTION* 221–23 (1963) (emphasizing importance of "book-learning and thinking in concepts" for makers of American Revolution, and their successors' loss of interest in "political thought and theory").

dication or democratic reform, but as the foundation for an entire tradition of political thought, a tradition he described as “Whig in the English eighteenth-century sense”¹⁴⁹ and identified, in particular, with the views of Edmund Burke. Bickel’s account of the Whig tradition is contained in an essay entitled “Constitutionalism and the Political Process,” written shortly before his death in 1974 and published posthumously, along with several other essays, in *The Morality of Consent*.¹⁵⁰ In this essay, Bickel states his own prudentialist conception of law and politics in more general—one might even say more philosophical—terms than he does in any of his other writings. The conception he defends, however, is the same one that underlies both his discussion of judicial review and his analysis of the complexities of American democracy. Bickel’s late essay on Burke and the Whig tradition merely brings to a level of greater explicitness and generality the one idea that had guided him from the beginning.

It is therefore misleading to suggest, as Judge Robert Bork has done, that “Constitutionalism and the Political Process” brought Bickel’s “political philosophy . . . into alignment with his legal philosophy,”¹⁵¹ as if these had ever been disjoined; in fact, as I have attempted to show, the concept of prudence was from the start their common element. And it is equally wrong to suggest, as John Ely has, that one “can’t account for the *Morality of Consent*” without assuming “that Bickel’s politics had moved somewhat toward the end.”¹⁵² Certainly the animating center of Bickel’s politics had not moved—been sharpened and clarified perhaps, but not moved—from the commitment to prudence that remained, throughout his career, the premise of everything he wrote. “Constitutionalism and the Political Process” is a significant essay not because it marks a departure from Bickel’s earlier work or anticipates some future (and unrealized) shift in his thinking, but because it is so strikingly continuous with everything he had done before.

The essay itself begins by drawing a distinction between “[t]wo diverging traditions in the mainstream of western political thought.”¹⁵³ The first of these is the “contractarian” tradition deriving from Locke and Rousseau and defended, most recently, by John Rawls.¹⁵⁴ The second or “Whig” tradition, to which Bickel himself claims allegiance, is “usually called conservative” and is associated “chiefly with Edmund Burke.”¹⁵⁵

149. MORALITY OF CONSENT, *supra* note 5, at 3.

150. *Id.* at 3-30.

151. Bork, *Remarks by Robert H. Bork*, in ALEXANDER MORDECAI BICKEL 1924-1974, at 9 (1975) (available in Yale Law School Library).

152. J. ELY, *supra* note 1, at 72.

153. MORALITY OF CONSENT, *supra* note 5, at 3.

154. J. RAWLS, A THEORY OF JUSTICE (1971).

155. MORALITY OF CONSENT, *supra* note 5, at 3.

In the contractarian view, one assesses existing political arrangements from the standpoint of an imaginary situation (described by Locke and Rousseau as the "state of nature"¹⁵⁶ and by Rawls as the "original position"¹⁵⁷) that is asserted to be prior to the established order in a theoretical or conceptual sense. Individuals in the state of nature are assumed to have certain rights and to be motivated by certain interests; the arrangements such individuals would establish by free agreement constitute a yardstick or criterion by which the legitimacy of the existing order may be measured (but not vice versa). The state of nature is, of course, a philosophical abstraction; to reach it, we must literally think away the tangled web of institutions that comprise the "real society" in which we live, institutions whose origins lie in "the historical mists."¹⁵⁸ In the contractarian tradition, however, the abstractness of the state of nature is not regarded as a shortcoming or defect. Indeed, for those who subscribe to this view, it is the abstractness of the concept, its deliberate remoteness from the established order, which gives arguments based upon it their moral appeal.

The essence of the contractarian tradition, as Bickel conceived it, is an insistence, in ethical and political matters, on the priority of reason over fact. For a contractarian, the established order has no claim to our allegiance just because it happens to exist, even if it has endured for a considerable period of time and affords a workably decent system of government. To have legitimacy, existing arrangements must conform to principles that can be "deduced by pure reason,"¹⁵⁹ or, more precisely, that can be derived by rational deduction from the rudiments of human nature, the elementary facts about human beings that remain after we have abstracted away every specific trait and attachment that may be viewed as a social or historical accident.

From a contractarian perspective, the contingent features of existing institutions are to be regarded not with the wonder that Bickel thought appropriate when contemplating a complex, historically evolved system of government, but with suspicion. Only reason legitimates. Whatever, in the present order, cannot be rationally derived from the state of nature or original position lacks an ethical foundation, and may therefore be eliminated without moral qualms. By discrediting the unreasoning attachments men often have to the arrangements under which they live, contractarianism opens the way to revolutionary change and, beyond that, to perma-

156. J. LOCKE, *The Second Treatise of Government* §§ 7, 8 in *TWO TREATISES OF GOVERNMENT* (P. Laslett ed. 1960) (1st ed. London 1698); J. ROUSSEAU, *OF THE SOCIAL CONTRACT* Bk. I, ch. 6 (R. Crosby trans. 1978) (1st ed. n.p. 1762).

157. J. RAWLS, *supra* note 154, at 17-22.

158. *MORALITY OF CONSENT*, *supra* note 5, at 4.

159. *Id.*

ment revolution¹⁶⁰—the continual reconstruction of society's most basic features "in submission to the dictates of abstract theories."¹⁶¹

The revolutionary implications of the contractarian tradition thus derive ultimately from its insistence on the moral weightlessness of all political institutions that have not—or, more exactly, could not—be deliberately constructed in accordance with some master plan or program. "Ideas," according to Bickel, "are the inventions of men and are as arbitrary as their will,"¹⁶² and for the contractarian who believes that existing arrangements have legitimacy only insofar as they conform to some abstract, prepolitical scheme, the arrangements in question are likely to seem as easily manipulable as the "abstract, absolute ideas"¹⁶³ that constitute the sole basis for judging their moral worth.

The "Whig model," as Bickel calls it, starts from entirely different premises. Instead of judging existing institutions from the standpoint of the state of nature or, what amounts to the same thing, the standpoint of pure reason, it accepts the values embodied in these institutions, acknowledging their origin to be "mysterious"¹⁶⁴ and hence beyond the power of human beings to replicate or even fully understand. In the Whig view, "[t]he values of . . . society evolve, but as of any particular moment they are taken as given. Limits are set by culture, by time- and place-bound conditions, and within these limits the task of government informed by the present state of values is to make a peaceable, good, and improving society."¹⁶⁵ Here, "good" and "improving" are relative terms that must be understood against the background of an established social order. A society may, of course, evolve through a process of self-criticism, but on the Whig model the grounds for such criticism can come only from the society's own institutions. What makes self-criticism of this sort possible is the fact that a society's values always represent ideals as well as limits, so that their endorsement can never be equated simply with approval of the status quo. The Whig model does rule out, however, the possibility that any critical standard could ever be absolute or unconditional, for this would require that it have its foundation in reason alone, outside the limiting context of any actual society.

160. Unger celebrates permanent revolution as both a political and personal ideal. See R. UNGER, *PASSION: AN ESSAY ON PERSONALITY* 164 (1984) (arguing that established habits reflect "a failure to understand the tentative nature of any fixed version of an individual identity"); Unger, *supra* note 23, at 592 (urging establishment of an "institutional structure" that would be "self-revising, that would provide constant occasions to disrupt any fixed structure of power and coordination in social life").

161. *MORALITY OF CONSENT*, *supra* note 5, at 25.

162. *Id.* at 19.

163. *Id.*

164. *Id.* at 4.

165. *Id.*

Like the contractarian, the Whig believes that "to survive, be coherent and stable, and answer to men's wants, a civil society ha[s] to rest on a foundation of moral values."¹⁶⁶ Without such a foundation, without "visions of good and evil"¹⁶⁷ to sustain it, no political order can claim our allegiance or respect. Unlike the contractarian, however, the Whig looks for the values that sustain his society in its history and traditions, in the experience of an actual past, and not in some imaginary antecedent condition from which the contingencies of historical experience have all been carefully expunged.

The temptation to place the moral foundations of society in a pre-existing state of nature reflects the powerful wish to give one's favored scheme of values a precision and unconditional legitimacy that put it safely beyond the realm of political controversy. The contractarian seeks to establish the legitimacy of his principles *sub species aeternitatis*, to show that they have absolute validity and would be agreed to by all rational men (that is, all men motivated by reason alone, undisturbed by the distorting passions associated with their actual histories and social positions). If principles of such absolute validity could be established, anything might be done in their name or for their sake. In this way, according to Bickel, the "absolute, timeless"¹⁶⁸ principles toward which the contractarian aspires stimulate totalitarian ambitions and encourage an ideological view of politics. However generous and liberal the impulses that have given rise to the great ideological movements of the modern age, these have all shown a tendency to degenerate into totalitarian idealism, a tendency rooted in "their pretensions to universality, in their overconfident assaults on the variety and unruliness of the human condition, [and] in the intellectual and emotional imperialism of concepts like freedom, equality, even peace."¹⁶⁹

The Whig believes it is impossible to give any value an unconditional foundation, and he fears the consequences of attempting to do so. According to the Whig model, there can be no values apart from the conditional ones bequeathed to us by our history and political tradition, and like everything historical, these values are imprecise, inconsistent, and even partly unintelligible. Here, in the domain of values as the Whig conceives it, there are no absolutes, only commitments of different and shifting weight. The variety of human concerns and the endless novelty of political

166. *Id.* at 23.

167. *Id.* at 24.

168. *Id.* at 8.

169. *Id.* at 11. Varying accounts of the origins of modern totalitarianism, all stressing its absolutist character, may be found in H. ARENDT, *TOTALITARIANISM* (2d. ed. 1958); N. COHN, *THE PURSUIT OF THE MILLENNIUM: REVOLUTIONARY MILLENARIANS AND MYSTICAL ANARCHISTS OF THE MIDDLE AGES* (rev. ed. 1970); J. TALMON, *THE ORIGINS OF TOTALITARIAN DEMOCRACY* (1960).

life assure that no final, exhaustive accommodation among these conflicting commitments can ever be attained—except, perhaps, according to the dictates of some abstract theory which, however great its intellectual attractions, is bound to clash “with men’s needs and their natures, and with various unforeseeable contingencies.”¹⁷⁰

What the Whig values, above all else, is a workable accommodation of existing interests and ideals, one to which those affected are willing to give their consent even though the accommodation itself is theoretically indefensible. Without consent, stable government is impossible and without government, all other human goods are unattainable. The first responsibility of the politician, therefore, is to promote consent by balancing or adjusting the different factions of which his society is composed.

This does not mean that conflict can be eliminated nor, more importantly, that a politician can (or should) avoid taking sides in the moral controversies which the political process continually churns up. Conflict is unavoidable, and a responsible politician must often choose sides,¹⁷¹ defending his choice by appealing to the values he thinks controlling under the circumstances—a judgment that itself depends upon his own assessment of the relative weight to be assigned the conflicting norms and interests. But even so, a Whig politician will feel an overriding obligation to prevent the conflict from becoming too generalized or too deeply entrenched. While promoting his own views, he will seek means of accommodation and pursue a gradualist strategy of piecemeal reform rather than revolutionary reconstruction, in the hope that time will ease tensions and show the way to some as yet unthought-of resolution capable of securing the consent of all involved. Struggling to construct a more perfect moral vision out of the tangled materials of his tradition, while never losing sight of the need for consent, the Whig politician finds himself in the Lincolnian tension and, like the Justices of the Supreme Court, must learn to exploit the passive virtues of incrementalism and delay.

In a passage from Burke’s *Reflections on the Revolution in France*, which Bickel quotes with approval, the rights of man are said to exist “in balances between differences of good, in compromises sometimes between good and evil, and sometimes between evil and evil.”¹⁷² According to Burke, “[p]olitical reason is a computing principle: adding, subtracting, multiplying and dividing, morally and not metaphysically, or mathematically, true moral denominations.”¹⁷³ This is the prudential wisdom of the

170. MORALITY OF CONSENT, *supra* note 5, at 23.

171. See M. WEBER, *Politics as a Vocation*, in FROM MAX WEBER 95 (H. Gerth & C. Mills eds. 1946).

172. MORALITY OF CONSENT, *supra* note 5, at 23, quoting E. BURKE, *supra* note 138, at 153.

173. MORALITY OF CONSENT, *supra* note 5, at 23–24.

statesman or judge who has been immunized by a "mature skepticism"¹⁷⁴ from the temptations of metaphysical thinking, who is equipped with an eye trained (like those in Plato's cave)¹⁷⁵ to see details in the dark, and who possesses the patience to endure the world's stupidity while working to make it better. Against the prudentialism commended by his own Whig model of politics, Bickel set the tradition of political philosophy exemplified by Rousseau's *Social Contract*,¹⁷⁶ a form of abstract theorizing about law and politics motivated by the search "for reciprocity and symmetry and clarity of uncompromised rights and obligations, rationally ranged one next and against the other."¹⁷⁷ "Such thinking," Bickel maintained, "bodes ill for the endurance of free, flexible, responsive, and stable institutions and of a balance between order and liberty."¹⁷⁸

In the great debate between those who follow Rousseau (temperamentally as well as doctrinally), and those who follow in the tradition of Edmund Burke, Bickel placed the entire weight of his intellect with the Burkeans and in his final essays sought to vindicate, as forcefully as he was able, the conception of prudential reason that underlies Burke's Whiggish view of politics. I have attempted to show that Bickel's prudentialism informs his earlier work as well, and provides the common element linking his detailed theories of judicial review and democratic government to his more speculative observations regarding the two competing traditions of modern political thought. This concept of prudence gives Bickel's political philosophy its consistency and coherence; indeed, it justifies the claim that Bickel had a political philosophy and not merely a collection of views on different topics. Toward the end of his life, Bickel's prudentialism sharpened and became more self-conscious as he acquired a deeper understanding of the ancestry of his own ideas and a keener appreciation of their unfashionableness. But the ideas were there from the beginning, anchored in the continuities of temperament and disposition that undoubtedly precede all unity of thought and whose palpable presence in Bickel's work allows the reader even now to know something of the man himself.

IV. AN EMBARRASSED VIRTUE

Lawyers in the common law tradition have always regarded prudence in the way Bickel did, as a virtue of an especially important sort, indispensable to the practice of their craft in all its registers, from the counseling and representation of individual clients to the governance of states.

174. *Id.* at 4.

175. PLATO, *supra* note 101, at § 514a.

176. J. ROUSSEAU, *supra* note 156.

177. MORALITY OF CONSENT, *supra* note 5, at 53.

178. *Id.*

Until quite recently, this traditional view was so well-established that it required no defense, and those who have advocated a more rationalist view of politics have long considered the unreflective prudentialism of common law lawyers one of the principal obstacles to their programs of reform.

Three centuries ago, Thomas Hobbes expressed the rationalist's antipathy to the prudentialism of the English-speaking lawyer in an essay entitled *A Dialogue between a Philosopher and a Student of the Common Laws of England*.¹⁷⁹ The philosopher in Hobbes' *Dialogue* argues that law is a science whose comprehension requires only the methodical application of certain elementary principles intelligible to all men by virtue of what he calls their "natural reason."¹⁸⁰ The student with whom he is speaking disagrees, maintaining instead that the common law is an art whose mastery demands a form of practical wisdom not reducible to the scientific understanding championed by Hobbes' imaginary philosopher (and, of course, by Hobbes himself).¹⁸¹ The student in Hobbes' *Dialogue* speaks for the incremental pragmatism and seasoned know-how that practitioners of the common law have traditionally regarded as professional virtues, and in the celebration of these qualities Hobbes recognized, quite correctly, an intellectual spirit antithetical to his own. So deeply entrenched has this spirit remained in the habits of the profession and in the pedagogy of its schools that even twenty years ago few lawyers would have doubted that prudence is a virtue or felt more sympathy for Hobbes' philosopher than for the student whose views he despised and made appear ridiculous.

Today, however, everything seems changed. In the past twenty years, and with increasing rapidity in the last ten, the rationalist spirit that Bickel associated with the contractarian tradition has come to dominate academic legal discourse to an extent that Bickel himself only partially anticipated. This new rationalism can be seen everywhere. It is discernible in the now vast law and economics literature, which aspires (as Judge Posner once put it) to make the study of law as scientifically respectable

179. T. HOBBS, *A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND* (J. Cropsey ed. 1971) (1st ed. London 1681).

180. *Id.* at 55, 62.

181. *Id.* at 55. For Hobbes' own view, see T. HOBBS, *LEVIATHAN* 136 (M. Oakeshott ed. 1947) (1st ed. London 1651):

But howsoever, an argument from the practice of men, that have not sifted to the bottom, and with exact reason weighed the causes, and nature of commonwealths, and suffer daily those miseries, that proceed from the ignorance thereof, is invalid. For though in all places of the world, men should lay the foundation of their houses on the sand, it could not thence be inferred, that so it ought to be. The skill of making, and maintaining commonwealths, consisteth in certain rules, as doth arithmetic and geometry; not, as tennis-play, on practice only: which rules, neither poor men have the leisure, nor men that have had the leisure, have hitherto had the curiosity, or the method to find out.

as biology and astronomy;¹⁸² in the work of an important wing of the critical legal studies movement, whose main aim is to uncover the deep structural regularities (usually described in philosophical terms of the utmost generality) that are alleged to underlie the surface-confusion and indeterminacy of established legal doctrines;¹⁸³ and in the writings of liberal reformers like Bruce Ackerman¹⁸⁴ whose ambition is to give the administrative apparatus of the modern welfare state a more rigorously rationalist foundation, as regards both its moral legitimacy and operational procedures. Different as these intellectual movements are, each is imbued in significant measure with a Hobbesian distrust for the prudentialism of the common law tradition. Today, prudence is an embarrassed virtue in a discipline that has always been hospitable to it. It is as if a fifth column had arisen within the law, and surrendered control of it to the rationalist forces that have for so long been pressing from without.

How this could have come about is an immensely complicated question. My own view is that the rationalism that today dominates American legal studies has its roots in two related events: the realist attack on Langdell's notion of a doctrinal science of law,¹⁸⁵ and the post-realist effort to rehabilitate the idea of a legal science by devising methods for the rational analysis of legal issues, both factual and normative, that could themselves be made consistent with the iconoclastic premises of legal realism¹⁸⁶ (methods, it should be emphasized, which had to have their own foundations in disciplines other than the law—economics, for example, or philosophy). Whether these are in fact the causes of our current intellectual condition, it is indisputable that a rationalist spirit, often openly contemptuous of prudentialism and its claims, now dominates the legal academy, leaving oddly undefended a virtue whose value was for centuries assumed without question, and which has helped generations of lawyers maintain a sense of professional self-esteem.

Bickel's work has continuing importance because of its power to recall the prudentialist tradition, only recently displaced from the center of legal

182. Posner, *Volume One of the Journal of Legal Studies—An Afterword*, *supra* note 24, at 437.

183. See, e.g., M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977); Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 *YALE L.J.* 997 (1985); Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685 (1976); Unger, *supra* note 23.

184. See B. ACKERMAN, *supra* note 22.

185. See J. FRANK, *LAW AND THE MODERN MIND* 48-56, 118-47 (1930).

186. The methodological foundations for a post-realist descriptive science of law were first set out in two of Karl Llewellyn's early essays, *A Realistic Jurisprudence—The Next Step* and *Some Realism about Realism*, both reprinted in K. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* (1962). For an especially interesting and influential attempt to found a normative science of law on premises consistent with the critical views of the earlier realists, see Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L.J.* 203 (1943).

thought by a sweeping rationalism of the sort he thought inappropriate, and even dangerous, in law and politics. Bickel reminds us that there is, after all, a fundamental alternative to the varieties of rationalist argument that today seem to exhaust the available forms of legal theory. It is not enough, however, merely to be reminded that prudentialism is a conceivable view of law, one that in the past has enjoyed considerable popularity. We also want to know whether it is a defensible view, a view we should embrace and continue to support. Is it true, in fact, that prudence is a virtue in the practice of law (by which I mean the teaching and making of law as well as its practice in the more ordinary sense)? Or is it wrong, and perhaps even pernicious, to make such a claim? These are important questions that cannot be answered using only the resources that Bickel's work provides. Answering them requires a more philosophical account of prudentialism than the one Bickel himself presents, and may require, as well, some significant modification of his views.

I shall not attempt to give a full account of this sort here. What I propose to do, instead, is briefly describe four criticisms which any proponent of Bickelian prudentialism should anticipate, and suggest how I think they can be met. I hope my responses to these four objections will indicate, in a partial way, how a full account of prudentialism might be constructed, and help to make the view itself more credible.

To a prudentialist theory of law or politics it will first be objected that the theory's Whiggish celebration of existing institutions functions, in reality, as an apology for the status quo and the interests it protects, however corrupt or illegitimate these happen to be. A prudentialist, it will be said, simply prefers to keep things the way they are and chooses his political philosophy because it excuses inaction on the grounds that it is virtuous to do little, and more virtuous still to do nothing at all. It is true, of course, that prudentialism can be (and often has been) invoked in a self-interested way to justify resistance to change, especially in the direction of a more egalitarian distribution of privileges and resources. But there is nothing in the theory itself which requires that this be so.

A developed political institution is never just a collection of rules prescribing how those subject to it should behave. Any institution of even moderate complexity will also have an aspirational component—it will reflect certain ideals and be oriented toward the attainment of certain values that are never fully realized in practice. Moreover, the gap between an existing institution and its own ideals is bound to remain open so long as these ideals themselves are incompletely defined, and it is one of the marks of a complex institution or tradition that its aspirational goals can never be finally and exhaustively fixed.

Those who participate in the life of such an institution, or belong to

such a tradition, are therefore always involved in a controversy about the meaning of its ideals; indeed, in its aspirational dimension, the institution or tradition is just this controversy itself—a kind of endless debate about the proper construction to place on the partially inchoate commitments that the participants share in common.¹⁸⁷ So long as this debate continues, one can always argue that the currently prevailing interpretation of an institution's ideals is faulty or incomplete, and attempt to show that from the standpoint of a more adequate interpretation, certain of the institution's existing features must be judged wanting and in need of reform. This process of self-criticism gives institutions and traditions their life, and makes it possible for those involved to assert at once, and without contradiction, their allegiance to the established order and their conviction that it must be reformed.

To be sure, prudentialism not only asserts, in general terms, that legal and political controversies are contextually located within institutions and traditions capable of self-revision, but also attaches a positive value to change of a particular sort—gradual change carried out, as Bickel was fond of saying, at the retail level. It is to this preference for incremental change that the charge of apologism seems to me in fact to be directed. We are moved by this charge because there is, indeed, always some danger that a person's preference for incremental reform may dull his capacity to see, or appreciate fully, deficiencies in the existing order, especially where his own self-interest happens to be well served by whatever arrangements are presently in place. This is a danger that advocates of prudentialism must be aware of and guard against, and those who fail to do so forfeit their right to our respect. It would be wrong to conclude, however, that prudentialism is the only political philosophy that carries with it a risk of self-deception and wrong to reject the intellectual premise on which prudentialism rests because some who hold the view are moral failures in a personal sense.

The premise of prudentialism is that gradual reform within the framework of existing institutions is almost always preferable to more dramatic and discontinuous modes of change that seek to replace one entire framework with another. Institutions sometimes do become so corrupt, and work such injustice, that no morally tolerable alternative remains except their wholesale abolition. But revolutionary changes of this sort are not without their costs. Any new regime must depend, for a time, more on ideas than habits, and the malleability of ideas together with the perfectionist impulses they encourage make the early years of a revolutionary

187. See A. MACINTYRE, *AFTER VIRTUE* 222 (2d ed. 1984) ("A living tradition then is an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition.").

government an especially dangerous period, one in which despotisms flourish. Moreover, once this period passes, as it always must, complex institutions are bound to reemerge, and the many accidental processes that condition their growth assure that in their maturity these institutions will reflect only partially and in distorted form the ideas of the revolutionists who founded the new regime.

The risks of revolutionary change and the ambiguous legacy of most revolutionary programs justify the prudentialist's preference for incremental change. The prudentialist views revolution as an extraordinary remedy, to be employed only when all other correctives have failed, and even then not in a spirit of exuberance but with apprehensive concern. Revolutions are justified, but rarely so, and nothing is more destructive of political life than a too-frequent indulgence in them. Nearly as destructive, it should be added, is the tendency to examine ordinary political problems from the heady but unmoored perspective of those engaged in the extraordinary work of revolution. Against this, too, prudentialism cautions us by emphasizing the value of existing institutions and the virtue of gradual reform. To endorse such a view is not to embrace the status quo in a mindless and mechanical way, but only to insist on due recognition of the dangerous amplification that pure ideas give to human power.

A second objection to prudentialism emphasizes what some are likely to see as its failure to take account of the most striking characteristic of modern Western civilization—the increasing rationalization of all aspects of social life, including law and politics. The rationalization of modern society is a function of its “artifactual”¹⁸⁸ character. We tend, today, to view all important social institutions as deliberate human creations, as artifacts that we (or our predecessors) have constructed in accordance with a plan. To the extent that social institutions are in fact man-made, they are subject to our control in ways that would be impossible were they, instead, the products of some extra-human agency.¹⁸⁹ The more control we are able to exercise over the background institutions that circumscribe our lives, the more we are able to mold them in accordance with principles that have been deliberately thought out in advance and hence to ensure that their design satisfies the requirements of human reason.

Those responsible for the construction of our basic institutions, it has been argued, require a science of government which, in sharp contrast to the prudence of the statesman, relies heavily on a mathematizable theory

188. Unger, *supra* note 23, at 586.

189. See M. WEBER, *Science as a Vocation*, in FROM MAX WEBER, *supra* note 171, at 139 (“intellectualization and rationalization” of world means that “principally there are no mysterious incalculable forces that come into play, but rather that one can, in principle, master all things by calculation”).

of human behavior and abstract principles of moral argument.¹⁹⁰ Prudential wisdom, it might be claimed, has no value to the social architect or engineer; what he needs is not a nuanced appreciation of complexity or a tolerance for compromise, but an understanding of the laws that describe the broad regularities of human action and the ability to follow a simple blueprint without deviating from its lines. As wider areas of social life come under our control, the role of the social engineer grows in importance and the value of prudence arguably shrinks. At the end of this long process, it may be thought, prudence will have lost all its utility and ceased to be a virtue. For the pre-modern statesman, prudence undoubtedly had value; for his modern, more scientific counterpart, it has none. Given the irreversible rationalization of our entire culture, any contemporary appeal to prudence is, therefore, likely to seem hopelessly anachronistic.

The weak link in this argument is its implicit assumption that all problems of government, at whatever level, can eventually be reduced to problems of scientific administration requiring only technical expertise. It is unquestionably true that the basic structure of social institutions is today a matter of self-conscious concern to an extent unknown in earlier societies, and also true that the construction of whole institutions requires a kind of knowledge that statesmen in the past generally lacked and for which they had no need. But even if we were to agree that prudence plays no role whatsoever at what might be called the "foundational" level of political life (and this is itself a claim I would vigorously dispute), the suggestion that prudence can be entirely eliminated from politics and law assumes that the day-to-day administration of institutions is an activity indistinguishable, in principle, from their original foundation; an activity that may be performed simply by applying the same techniques in greater detail. This, I believe, is profoundly wrong. Even the most carefully designed institution, if it is of sufficient scale, will have complexities and internal inconsistencies that exceed the power of its own foundational principles to manage or resolve. As a result, any such institution will always require, at the point of its actual application to human affairs, a tolerance for compromise and the ability to work, by means of a practical wisdom irreducible to rules, toward greater coherence and overall good sense.

This is most obviously so in the case of the judge. However scientific the statutory scheme he is required to apply in a particular case, a judge needs something more than the knowledge of economics or philosophy on which the draftsmen of the statute themselves relied. A judge also requires

190. See B. ACKERMAN, *supra* note 22, at 1-5, 105-10.

prudence, and it is a mistake to believe that anything else is, or can be, an adequate substitute.

The same is true, I believe, of lawyers in general. Lawyers are, by professional training, experts in the handling of individual cases and not in the general design of institutions (though they may, of course, also have the social-scientific and philosophical competence required for this latter task). Even when a lawyer participates in the process of institutional design, acting, for example, as legal counsel to a committee of legislative draftsmen, to the extent that he does so *qua* lawyer and not *qua* economist or statistician, it is his job to anticipate the frictions that particular cases are likely to create and to suggest strategies for their reduction. To do his job well, the lawyer requires something his more scientifically-minded colleagues can do without—a vivid practical imagination and the wisdom to deal with the concrete problems he conjures up. The practicing lawyer representing a client needs the same skills. So long as lawyers have clients, and give counsel, and become judges who must decide cases, they will continue to require prudence in their work. No amount of rationalization can change this fact. Although lawyers today have an additional responsibility to familiarize themselves with the various bodies of scientific knowledge on which the design of legal institutions increasingly depends, knowledge of this latter sort can never be a substitute for prudence or become the basis of the lawyer's special art.

A third criticism of prudentialism is that it fails to take rights seriously enough.¹⁹¹ Rights, as Ronald Dworkin has said, are “trumps”: they have a special status and cannot be overridden merely for reasons of social policy.¹⁹² Moreover, if a person *has* a right, it can never be legitimate to postpone its recognition or enforcement just because others in the society object. Rights are absolutes, and some will say that a prudentialism which would delay the full protection of a right only to avoid unpleasant social conflict must be rejected.

There are several related responses to this objection. First, rights are absolutes only in the sense that they occupy an especially important position in a larger system of commitments, much like the so-called “analytic” truths of natural science.¹⁹³ Rights do not have a different logical status than other sorts of values, nor do we discover them by some special intellectual method (Hobbes' “natural reason,” for example) that operates independently of our knowledge of the moral and legal tradition to which

191. See R. DWORKIN, *supra* note 60, at x–xi, 146–47.

192. *Id.* at xi.

193. See W. QUINE, *Two Dogmas of Empiricism*, in *FROM A LOGICAL POINT OF VIEW* 20 (2d. ed. 1961) (arguing against cleavage between analytic and synthetic truths on which “[m]odern empiricism” allegedly rests).

we belong. We learn what rights people have by familiarizing ourselves with that tradition and its own internal hierarchy of values. A right is an interest that stands at, or near, the top of this hierarchy, and the assertion that it is absolute is just a shorthand way of saying that its violation, in a particular case, would unsettle too much of the larger normative system of which it is a part. Putting the matter this way, however, underscores the continuity between rights and other sorts of interests (including social policies) and opens up the possibility that there may, in fact, occasionally be systemic reasons for the suspension or subordination of a right.

Second, even if we accept at face value the claim that rights are absolutes, rights do come into conflict with one another, and it is not always possible to resolve conflicts of this sort by appeal to a higher-order rule or general principle. When this happens, it is necessary to balance the conflicting rights and reach a suitable compromise between them. The fact that such a compromise cannot be justified on grounds of principle does not mean, however, that it must be wholly arbitrary. What is required here is prudential judgment of just the sort that Bickel thought indispensable in constitutional adjudication. Moreover, in cases of serious conflict between competing rights, the wisest course often may be to postpone decision and to search, instead, for ways of reducing the conflict by means of incremental measures, none of which can be justified on the grounds that such measures are necessary to vindicate one or another of the rights in question. In cases of this sort, only a belief that there must always be an immediately obvious and principled solution to every conflict between competing rights could lead one to deny the value of prudential delay.

Third, even when a particular right is held to be an absolute and is not in conflict with any other right, it still does not follow that its full and immediate enforcement is appropriate in all circumstances. If unconditional enforcement would be worse for the beneficiaries of the right than a temporizing strategy that vindicates their entitlement slowly and by degrees, there can be no justification, other than sheer intellectual consistency, for immediate and uncompromising enforcement of the right (especially since a right can be acknowledged without being fully enforced).¹⁹⁴

194. See Note, *Judicial Right Declaration and Entrenched Discrimination*, 94 YALE L.J. 1741 (1985) (bifurcation of right and remedy can serve long-term constitutional interests of minority); see also Fiss, *supra* note 60, at 52 ("A right . . . can exist without a remedy The right would then exist as a standard of criticism, a standard for evaluating present social practices."); Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 673 (1983) ("Making explicit both the right and any remedial shortcoming is the best way to preserve the right. . . . By candidly acknowledging that they are providing something less than a full remedy, courts leave the unfulfilled right as a beacon."). But see Fiss, *supra*, at 52 ("A constitutional value such as equality derives its meaning from both spheres, declaration and actualization, and it is this tight connection between meaning and remedy, not just tradition, that require a unity of functions.") (footnote omitted); Gewirtz, *supra*, at 679 ("If legitimacy is undercut when judges behave adaptively and compromise with realities, then this behavior

To decide when such a temporizing strategy is in fact appropriate, one requires more than an understanding of the right itself, one also requires a prudential appreciation of the forces that are likely both to aid and impede its implementation, a worldly wisdom which no theory of rights alone can yield.

Finally, those who emphasize the absolute character of rights often tend to devalue other human interests, as if these could have worth only in case they were themselves made into rights or supported by rights. Persons do, however, have many attachments and associations that do not rise to the level of rights but are nevertheless of value to them, the attachments of friendship, for example, and professional collaboration. Prudentialism gives weight to these local ties in a way that rights-based theories have difficulty doing. To view a person as a bundle of universalistic rights is to treat him as a cipher; prudentialism avoids this mistake, without denying that certain rights, in certain situations, do indeed operate as trumps that define the boundaries of what may permissibly be done to those that hold them.

A fourth, and final, objection to prudentialism raises a metaphysical issue. A philosophy of prudence, it may be objected, is a contradiction in terms. Philosophy is a discipline that seeks first principles, clear and distinct truths, and any theory, like prudentialism, which celebrates qualities of mind and character that not only resist principled analysis but actually reflect a skeptical mistrust of philosophical argument, cannot itself be a philosophy. No one would dispute that prudentialism represents a distinctive point of view, but some might deny that it rises to the level of a genuine political philosophy, like social contract theory or the Hegelian analysis of the state.

Now there is certainly nothing inherently contradictory in a philosophy of or about something that is itself non-philosophical—a philosophy of art, for example, or religion. For a philosophy of this sort to be illuminating, for it to instruct us about its subject matter, it must, of course, speak in terms different from, and more general than, the ones employed by those engaged in the activity under investigation. This does not mean, however, that such a philosophy need strive for and attain maximum generality in order to succeed. It is the sign of an educated man, Aristotle observed, not to demand more rigor in a discipline than the discipline is capable of yielding.¹⁹⁵ In the philosophical description of certain activities, like adjudication and statecraft, it may be impossible to do without concepts like prudence and common sense that have a necessary residual

undercuts legitimacy at whatever 'stage' it occurs. The problem cannot be solved by the bifurcation of rights and remedies.") (footnote omitted).

195. ARISTOTLE, *supra* note 75, § 1094b at 5.

opacity. Indeed, the best (that is, most illuminating) account of such activities may be one that relies heavily on concepts of this sort, and any competing philosophical theory that strives for greater rigor by employing concepts more fully transparent to rational analysis may lose more descriptive power than it gains.

To be sure, prudentialism is not merely a description of certain non-philosophical activities, but also an endorsement of the attitudes which those engaged in these activities display, and it is this that may make a philosophy of prudence appear self-contradictory. But again, the appearance of self-contradiction is illusory. It is perfectly legitimate to argue, on philosophical grounds, that there are occasions when it is best to proceed non-philosophically, relying instead on habit and know-how or, as certain utilitarians maintain, on a convenient rule of thumb.¹⁹⁶ Even if one believes that philosophy enjoys a logically privileged position vis-a-vis the pragmatic routines of everyday life (because the former provides a vantage point from which the latter may be understood, but not vice versa), it does not follow that all of life should be conducted in the way we conduct a philosophical inquiry. This was Plato's mistake, and one for which he was rightly criticized by Aristotle.¹⁹⁷ Prudentialism is a self-limiting philosophy in the sense that it recognizes the boundaries of philosophical argument and offers reasons for respecting them. Critics may find in such a philosophy much to disagree with but not, I believe, a contradiction.

Even if they are persuaded that the idea of a philosophy of prudence is not in itself absurd, many will still doubt whether anything of philosophical significance can be said about a capacity that is at once so ordinary and ineffable and seemingly resistant to analysis. The only way to dispell such doubts is to provide a broader and more positive account of prudentialism than I have given here. How might an account of this sort begin? One way to start would be by examining more closely the peculiar nature of prudence itself. In my interpretation of Bickel, I found it necessary to emphasize, at several points, that prudence is a virtue which combines both intellectual and temperamental qualities. It is, I think, just this conjunction of intellect and character that distinguishes prudence from many other virtues, such as courage and temperance, and also from the more purely theoretical capacities employed in science and philosophy. But how this conjunction is achieved, indeed, how it is possible at all, are questions I have not touched on here. These are the questions with which any really adequate philosophy of prudence must begin. My hope is that those who have followed my account of Bickel's political philosophy and who sympa-

196. Smart, *An Outline of a System of Utilitarian Ethics* in J. SMART & B. WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 3, 42-46 (1973).

197. ARISTOTLE, *POLITICS* § 1264a.

thize with my effort to reinvigorate his prudentialist views, will feel, as I do, that they are questions well worth asking.