Essay

Alex Bickel's Law School and Ours

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One generation succeeds another almost without acknowledgment. Or so it seems in universities where students, who come and go recurrently, are always the same age and teachers scarcely notice that they alone are growing older.

This inclination to ignore the passage of time is especially strong in law schools and legal institutions generally. When my first-year students begin our Constitutional Law course with *Marbury v. Madison*,[1] as when the Supreme Court cites the authority of *Marbury*,[2] we all speak of the decision as vital, informative, and binding as if it had been decided only yesterday. And when, in the next breath, we criticize *Marbury*, identify its begged questions, and unmask its pretensions—the delight of every first-year Con. Law course—we are reciting a favorite folktale and entering into a great tradition. Thus Alex Bickel began his most important book, *The Least Dangerous Branch*, with *Marbury* on the first page followed on the second page by the assertion that "the opinion is very vulnerable" and citations to a continuous lineage of skeptical readers from "the late Judge Learned Hand," to Thomas Reed Powell, to Oliver Wendell Holmes, to James Bradley Thayer.[3]

This impulse to stress continuities between generations is the dominant perspective in constitutional law today. The contemporary dispute between the

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1. 5 U.S. (1 Cranch) 137 (1803).

2. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 703 (1974); Cooper v. Aaron, 358 U.S. 1, 18 (1958).

3. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 1–2 (Yale Univ. Press 1986) (1962).

originalists (such as Judge Bork[4] and Justice Scalia[5]) and the interpreters (such as Ronald Dworkin[6] and Justice Brennan[7]) grows from the agreed premise of the importance and feasibility of linkages from one generation to the next. These disputants differ only in the techniques they recommend for accomplishing these linkages—strict loyalty to "original understanding" for Bork[8] versus the collaborative enterprise of writing a continuous "chain novel" in Dworkin's evocative image.[9] Notwithstanding these differences, the disputants share the same underlying vision of the generational connections that Alex Bickel invoked on the opening pages of his book: that the same cup passes from one generation to the next with scarcely a drop spilled.

But it is not true. Premature death disrupts this comforting cycle—as did Alex's death in 1974 just before his fiftieth birthday. And, even when our predecessors live their full biblical allotment, there are still sharp breaks from one generation to the next. It is easy to overlook these disjunctions when we discuss constitutional law and all of us—whether student or teacher, elderly judge or younger litigant—readily imagine that we are speaking to one another in the same terms because we cite the same cases and, indeed, meet in the same place at the same time. This casual deduction from the observed fact of conversational or locational contemporaneity is, however, misleading. The truth is that, although we come together in a common place, we are speaking to one another from different worlds, we are talking across generational lines.

The best illustration I can draw of this difference and its imperceptibility is from the occasion when I gave the lecture on which this Essay is based, marking my inauguration as the Yale Law School's third Alexander M. Bickel Professor of Law. I spoke in Room 127 to an audience of students, faculty, and other friends. A portrait of Alex Bickel dominates one wall in Room 127—a marvelous likeness that evokes his energy and dramatic presence. There was, however, another way that Alex was in that room, a way that was invisible to everyone, but very palpable to me.

When I was Alex's student, as a member of the Yale Law School Class of 1964, one of my courses with him met in Room 127. In those days, however, the room had a different configuration. It sloped from north to south and the podium was at the southern end. Room 127 was redesigned in the mid-1970's and it now inclines from east to west, with the podium at the western end. Thus, in one sense, the old Room 127 is gone, obliterated. But the

4. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA (1990).
5. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).
6. *See* RONALD DWORKIN, LAW'S EMPIRE (1986).
7. *See* William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313 (1986).
8. BORK, *supra* note 4, at 143.
9. DWORKIN, *supra* note 6, at 228.

subterranean structure of that old room still exists and exerts some influence on all of us.

The influence on me is obvious because the old room and Alex's presence as my teacher are still vividly in my mind. Although I can relate my memories to those who never knew Alex, or who never knew him as a teacher in the old Room 127, I cannot adequately convey the vibrancy and immediacy that he still has for me. Even when I try to conjure his presence, my listeners see only me standing at the western podium talking about Alex Bickel; I, however, see Alex standing at the southern podium talking to me. My listeners cannot fully comprehend me, nor can I comprehend myself, without understanding that Alex is still speaking to me as I am speaking to them, and that we are both talking across generations.

The metaphor can be extended from this spatial expression in Room 127 to the intellectual structure of constitutional law theory. We all know the great progression of constitutional law landmarks in this century: from *Lochner*[10] and its companion cases,[11] where the Supreme Court regularly invoked a substantive ideal of "liberty" to invalidate state and federal economic restrictions; to the 1940's, when the Court, in homage to the New Deal, overruled the *Lochner* line and bowed to majoritarian enactments;[12] to *Brown v. Board of Education*,[13] where the Court withdrew its prior deference to Southern race segregation laws (embodied at the beginning of the *Lochner* era in *Plessy v. Ferguson*[14]); to *Roe v. Wade*,[15] where the Court invoked a substantive ideal of "privacy" to invalidate state abortion restrictions. It is possible to draw a consistent and logical order from this series of Court decisions to find a common pattern that seamlessly joins one generation to the next. But this harmonizing enterprise—the conventional effort of constitutional lawyering—does not give an adequate account of the inevitable force of generational differences in perspective. It is equally possible in retracing this series of landmark constitutional decisions to claim, for example, that *Roe* is fundamentally indistinguishable from *Lochner*, that both rulings were impositions of the Justices' subjective values masquerading as constitutional verities—"liberty" in *Lochner*, "privacy" in *Roe*—and that if the Court was correct in overruling *Lochner*, then it must also overrule *Roe*. This is a familiar

10. Lochner v. New York, 198 U.S. 45 (1905).

11. The Court elaborated the *Lochner* vision in cases such as Allgeyer v. Louisiana, 165 U.S. 578 (1897); Adair v. United States, 208 U.S. 161 (1908); Coppage v. Kansas, 236 U.S. 1 (1915); Adkins v. Children's Hosp., 261 U.S. 525 (1923).

12. The Court's reversal of the *Lochner* line unfolded in Phelps Dodge Corp. v. NRLB, 313 U.S. 177 (1941); Olsen v. Nebraska *ex rel.* Western Reference & Bond Ass'n, 313 U.S. 236 (1941); Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949).

13. 347 U.S. 483 (1954).

14. 163 U.S. 537 (1896).

15. 410 U.S. 113 (1973).

claim today, and has recently attracted the votes of four Justices.[16] It is also possible to argue that the Supreme Court's decision in *Brown* is fundamentally indistinguishable from *Lochner* and that *Brown* therefore was wrongly decided—a position, now virtually eclipsed, that was taken in the 1950's not only by Southern white supremacists but by widely respected figures.[17]

I do not intend to resolve these claims. My goal is not to find consistency among the progression of these cases or in the succession from one generation of constitutional lawyers to the next. Nor is it my goal to establish some hierarchy of authority, to give preemptive force to one decision or to one generation's perspective over the others. I want instead to describe and to understand how legal reasoning that is widely persuasive in one era becomes less persuasive in another. I want to see what one generation can offer the next if each of us—elders and youngsters, teachers and students—adequately acknowledges that we speak to one another from different rooms, even though we appear to be in the same place at the same time.

Alex Bickel is an excellent exemplar for this exploration. Alex's distinctive vision framed the terms of debate in constitutional jurisprudence in the 1960's and beyond. His name is known by every student of constitutional law today. But as much as he is recognized, his ideas no longer have the same powerfully shaping impact on constitutional law debates that they had twenty-five years ago. The internal, logical coherence of his ideas has not changed. But the definition of what counts as a persuasive legal reason has changed from that time to this—not because the precedential force of one or another judicial decision has waned or been overruled, but because the underlying conception of the very nature of judicial authority has changed.

The core of Bickel's conception was expressed in a passage from his last completed manuscript, *The Morality of Consent*, which was published posthumously in 1975. In a chapter of the book specifically addressing judicial decision making, Alex made this observation:

> [T]he general good is achieved by pragmatic trial and error—having regard to principle, but not dogmatically bound to it in action—which is the genius of democratic institutions. . . . A Court sensitive to [this proposition] tends to attack problems at retail, in the smallest possible compass, illuminating ultimate principles in the glare of its headlights, as it were, but seldom speeding ahead to seize such principles and to

16. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2855 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (joined by White, Scalia, and Thomas, JJ.). If the Senate had confirmed Robert Bork, Alex's colleague at Yale (and the first occupant of the Bickel chair), there would almost certainly have been a fifth vote on the Court two years ago to overrule *Roe*. *See* BORK, *supra* note 4, at 116 ("*Roe*, as the greatest example and symbol of the judicial usurpation of democratic prerogatives in this century, should be overturned.").

17. *See* LEARNED HAND, THE BILL OF RIGHTS 54–55 (1958); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33–34 (1959).

> deploy them for the definitive, authoritative resolution of large social and political issues.[18]

Bickel wrote this passage less than a year after the Supreme Court had decided *Roe v. Wade*—a decision that clearly transgressed Bickel's injunction by deploying an ultimate principle, "privacy" or "freedom of choice," in order to resolve the abortion issue definitively, authoritatively. Bickel, of course, was critical of *Roe* for this reason; but in the course of his criticism, almost as an aside, he stated that "[i]t is astonishing that only two [Justices (White and Rehnquist)] dissented from the Court's decision."[19] Twenty years later, in retrospect, we can see that *Roe* was at the edge of a generational shift. Bickel's astonishment was an early indication of this shift.

We can most clearly see this shift in the style of legal reasoning—in the underlying "feel" for what counts as a persuasive legal reason—by considering the way that contemporary supporters and opponents of *Roe* have approached the Supreme Court's 1965 decision in *Griswold v. Connecticut*[20] and the very different treatment of *Griswold* that would follow from Bickel's conception of judicial authority. *Griswold* struck down an 1879 Connecticut law forbidding the use of contraceptives for birth-control purposes by anyone, including married couples. Current supporters of *Roe* make a powerful argument that the "right to privacy" principle enunciated in *Griswold* could readily be generalized to extend to freely available abortion. Contemporary opponents of *Roe* do not dispute the logic of this argument; in fact, they embrace it but turn it upside down, as it were, to make the opposite generalized argument that *Griswold* itself was wrongly decided because there was no adequate textual basis for finding a "right to privacy" in the Constitution.[21]

But here is another reading, a Bickelian reading, of *Griswold*. In 1965, when the Supreme Court considered the case, the Connecticut statute was unique in the entire United States.[22] A few other states restricted the sale or distribution of contraceptives, but no other state directly provided criminal penalties for the *use* of contraceptives, whether by married couples or anyone. Moreover, the anti-use statute was notoriously unenforced in Connecticut itself and, in fact, was virtually impossible to enforce because of the private character of the actions.[23] Anti-abortion statutes, on the other hand, presented radically different circumstances in 1973 when the Court considered *Roe*. At that time abortions were criminally prohibited (with varying degrees of

18. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 105–06 (1975).

19. *Id.* at 28.

20. 381 U.S. 479 (1965).

21. *See, e.g.*, BORK, *supra* note 4, at 98–99 ("The Connecticut statute was not invalid under any provision of the Bill of Rights, no matter how extended. . . . *Griswold* [was] an assumption of judicial power unrelated to the Constitution . . . .").

22. *See* Poe v. Ullman, 367 U.S. 497, 554–55 (1961) (Harlan, J., dissenting).

23. *See Griswold*, 381 U.S. at 505–06 (White, J., concurring).

stringency) in forty-six of the fifty states,[24] and because most abortions involve the participation of third-party professionals who are sensitive to legal regulation, enforcement of anti-abortion statutes was much more effective than the enforcement of Connecticut's anticontraceptive law. Thus, as a practical matter, judicial action striking down anti-abortion laws would have a vastly more extensive reach than invalidation of the unique and virtually unenforced Connecticut anticontraceptive law.

But so what? Is this a difference with any legal significance? From Bickel's perspective, the difference in scale between the two cases would have relevance. The special circumstances and limited reach of the Connecticut statute gave the Court a welcome opportunity to address a larger problem—state interventions in matters of intimate private life, the Orwellian specter of all-intrusive Big Brother. But from Bickel's perspective, the Court could have addressed this problem "at retail, in the smallest possible compass," without instantly binding everyone to a single-minded generalized principle. From Bickel's perspective, *Griswold* could be justified as a judicial intervention precisely because of its relatively contained scope; it therefore could not serve as an ideological way station for the much broader judicial intervention of *Roe*.[25] From Bickel's perspective, both the contemporary opponents and supporters of *Roe* are wrong because neither group understands how we could have *Griswold* without having *Roe*.

Today, however, this differentiation between *Griswold* and *Roe* has much less plausibility and carries much less weight than it did thirty years ago when Alex Bickel was my teacher. Since the early 1960's, a fundamental shift in the dominant style of legal reasoning has occurred: Bickel's pragmatics, his aversion to high abstraction, has been eclipsed by the generalizing spirit of *Roe v. Wade*. In effect, *Roe* has now become the contemporary paradigmatic constitutional law decision. Not *Roe*'s substance, not its idea of an expansive "right to privacy," but rather *Roe*'s underlying conception of judicial authority guides contemporary constitutional lawyers whether they are supporters or opponents of *Roe*'s substantive doctrine.

Roe's supporters obviously reject Bickel's jurisprudence in their approbation of the Court's sweeping, definitive resolution of the abortion dispute. *Roe*'s supporters maintain that the "right to privacy" is sufficiently implicit in our constitutional tradition and that the logical implications of that principle regarding free choice are sufficiently clear to justify a broad-stroke

24. *See* ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 347–48 (1992).

25. Thus viewed, a state restriction on public distribution of contraceptives appears different from a law forbidding their intimate use; on its way to *Roe*, however, the Supreme Court did not see the difference. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).

judicial conclusion of the abortion debate.[26] *Roe*'s critics claim that the abortion issue is not properly subject to judicial authority because the Constitution does not explicitly endorse a "right to privacy" or "freedom of choice" or any other generalized principle that unambiguously provides resolution of the abortion dispute.[27] In this assertion, *Roe*'s critics also reject Bickel's jurisprudence. The disagreement among critics and supporters of *Roe* is about whether judges must have explicit or implicit bases in the constitutional document to justify their actions. But both the opponents and the supporters of *Roe* share the same conception of the nature of judicial authority—that the correct role of judges is to impose definitive, authoritative resolution of disputes properly brought before them. The most passionate contemporary opponents and supporters of *Roe* thus have much more in common with each other than any of them has with Alex Bickel.

It is in this sense that *Roe v. Wade* has become the contemporary paradigmatic exercise of judicial authority. And in this sense both the supporters and opponents of *Roe* endorse the same conception of judicial authority that guided the Supreme Court in *Lochner*: that the judiciary acts properly when, and only when, it can invoke abstract principles of sufficient generality and logical force to impose definitive resolution on social disputes. In this *Roe-Lochner* conception, there is no independent value in judicial incrementalism.

The mindset underlying this view of judicial authority is vividly illustrated in a 1936 Supreme Court opinion by Justice George Sutherland. In *Carter v. Carter Coal Co.*,[28] the Supreme Court struck down New Deal regulatory legislation; in holding that coal mining was not "interstate commerce" and thus not within Congress' delegated powers, Sutherland wrote:

> If the production by one man of a single ton of coal . . . affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the number of men employed, or adding to the expense or complexities of the business, or by all combined. . . . [T]he matter of degree has no bearing upon the question here . . . .
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> Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is *greatly* affected thereby. But . . . the conclusive answer is that the evils are all local evils over

26. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2846–47 (1992) (Blackmun, J., concurring in the judgment in part, concurring in part, and dissenting in part). *See generally* RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1993).

27. *See Casey*, 112 S. Ct. at 2874–76 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (joined by Rehnquist, C.J., and White and Thomas, JJ.); BORK, *supra* note 4, at 113–16.

28. 298 U.S. 238 (1936).

> which the federal government has no legislative control. . . . An increase in the greatness of the effect adds to its importance. It does not alter its character.[29]

This 1936 decision was, as it turned out, the last gasp of *Lochner*-ism on the Supreme Court. With the country still in the grip of the Great Depression, and the consequent urgency of the need for national action seemingly apparent, the Court reversed course the following year to uphold the National Labor Relations Act.[30] At first glance, this reversal seemed to signify only that the Court would now consider scale and complexity in determining the constitutional validity of federal regulatory legislation. But in the next five years, it became clear that a more radical critique of judicial authority had taken hold in the Court.[31] By 1952, the Court could characterize its new jurisprudence for both federal and state regulatory authority as mandating virtually complete deference by the judiciary to majoritarian elected institutions.[32]

This anti-*Lochner* proposition was, however, much more than a prescription for judicial deference; it was an attitude toward all exercise of governmental authority. At its heart, the anti-*Lochner* proposition that had become dominant by 1952 was based on a conviction that abstract principles had very little relevance to the proper functioning of government. The central political issue of the preceding seventy-five years had been the struggle between labor and capital regarding the proper distribution of economic resources. The anti-*Lochner* proposition signified that abstract formulations such as "liberty" versus "equality" or an individual's "private property rights" versus the nation's "general welfare" were not reliable guides for addressing this struggle. The proper goal of governance institutions in responding to economic and social conflict generally was not, from the anti-*Lochner* perspective, to identify the true principle in the welter of conflicting claims and to guarantee that this truth emerged victorious. The proper goal was, instead, for governance institutions to foster mutual accommodation among conflicting parties. From the anti-*Lochner* perspective, governance institutions should avoid any definitive resolutions of the competing abstract principles that each side might invoke, and instead should identify the incremental adjustments, the ideologically inconsistent muddle that might serve as a tolerable middle ground so that each party could walk away from the dispute as neither winner nor loser.

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29. *Id.* at 308–09.

30. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

31. *See* cases cited *supra* note 12.

32. *See, e.g.*, Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 425 (1952) ("[I]f our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision.").

A clear implication for judicial authority appears to follow from this normative ideal for governance. If, as Alex Bickel put it in his last completed manuscript, "[t]he business of politics is not with theory and ideology but with accommodation,"[33] then it is difficult to see any useful role for judicial review of the substantive terms in the majoritarian resolution of any dispute. To the contrary, judicial review based on abstract constitutional principle casts social disputes into win/lose, zero-sum terms, which—from this perspective—only inflames conflict and obstructs processes of mutual accommodation.

But if this was the clear implication of the anti-*Lochner* perspective for judicial authority, how then is it possible to explain the Supreme Court's decision in *Brown v. Board of Education*?[34] From the dominant jurisprudential perspective of today, *Brown* appears to be a judicial assertion of high abstract principle, a triumphalist proclamation of equality to overturn a morally evil regime of racial segregation. This is a plausible reading of *Brown*—but it was not the Supreme Court's understanding of *Brown* in the 1950's, nor was it Alex Bickel's understanding. *Brown* was the most ambitious deployment of judicial authority in our history, but the Court that decided *Brown* was guided by the anti-*Lochner* proposition, by a deep mistrust of abstract principle, and by an embrace of incremental accommodationism.

In the 1940's and 1950's, the claims of aggrieved black litigants were not heard, nor were they fundamentally framed, in terms of abstract principle. The claims were most widely understood in an egalitarian spirit as a demand that black people be treated not as pariahs, not as permanent outcasts, but like everyone else in American society. And in the dominant accommodationist imagery of the day, everyone else was treated as a recognized participant entitled to bargain in public forums for a mutually agreed share of public and private resources. But this kind of egalitarianism was not conceived—at least in the popular, and one might say naive, understanding of the 1940's and 1950's—as an abstract ideological principle. In those days ideological abstractions were viewed as dividing people into artificial oppositions—into racial opposition (such as the Nazis had imposed); ethnic or nationalist oppositions (such as had convulsed Europe in the two World Wars); or economic class oppositions as between labor and capital (such as had produced revolution in Czarist Russia and that, in the early 1930's, appeared to portend class warfare in this country).

But America was different from Nazi Germany and Bolshevik Russia. Our difference, as it appeared in the 1940's and 1950's, was not that we had a competing ideology; our difference was that our nation was not divided by

33. BICKEL, THE MORALITY OF CONSENT, *supra* note 18, at 19.
34. 347 U.S. 483 (1954).

ideology.[35] We were predominantly inclined to view egalitarianism as the *absence* of ideology, a kind of natural human state where people were fundamentally alike—notwithstanding the genetic accidents of skin pigmentation or the cultural accidents of different ethnic, religious, or economic class affiliations. There were disagreements and ideological differences among Americans, but none that equal citizens could not peaceably negotiate. Egalitarianism in this sense was not a principle, it was more like a "fact of life," a perspective that would naturally arise among people if they freed themselves from ideology, from intellectual prejudgments, and from "prejudices" that obscured their otherwise open-minded, accommodationist views of one another.

Except, of course, in the South, which was still in the grip of the racist ideology of the defeated Confederacy, and where artificial distinctions between blacks and whites persisted in the publicly imposed forms of race segregation. White Southern racism was un-American not because it violated the equality principle, but because—unlike equality—racism *was* a principle. And like all abstract, nonnegotiable principles, racism stood in the way of peaceful, mutually respectful, nonideologically driven, nonprejudicial human relations.[36]

I put such stress on this difference—the difference between egalitarianism as a principle, and egalitarianism as the absence, the transcendence, the mooting of principle—because this difference must be grasped in order to understand the reasoning that led the Supreme Court to *Brown v. Board of Education*. Without a firm grasp on this difference, it is impossible to comprehend how the same Justices who had overruled *Lochner*—who had proclaimed in effect that they were rejecting the regime of "rule by judiciary"—could take on the transformation of Southern social relations with no explicit authorization in the text of the Constitution itself.[37] But with an understanding of the anti-*Lochner* proposition as these Justices themselves saw it—as removing artificial, ideologically driven obstacles to freely conducted, accommodationist bargaining between social disputants—then the correspondence between anti-*Lochner* and *Brown* becomes clear.

To be sure, the obstacle that the Justices removed in overruling *Lochner* was the Court's own imposition of the ideology of "individual liberty" to override accommodationist bargaining, whereas in *Brown*, the obstacle to such bargaining between whites and aggrieved Southern blacks was legislatively rather than judicially imposed. But even on this score, the Justices who decided *Brown* were acutely aware that fifty years earlier the Supreme Court's decision

35. *See* BURT, *supra* note 24, at 26–27 (discussing LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (1955)).

36. *See id.* at 272–76 (discussing GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 3–5 (1944)).

37. *See id.* at 11–13; Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58–59 (1955).

in *Plessy v. Ferguson*[38] had explicitly endorsed Southern racism, and that *Plessy* still stood as a significant judge-made impediment to the eradication of racism. In an important sense, *Brown* did little more than erase *Plessy* in the same way that these same Justices had overruled *Lochner*.

Furthermore, without grasping the fundamental similarity that the Justices in those days saw between anti-*Lochner* and *Brown*, it is impossible to understand how *Brown I*, invalidating race segregation laws, could be followed a year later by *Brown II*,[39] specifying that the implementation of its ruling should proceed on an indeterminate timetable presided over by white Southern district court judges. The extreme modesty of *Brown II* was in fact a logical extension of the way in which *Brown I* itself was an application of the anti-*Lochner* proposition.

In 1954 the Justices came only haltingly to the logic of the anti-*Lochner* position as they agonized about whether they were justified in overruling *Plessy* and invalidating Southern race segregation laws.[40] But their initial hesitancy arose because in 1954 they had still not wholly freed themselves from the underlying assumption about judicial authority in *Lochner* itself—the assumption, as Alex Bickel disparagingly characterized it, that the proper role of the judiciary was to impose "definitive, authoritative resolution of large social and political issues."[41] The Justices' conclusion in 1955, in *Brown II*, that it was appropriate to differentiate abstract declarations of constitutional principle from the pragmatic, incremental, accommodationist application of these principles marked their definitive break with the *Lochner* assumptions about the nature of judicial authority. *Brown II* was the final step in overruling *Lochner*.

For the generation that decided *Brown*, the anti-*Lochner* proposition was the ruling paradigm; *Brown* was jurisprudentially subordinate to it. Alex Bickel saw this with greater acuity than any other constitutional lawyer of his time. In *The Least Dangerous Branch*, he praised the conjunction of *Brown I* and *Brown II* as, in effect, an appropriate balancing of "principle" and "expedience"—an equipoise that, Bickel argued more generally, should be characteristic of all constitutional law rulings.[42] In this conceptualization, Bickel revealed his view of the anti-*Lochner* proposition as the central organizing doctrine of constitutional law.

By contrast, from the dominant legal perspective today, *Brown II* is generally viewed as wholly inconsistent with, even a betrayal of, the

38. 163 U.S. 537 (1896).

39. Brown v. Board of Educ., 349 U.S. 294 (1955).

40. *See* BURT, *supra* note 24, at 277–85.

41. BICKEL, THE MORALITY OF CONSENT, *supra* note 18, at 106.

42. BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 3, at 68–69, 247–54. "['All deliberate speed' in *Brown II* is a] phrase . . . that resembles poetry and resembles equity techniques of discretionary accommodation between principle and expediency, but that fits precisely one thing only, namely, the unique function of judicial review in the American system." *Id.* at 253–54.

constitutional rule announced in *Brown I*.[43] This prevalent contemporary view is, however, only a measure of how much the anti-*Lochner* proposition has been displaced today as the dominant model for constitutional law. *Brown* today is jurisprudentially viewed in the same way that *Roe* is regarded: as a proclamation of high abstract principle that, if properly derived from constitutional law sources, should dispositively end all social dispute and be faithfully obeyed by everyone. This is the sense in which *Roe* has become the paradigmatic exercise of judicial authority in constitutional law today.

There was, however, an intermediate step between the shift from anti-*Lochner* to *Roe* as organizing jurisprudential paradigms. For my generation, the central event was *Brown* itself. Alex Bickel never took this next step. Though he endorsed *Brown*, his approbation was always based on his commitment to anti-*Lochner* and was always cautiously qualified; Alex always viewed *Brown* as an exceptional and highly risky judicial enterprise because of its ambitious reach and disruptive social impact.[44] My generation, however, was attracted by *Brown*'s ambition and unfazed by much of the turmoil that followed from it.

We generalized *Brown* as an exercise of judicial authority. Even within Alex's conception of the Court's role—supporting the democratic process of accommodation among political antagonists and remaining properly confined to small-scale, incremental remedial measures—we saw applications for *Brown* far beyond the specific context of Southern race relations. We saw many other such buried disputes in American social life where one side dominated the public arena and virtually deprived its aggrieved, suppressed opponents of any voice or any acknowledged participation in the processes of political bargaining.

Race relations in the North was one such context, where, unlike in the South, officially enforced segregation was not the central instrument of race subordination.[45] Political relations between the rich and the poor, a category that overlapped but was not coterminous with race, was another such context. Relations between criminal justice institutions—the police, criminal courts, and prisons—and accused or convicted criminals, another category that overlapped with race, was yet another such context. And so the list of such unequal relationships grew: relations between overrepresented rural voters and underrepresented urban residents, between enfranchised citizens and aliens who could not protect themselves through voting participation, between men who monopolized political authority and women who were wrongfully absent from participation in public life, and between the advocates of conventional sexual morality and gays or lesbians.

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43. *See* Robert A. Burt, Brown's *Reflection*, 103 YALE L.J. 1483, 1494 (1994).

44. *See* ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 99, 150–51 (1978) [hereinafter BICKEL, IDEA OF PROGRESS].

45. SAMUEL LUBELL, WHITE AND BLACK: TEST OF A NATION 140–45 (1966).

In all of these social relationships, the *Brown* analogy beckoned; all increasingly seemed plausible and important candidates for ameliorative judicial attention and appropriate applications of *Brown*'s conception of judicial authority. And in many of these contexts, the Warren Court responded in the *Brown* mode by identifying and denouncing the inequality in the relationship while, for the most part, implementing small-scale remedies that served less to eliminate the inequality than to enhance the social visibility and political bargaining strength of the disfavored group.[46] But Alex Bickel was not happy with these extensions of *Brown*. He was much more transfixed by the grand sweep of the Warren Court's egalitarian rhetoric, and was inclined to overlook the practical modesty of many of its remedial measures. He saw what he regarded as too much of the bad old days of *Lochner* in the Court's self-confident rhetoric and too little self-conscious agonizing about the limited role of judicial interventions in a democratic polity.[47] Bickel was, moreover, not alone in this criticism of the Warren Court; his complaints were typical among dominant legal scholars of the late 1950's and early 1960's.[48] There were academic defenders of the Warren Court at the time,[49] but their voices were muted because they could not muster a jurisprudential theory with the same apparently comprehensive force as the anti-*Lochner* proposition that was brandished by Bickel and other critics.

But in the 1960's, in the transition from Alex's generation to mine, anti-*Lochner* receded and *Brown* moved forward as the paradigmatic expression of judicial authority. This shift brought increased approbation for the Warren

46. Thus the Warren Court found a constitutional basis for condemning distinctions between rich and poor in limited circumstances. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (guaranteeing indigent defendant's right to criminal trial counsel); Griffin v. Illinois, 351 U.S. 12 (1956) (guaranteeing indigent defendant's right to criminal trial transcript). Similarly, the Court found a Sixth Amendment right to counsel for police-station interrogations, but permitted uncounseled waiver of the right. Miranda v. Arizona, 384 U.S. 436, 474 (1966). In addressing the death penalty, the Warren Court moved with a similar admixture of bold condemnation leading only to cautiously modest procedural changes. *See, e.g.*, Witherspoon v. Illinois, 391 U.S. 510 (1968) (barring exclusion of death-penalty opponents from capital case juries). *See generally* BURT, *supra* note 24, at 329–30. Regarding discrimination against illegitimate children, the Warren Court also issued sweeping condemnations but nonetheless left room for continued state differentiations. *Compare* Levy v. Louisiana, 391 U.S. 68 (1968) (invalidating exclusion of illegitimate children from wrongful death act recovery) *and* Glona v. American Guarantee & Liab. Ins., 391 U.S. 73 (1968) (same) *with* Labine v. Vincent, 401 U.S. 532 (1971) (approving exclusion of illegitimate children from intestate inheritance). *See generally* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 943–45 (1973) (defending Warren Court against charges of overbroad pronouncements of constitutional law).

47. *See* BICKEL, IDEA OF PROGRESS, *supra* note 44, at 173–81.

48. *See* Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 100–01 (1959); Philip B. Kurland, *Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of Government*, 78 HARV. L. REV. 143, 144–45, 162–63 (1964); Wechsler, *supra* note 17, at 31–35. Judge Learned Hand similarly criticized the Warren Court in his 1958 Oliver Wendell Holmes Lectures at the Harvard Law School. HAND, *supra* note 17, at 45–46, 54–55, 61–66; *see also* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 654–61, 664–66 (1994).

49. *See, e.g.*, Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

Court both from the academy and from society at large. Though it was not so clear to me when Alex was my teacher, I have come to believe that there was a fundamental difference between our generations, and between Alex and me, that goes a long way toward accounting for this shift in attitude. It seems to me now that he (and the dominant voices in his generation) remained exclusively committed to anti-*Lochner* and viewed *Brown* as an exceptional and risky judicial enterprise, while I (and the dominant voices in my generation) came to view *Brown* as the paradigmatic exercise of judicial authority, because we had different views and different social experiences regarding the essential unity and amicability of American society. We differed about the proper conception of judicial authority because we disagreed about the true strength of the accommodationist impulse in American social life.

There are at least three possible bases for this fundamental difference in perspective. The first is a difference between all Americans of Alex's generation and mine. His generation had lived through the Great Depression and then the Second World War. They saw and felt its impact on their lives, and knew in their bones the uncertainty about the prospects for overcoming the domestic social disorder engendered by the Depression and the international chaos of the War. My generation knew these events only in remote retrospect, in the softened glow of the ultimate victory over fascism achieved by our apparently invincible strength. My generation saw only domestic prosperity and peaceful accommodation between labor and capital. We knew that the Great Depression and Nazi tyranny had ended. Alex's generation knew that the happy ending had not always been assured.

The second difference between Alex and me is in our experiences as American Jews. Overt anti-Semitism was commonplace in the daily lives of American Jews of Alex's generation;[50] and Alex must have seen this, even if he was never directly targeted. When I came into maturity, however, I could only hear echoes of this anti-Semitism: There were still informal but clearly enforced Jewish quotas in admissions to Ivy League undergraduate institutions, still law firms that would not hire Jews, and still social clubs that excluded us. But these exclusions, these echoes, seemed more like oddities than insuperable barriers; for my generation, these discriminations seemed clearly disfavored in principle in American life generally and appeared to be already dissolving in practice.

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50. As one commentator has written:

> [T]he second generation, emerging from the [Jewish] immigrant ghetto, found themselves once more bunched together, segregated from the real, authentic nuclear America. . . . Social restrictions blocked many occupational outlets from the ghetto . . . . Moreover, . . . the old [Gentile] settlers, keeping their social distance, withdrew . . . to new residences. Socially, at least, the flight [of second-generation Jews from the immigrant ghetto] . . . led to no significant assimilation in the strict sense, however great the acculturation these American Jews had undergone.

BEN HALPERN, THE AMERICAN JEW: A ZIONIST ANALYSIS 62 (1956).

Then there is a third difference between Alex and me—a difference that marked Alex apart not only from me but from most Americans and most American Jews even of his generation. I was born in this country, to parents who themselves had been born in this country. Alex had been born in Romania and emigrated to this country with his parents in 1939 when he was fourteen years old. In the short span of five years after Alex and his family fled from Romania, more than sixty percent of their fellow Jews in that country, some half-million of them, were killed—first by the Romanian government in implicit collaboration with the Germans, and then by the Germans themselves when the Romanian officials appeared to falter.[51] Though Alex could believe that he had found in the United States a home where tolerance was prevalent, where the accommodationist impulse was strong, where people did not see themselves rigidly divided and irreconcilably hostile to one another because of ideology or creed, nonetheless he knew deep in his bones, deep in the marrow of his personal experience, that these tolerant attitudes were not universal, that such social amicability as he saw in postwar America was fragile and easily disrupted.

Considering these three differences alone, it seems to me that Alex and I lived in two different places. American society—indeed, the entire world—must have seemed a more dangerous place for him than it did for me. He must have felt more vulnerable in his America, in his world, than I felt in mine.

This is, of course, speculation on my part. Alex is not here for me to ask. But this much was clear between us: He was much more alarmed and agitated than I at the social disruptions that we both observed in the 1960's—the violence of white segregationists against blacks in the Southern struggles for civil rights; the violence among blacks in urban riots starting with Watts in 1965 and echoing in successive years through Newark, Chicago, Detroit, and other cities; and the convulsions of the late 1960's that spread across the country and especially onto university campuses in response to the escalating destructiveness of the Vietnam War. I was deeply disturbed by this violence and by the underlying social conditions that provoked it. But I was inclined to view this violence as an excessive eruption of an American dissenting tradition—a wrongful distortion, but a recognizable version of a basically healthy American commitment, as Justice Brennan put it in a memorable phrase, to political dissent that is "uninhibited, robust, and wide-open."[52]

Alex was, however, much more apocalyptic in his response. In a chapter he wrote in 1973, entitled "Civil Disobedience, Revolution, and the Legal Order," Bickel concluded that we were living in "an age of assaultive politics"

51. *See* LUCY S. DAWIDOWICZ, THE WAR AGAINST THE JEWS 1933–1945, at 383–86 (1975).
52. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

and that "[w]e cannot survive a politics of moral attack."[53] Alex was not alone in this conviction. It was shared by many people of his generation who had themselves directly seen in the 1930's and 1940's, as Alex had seen, the startling ease and rapidity by which intolerance and violence can displace and overwhelm peaceful social relations. This concern was especially apparent, though in varying degrees of intensity, among the four members of the Supreme Court—Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist—whom Richard Nixon had appointed by 1973. The social disruptions of the 1960's, the "age of assaultive politics" as Bickel called it, precipitated on the Court in particular a return to an older attitude of distrust toward openly waged social conflict, of disbelief in the strength of the accommodationist impulse in American social life.

This distrust is profoundly antithetical to the anti-*Lochner* proposition. If you believe that ideological opponents are unlikely to find or even to want accommodationist resolutions to their disputes, if you are fearful about the potential for violent eruptions in all openly waged social conflicts, then you will want some social mechanism for imposing definitive, authoritative conclusions at even the earliest stages of ideological disputes. This was the conclusion that Thomas Hobbes reached as a reaction to the English civil wars of the seventeenth century. For most of the history of the American republic, the Supreme Court has occupied the role that Hobbes imagined for a sovereign authority, accountable to no one but itself, standing outside ordinary social relationships and imposing order on them.[54] This was the Court's self-conception in the mid-nineteenth century, most especially in the *Dred Scott* decision in 1857, when the Court tried to impose a definitive conclusion to the political conflict about territorial slavery by awarding definitive and conclusive victory to the Southern slaveowners.[55] This was the Supreme Court's self-conception during the first third of this century in its *Lochner* line of decisions. And this is the Court's self-conception in *Roe v. Wade.*

To portray *Roe* in these terms might seem merely an opening move toward a clinching argument, a slam-dunk conclusion, that since *Roe*'s conception of abstractly generalized, conflict-dispositive judicial authority is a direct descendant not only of *Lochner* but of *Dred Scott*, it is thus self-evidently wrong. But this syllogism does not have persuasive force today. Its contemporary weakness is evident in the currently dominant view of *Brown v. Board of Education. Brown* today is commonly understood as a triumph of principle—an appropriately authoritative, definitive statement by the Supreme Court that racial segregation is a moral evil. From this perspective *Brown II* is itself a moral evil—a wrongful, even cowardly, willingness of the Court to

53. BICKEL, THE MORALITY OF CONSENT, *supra* note 18, at 123.
54. THOMAS HOBBES, LEVIATHAN 142–50 (E.P. Dutton 1950) (1651).
55. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

tolerate the perpetuation of racist practices that it had correctly condemned in *Brown I*; and from this perspective, the error in *Brown II* was its application of the conception of incremental, accommodationist judicial authority of the anti-*Lochner* proposition. *Brown* today appears justified only as an application of the abstractly generalized, conflict-dispositive conception of judicial authority that *Lochner* itself embodied.

From this contemporary perspective, the problem in *Dred Scott* and in *Lochner* was not in the Court's conception of judicial authority; the error was in the substantive moral norm applied by the Court to protect slaveowners' "property" or employers' "liberty." This is also the contemporary perspective, the internally consistent logic, of those like Judge Bork and Justice Scalia who oppose *Roe* on the ground that the Constitution says nothing about abortion or privacy. This criticism does not reject the *Lochner* conception of judicial authority; it implicitly relies on it by claiming that the Court can assert its independent authority when and only when the Constitution itself speaks in authoritative, dispositive terms.

The anti-*Lochner* proposition has faded today because contemporary America looks so much like the country that the Justices imagined they saw when they decided *Dred Scott* and *Lochner*. To them, the accommodationist impulse seemed if not dead, then on its way toward extinction, and violent conflict seemed the only plausible outcome unless some authoritative body, somewhere, somehow, would impose a conclusive end to the dispute. This same conviction about the prevalence and irreconcilable character of contemporary social conflict is, I believe, the background assumption that makes the authoritative, dispositive conception of judicial authority in *Roe v. Wade* so plausible, so attractive, today.

Though all of us today think we see the same social conflicts, there is a striking generational difference in what we see. To put the difference in broadest generalized outline: Alex's generation is more likely to be fearful about, and more ready to suppress, divisive societal conflicts than mine; my generation is more optimistic about the possibilities of ameliorating these conflicts than my teachers' generation, but more disturbed by these conflicts than my students' generation; and my students' generation is more inclined to view apparently irreconcilable social conflict as an essentially irremediable, and even an unremarkable, state of affairs.

Today's students were born around 1970—around the time when optimistic assumptions of my generation about the character of our public life were apparently unraveling. The litany of events is distressing to recount: the assassinations of Martin Luther King and Robert Kennedy that in themselves seemed to mark the end of hopeful prospects for racial reconciliation; the destructive, mindless escalation of the Vietnam War, with the domestic turmoil that preceded and the recriminations that followed our ignominious and (I would say) deserved defeat; the Watergate affair that revealed pervasive

corruption and cynicism at the highest reaches of our public life, culminating not only in the first resignation of a Vice President, who in effect admitted that he had accepted bribes in office, but also in the first resignation of a President, who nonetheless admitted nothing.

These events were shocking for me and my generation because they were so radically inconsistent with our past experience. These events were more than shocking for Alex Bickel; they provoked his apocalyptic warnings because they were all too consistent with earlier terrible times that he and his generation had known, times when the survival of democracy was very much in doubt. But these events, it seems to me, are neither as shocking nor as frightening to the current generation of students. I suspect that my students are not surprised by these events because their generation does not believe as strongly as I did in the possible success, or even in the plausibility, of appeals to reasonableness and mutuality in our public life. I suspect that my students do not find these events alarming, and do not fear the contemporary absence of moderating, accommodationist virtues of reasonableness and mutuality in social discourse because they have never directly known what Alex Bickel and his generation experienced during the 1930's and 1940's.

There is a peculiar quality to our public life today. Our affairs are conducted in a rhetoric of pitched battle, of civil war on the right and on the left. The right calls for Armageddon-like clashes between good and evil regarding abortion, sexual behavior, "family values," and the like. The left trumpets constant alarms about racial or sexual genocide and appears to endorse preemptive violence. And yet, overall, calm seems to prevail. For the most part eruptive forces somehow seem contained (primarily within inner-city neighborhoods) and public business generally proceeds "as usual"—as if the apocalyptic rhetoric need not be taken seriously, as if it were just so much meaningless background noise.

To my ears, however, this noise is increasingly ominous. As I grow older, I take more seriously Alex Bickel's warning about the mortal danger in societies where mutual respect is not a strong motivating force in public life, where common interests are unlikely to be recognized much less to prevail, and where no bases exist for common understanding. My students, however, seem to take for granted that the social conditions Bickel described and feared are an accurate, perhaps regrettable, but nonetheless unalterable portrait of American society today. As I see it, the contemporary prevalence of this assumption parallels the attitudes of the generation of the 1860's—the generation that talked about civil war, even advocated it, but did not believe it would ever happen; the generation that then was engulfed by the bloodiest, most destructive war in this country's history.[56]

56. *See* DAVID M. POTTER, LINCOLN AND HIS PARTY IN THE SECESSION CRISIS 47–54 (1942); DAVID M. POTTER, THE SOUTH AND SECTIONAL CONFLICT 236–37, 254–56 (1968).

The generation of the 1860's had lost the habit of resolving sharply contested ideological disputes by working toward mutually satisfactory, mutually respectful accommodations. It had obliterated even the vocabulary for such social relationships, as the Supreme Court starkly revealed in the *Dred Scott* case.[57] And this is the danger that I see in the current generation's attitude toward the Supreme Court's decision in *Roe v. Wade*—not in its substantive outcome, not in the abortion issue as such, but in the underlying attitude about the irreconcilable character of ideological disputes that the decision represents.

There are troubling specific parallels between our time and the era that culminated in the Civil War. Just as the predominant public rhetoric shifted during the first half of the nineteenth century, from advocacy for peaceful race relations (however ambivalently avowed and haltingly implemented) to the openly sworn conviction of irreconcilable racial hostility,[58] this same progression has occurred in public discourse during the last half of this century regarding black-white relations. And just as nineteenth-century antebellum acknowledgment and then espousal of openly waged racial hostility came to dominate all American political relations—white-white, as well as white-black and white–Native American[59]—so too, this repetitive pattern is becoming evident in the openly antagonistic politics of our time.

Consider the warning in 1968 by the National Advisory Commission on Civil Disorders, the so-called Kerner Commission, convened in response to black urban riots, that "[o]ur nation is moving toward two societies, one black, one white" but that "[t]his deepening racial division is not inevitable. The movement apart can be reversed. Choice is still possible."[60] Compare the reconciliatory ambition of that warning with the progression of attitudes in the past thirty years regarding the administration of criminal law—where race relations is always a subtext and often an avowed text. Compare the high point of public sentiment in the late 1960's for abolishing capital punishment and the widespread endorsement of the goal of rehabilitation for convicted criminals (however ambivalently avowed and haltingly implemented) with the current overwhelming popularity of the death penalty, the wholesale repudiation of the rehabilitative ideal, and the escalating numbers of prisoners and lengths of prison terms.[61] And for one small sign of the spreading assumption that irreconcilable conflict is the fundamental characteristic of all political relations, consider this observation by Judge Bork:

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57. *See* WILLIAM W. FREEHLING, THE ROAD TO DISUNION: SECESSIONISTS AT BAY 1776–1854, at 556–60 (1990); DAVID M. POTTER, THE IMPENDING CRISIS 1848–1861, at 439–47 (1976).

58. *See* BURT, *supra* note 24, at 155–72.

59. *Id.* at 172–99.

60. NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, REPORT 1 (1968).

61. *See generally* Robert A. Burt, *Cruelty, Hypocrisy, and the Rehabilitative Ideal in Corrections*, 16 INT'L J.L. & PSYCHIATRY 359 (1993).

> [O]ur public moral debates over such matters as abortion and capital punishment have been interminable and inconclusive because we start from different premises and have no way of convincing each other as to which are the proper premises. . . . [Liberal] law professors . . . are as unlikely to convince me as I am to convince them. That is why . . . we should vote about these matters rather than litigate them. . . . [E]lected legislators [are] under no obligation to justify moral and political choices by a philosophy to which all must consent.[62]

In this vision of political relations, there is no special role assigned to conversation, no special virtue in the pursuit of mutuality. Voting, as Bork imagines it, is not a deliberative process with persuasion as its goal; we vote, rather than deliberate together, because "we start from different premises and have no way of convincing each other" and neither "elected legislators" nor the victorious voters have any obligation to justify their choices to their defeated opponents. The hands raised for this silent voting, these mute confrontations, may have no weapons in them, but Bork does not acknowledge the close connection between this show of armed force and more openly practiced hostilities. In this bleak, constricted conception of political relations, each of us is alone. To return to the metaphor I invoked at the outset, we remain in different rooms, unavailable and incomprehensible to one another even though we appear to be in congress with each other. This is not a happy state. It is a fearful state where antagonisms will feed on themselves because we have abandoned any effort, and accordingly lost our capabilities, for mutual reassurance.

Bickel's generation was too quick to fall into an apocalyptic account of the "culture conflicts" that erupted in the late 1960's, too quick to forget the ameliorative results that had emerged from the more terrifying experiences of the Great Depression and the Second World War. The characteristic shortsightedness of my generation was our assumption that the deep divisions in American life could be healed more easily, and that this country was more unified, than was in fact true. One of the ways that my generation maintained this truncated vision was evident here at Yale Law School in the virtual absence of people of color and of women on the faculty or in the student body. When I was a student here, in the Class of 1964, it was easy enough for us to imagine that this school and this country were places of mutual understanding and fundamental unity when the only people we talked to were drawn from an exceedingly narrow and comfortable segment of the population. But my generation came to see that this kind of blinkered vision was false and dangerous. Moved by the ideals that underlay *Brown v. Board of Education*, we began a process to open ourselves to previously excluded people—people

62. BORK, *supra* note 4, at 256–57.

with deep grievances arising from their past exclusion. Measured from the distance of 1964, considerable progress has been made—though the enterprise is still proceeding and is still incomplete.

In the midst of this process, the characteristic myopia of the current generation of students is to see the grievances and sharp differences that are now properly visible both in this school and in our society generally, and to assume that the only things we have in common are those differences, that our differences are the exclusive defining attributes of our social relations. It is not as easy to reach across those differences as I and many others in my generation once thought; but it is more urgent to do so, and more dangerous to fail in this effort than many people in the current generation seem to believe.

Law schools are not the only places where these dangers are manifest. In many ways law schools are protected places, less threatened by the explosive potential of polarized conflicts than other settings in our society. But law schools nonetheless are mirrors for these pervasive dangers, and precisely because they are more sheltered than other places, law schools can provide opportunities to practice ameliorating efforts that might then be applied more generally. Addressing the relationship between student and teacher, in particular, could serve as a focused preparation for turning to more deeply divisive, more difficult, social relations.

The intergenerational relationship between student and teacher does have its own intrinsic difficulties. We come at one another from different rooms even when it seems that we are in the same room. We can, however, learn in this relationship that to acknowledge these differences is not the last step that we can take together. With good will, with explicit, patient, and painstaking effort on both sides, with honest, persistent talk, we can reach toward one another until we find ourselves in the same place at the same time. We might then carry this discovery from these classrooms to the world outside.

This is what I learned from my teachers, from Alex Bickel. This is the best that a teacher can offer a student, that one generation of law teachers can extend to the next.