REVIEWS

THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS. By *Alexander M. Bickel.** Indianapolis; New York: The Bobbs-Merrill Company, 1962. Pp. ix, 303, $6.00.

POLITICS AND THE WARREN COURT. By *Alexander M. Bickel.** New York: Harper & Row, 1965. Pp. xii, 299, $6.95.

At a time when the Supreme Court finds in the constitutional guarantees of liberty and of equality constantly expanding limitations on the Congress and the States, enforcable by the judicial process, there is urgent need for deep reflection on the role the Court performs in our polity and for dispassionate appraisal of the basis of the judgments it hands down. To develop that critique is not the task of any single group in our culture but the legal professoriat is surely called upon to play a major part. It can play that part best, in my opinion, by foregoing both polemic and apologetic, striving rather for the disengagement that will place the issues in perspective and for no less judiciousness in dealing with their resolution than we should expect of courts. Professor Bickel's effort to conform to this exacting standard gives distinction to these books about the Constitution and the Court.

The earlier and more important work derives its title from Hamilton's anticipation and defense of the judicial duty "to declare all acts contrary to the manifest tenor of the Constitution void," in particular his argument that "in a government in which [the different departments of power] are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them."[1] The salute to Hamilton is no more than titular, however, for the main thrust of this full scale analysis of the basis, nature, potentialities and techniques of judicial review inheres precisely in forthright rejection of the reasoning enshrined in *Marbury* v. *Madison*, in favor of a new and far more complex theory of the function of the Supreme Court in its relation to the other organs of authority. Where Hamilton and Marshall derived the judicial duty from the concept of the Constitution as the "supreme law" and the duty of the courts as

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1. HAMILTON, THE FEDERALIST 490 (1961).

law interpreters, Bickel perceives no such compulsion in the history, language or animating ideas of the document and probably would deem it insufficient even if he were to find it there. The justification that he deems to be essential, and in terms of which he supports and would shape the judicial process, is the need in a democracy for an agency empowered to endorse or to reject measures of the representative branches as compatible or incompatible with principle, legitimating or condemning governmental action on the basis of a principled decision of the sort that politics alone cannot provide. As Mr. Bickel puts it, "the root idea is that the process is justified only if it injects into representative government something that is not already there; and that is principle, standards of action that derive their worth from a long view of society's spiritual as well as material needs and that command adherence whether or not the immediate outcome is expedient or agreeable" (p. 58).

This is not the whole of it, however, for Professor Bickel sees quite clearly that no "society, certainly not a large and heterogeneous one, can fail in time to explode if it is deprived of the arts of compromise, if it knows no ways of muddling through. No good society can be unprincipled; and no viable society can be principle-ridden" (p. 64). There is a "tension between principle and expediency" that Mr. Bickel not unreasonably terms "Lincolnian"; and the Supreme Court can maintain itself in this tension only by prudence in avoiding constitutional decision, when governance by principle would cast a burden too severe. The Court may reject or legitimate on principle; it also may do neither, by prudently refusing to decide.

Much of the volume is concerned with a much needed study of what Mr. Bickel deems the "passive virtues":[2] the formal techniques for avoidance of decision that have been developed in the jurisprudence of the Court. It deals at length with doctrines relating to standing, ripeness, non-justiciable questions, interpretation designed to eliminate the need for constitutional determination—to which Professor Bickel would assimilate such constitutional conceptions as the ban upon excessive vagueness, which call at most for legislative reconsideration and redrafting of a measure that may otherwise survive. These are, Professor Bickel tells us, "the techniques that allow leeway to expediency without abandoning principle" and thus "make possible a principled government" (p. 71). They are, in his view, like the discretion not to decide overtly conferred on the Supreme Court by the certiorari jurisdiction—

2. For an earlier and shorter presentation, see Bickel, *The Supreme Court, 1960 Term —Forward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

an area in which principle may properly give way to prudence as the test of whether or not the Court should be involved.

I need not say that this is an analysis of the judicial obligation markedly at variance with the received tradition and with the Court's own articulation of the nature and the sources of its duty. Professor Bickel would not differ on these points. He argues, if I understand him rightly, that the function of the Court ought to be understood and redefined in the terms that he advances; that such terms alone make it acceptable in a self-governing democracy; and that, to some extent at least, redefinition in such terms would describe and explain prevailing practice better and more candidly than the prevailing theory.

My difficulty with Professor Bickel's thesis does not stem from disagreement with his point that when the Court finds action of the other branches of the government or of a state forbidden or permitted by the Constitution, it is obligated by the nature of its function to reach judgment by a principled decision, or, further, that when judgment rests upon the open-ended formulations of the Constitution, the principle demanded is not far removed from an elaboration of what decency, as our culture understands it, deems to be beyond the pale. That is a point I have insisted on myself in a submission[3] that Professor Bickel treats with far more generosity and understanding than it usually has received. His discussion of the demands of principle in dealing with such problems as racial segregation, legislative malapportionment, movie censorship, Congressional investigations, security clearance, travel control and anti-contraceptive legislation yields a brilliant and incisive commentary on some of the most testing issues that the Court has had to face in recent years.

It is, however, one thing to contend that principled determinations as distinguished from *ad hoc* pronouncements are intrinsic to the function of a court when it elaborates the content of the constitutional provisions to which it accords the force of law. It is a very different thing to argue, as Professor Bickel does, that what the Supreme Court does not condemn it must defend and legitimate in terms of principle or else find ways to avoid passing on at all. This is to divorce the Court entirely from the text that it interprets and administers and ultimately to equate completely what is constitutional and what is good. I doubt that our polity would be improved if this conception were accepted. That no court would feel justified in so defining its responsibility and

3. See *Toward Neutral Principles of Constitutional Law* in WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 3-48 (1961); Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1009-14 (1965).

asking for the acquiescence of the other branches seems to me to be entirely clear.

Professor Bickel might reply that he does not purport to write about the courts in general, which he acknowledges "must, indeed, resolve all controversies within their jurisdiction, because the alternative is chaos," but only about the Supreme Court which "in constitutional cases sits to render an additional, principled judgment on what has already been authoritatively ordered" (p. 173). But the conception of judicial review has never been regarded as a special doctrine governing the role of the Supreme Court as distinguished from the lower courts in the judicial hierarchy; and the techniques for the avoidance of decision that Bickel so lucidly discusses are addressed to the propriety of any judicial intervention, not merely to adjudication by the highest court.

The only special rules relating to the Supreme Court are those defining its appellate jurisdiction, which the Constitution quite explicitly commits to the control of Congress, not to the self-regulation of the Court. Because this is so, there is, indeed, a simple method of achieving Mr. Bickel's goal of giving the Supreme Court full discretion to avoid involvement in decision, to wit, the amendment of the statutes governing appellate jurisdiction to substitute certiorari for appeal in the few situations where appeal has been preserved. If there is the need that Mr. Bickel sees for safeguarding the highest court against a duty to decide, when principled decision would involve imprudent intervention, that surely is the means that our system provides for achievement of the end.

The difference is that this would call for action by the political branches which in the prevailing statute have preserved an area of an obligating jurisdiction—an area in which the masters of prudential judgment thus far have considered that law rather than prudence ought to be the measure of the duty to decide. Within that area, the need for principled decision as to what is subject to adjudication seems to me no less than that for principled adjudication of the merits of the issues that the Court decides.

To say this is not, however, to deny that there have been occasions when the Court has seemed to disregard the statutory mandate—*Naim v. Naim*[4] and *Poe v. Ullman*[5] are the recent most egregious illustrations, though in *Poe* there was an effort at a reasoned explanation, an effort that I agree with Mr. Bickel plainly failed. Some of the older cases holding questions non-justiciable because "political" fall, in my

4. 350 U.S. 891 (1955); 350 U.S. 985 (1956).
5. 367 U.S. 497 (1961).

view, in the same class. I submit, however, that these should be taken as anomolous departures from judicial duty rather than as the material for a redefinition of judicial obligation, as I think Professor Bickel would contend. Apart from the legal difficulties faced by that contention, the position seems to me to be quite plainly self-defeating, resulting, as Professor Gerald Gunther puts it, in "100% insistence on principle, 20% of the time."[6] This is, in any case, the crucial issue that the reader should consider as he works through this exciting volume on the function of the Court. Those who are the least persuaded on the central thesis will be stimulated by the verve of the discussion and appreciate the wealth of insight Mr. Bickel offers on the potentialities and limitations of the Court in the governance of great affairs.

The running commentary on recent and current problems that I find so rewarding in *The Least Dangerous Branch* is continued and expanded in *Politics and the Warren Court.* This is in major part a collection and revision of a host of previously published papers, many of them drawn from Mr. Bickel's contributions to the New Republic in the last few years. It includes, though regrettably in smaller type in an Appendix, the brilliant study of the historical materials relating to the expectations of the generation that framed and ratified the Fourteenth Amendment as to its impact on state racial segregation, presented in the Harvard Law Review in 1955.[7] Miscellany though the volume is, successful editing has given it both unity and continuity, well justifying the decision to accord these papers the availability and durability hard covers will provide.

Despite the title, the reader should not expect a work concerned exclusively with the judicial process. Perhaps a half is given to a study of the sequel to the School Decision, further discussion of the apportionment decisions and a brief comment on the school prayer cases of 1962 and 1963. The rest is concerned with the legislative and executive action produced by the Civil Rights and Negro Protest movements, including an appraisal of the record of the Kennedy Administration, reflections on the uses and abuses of civil disobedience as a technique of protest, and detailed examination of the Civil Rights Acts passed in 1964 and 1965.

This second portion of the book is its distinctive contribution. Here Mr. Bickel has full scope for picturing the complex functioning of moral

6. Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review,* 64 COLUM. L. REV. 1, 3 (1964).

7. Bickel, *The Original Understanding and the Segregation Decision,* 69 HARV. L. REV. 1 (1955).

sentiment when it gives birth to change in law. The agent of the change is here, however, not the dictate of a court but the responsiveness of the political branches to the claims of a minority that touched the conscience of the country and thus marshaled general support. To be sure, the Court played a large part in this awakening of moral sensitivity, a fact that should forewarn us against too simplistic a conception of the discrete roles of law and politics. It is, indeed, the fact that Mr. Bickel sees the intricacy of their interplay that lends such great importance to this subtle study of the most transforming legal movement of our time.

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THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS. By *Rosalyn Higgins.** Oxford University Press, 1963. Pp. xxi, 402.

Mrs. Higgins' excellent book concerns precisely what its title denotes. It analyzes the development of international law through the practice of the "political organs" of the United Nations: the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council and the Secretariat. It does not deal with the development of international law by the International Court of Justice, the International Law Commission, or by law-making conferences held under the auspices of the United Nations (such as those on the law of the sea and diplomatic relations). The Sixth (Legal) Committee of the General Assembly is treated more as a legal than a political organ, and thus largely not dealt with, on the ground that: "The work of that Committee has become more and more restricted and political problems with important legal implications are debated in the First and Ad Hoc Committees" (p. 3). While an accurate appraisal at one time, it is no longer wholly so. Since 1961, the Sixth Committee has been increasingly concerned with a spectrum of problems of important political as well as legal content which are embraced by its continuing item of "Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations."

Mrs. Higgins maintains that:

The political organs of the United Nations . . . are vitally con-

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