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Book Review (reviewing Alexander M. Bickel, Politics and the Warren Court (1965))

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BOOK REVIEWS

POLITICS AND THE WARREN COURT. By ALEXANDER M. BICKEL. Harper & Row, Publishers, New York, 1965. Pp. xii, 299. \$6.95.

If anyone has fallen heir to the mantle of Professor Felix Frankfurter, it is his one-time law clerk and now professor of law at Yale, Alexander M. Bickel. This is not because Bickel is necessarily in agreement with the positions taken by Frankfurter, either on or off the Court. It is because Bickel as a professor of law has taken the Supreme Court as his primary focus of study while remaining fully cognizant of the real world in which that institution functions. It is because Bickel has taken to the hustings of the public press in his campaign to inform the general public about the important legal issues of the day. It is because Bickel is as passionately involved with the problems of his concern, problems of this day, as Frankfurter was with the crises of his time during his professorship at Harvard. It is because, despite the emotional investment, both have sought to attain an objectivity and excellence not readily available to lesser minds. It is primarily for these reasons that Bickel is Professor Frankfurter's rightful heir. And this volume is further proof of the legitimacy of succession. It is clearly within the tradition of Frankfurter's *Law and Politics*.

There is, too, a jurisprudential identity that is perhaps best revealed in Bickel's notions of the proper role of the judiciary—especially the Supreme Court—in American government and politics. Thus, in describing our system of government, he writes:

Seen in the large, it is of course a working system, and stable, but in tension. It is the tension that interests me in this volume, and the failures we risk when we imagine something else, when we fall in with the illusion that laws alone, or even alone the men of laws who constitute the Supreme Court, can govern effectively. Nothing of importance, I believe, works well or for long in this country unless widespread consent is gained for it by political means. And there is much that must be left to processes of political and even private ordering, without benefit of judicially enforced laws. The Court must not overestimate the possibilities of law as a method of ordering society and containing social action. And society cannot safely forget the limits of effective legal action, and attempt to surrender to the Court the necessary work of politics.¹

¹ BICKEL, *POLITICS AND THE WARREN COURT* at x (1965) [hereinafter cited as BICKEL].

This is the creed of a democrat. It requires a belief in the people that is not to be found among those who would seek a government "for the people" but not a government "by the people." Bickel's is not an easy faith to keep. The acids of cynicism or even the abrasives of skepticism can readily destroy it.

In the variegated pieces that make up this volume, Bickel is concerned essentially with two sets of problems: the proper function of the Supreme Court and the major issues of the day deriving from the Negro revolution. So far as the Court is concerned, most of the writing takes the form of a defense of its actions. With reference to the civil rights movement, although he is deeply dedicated to the Negro cause, he is nonetheless aware of the necessity for reasoned resolution of the very difficult problems that it raises.

In his first chapter he defends both the breadth and limits of the *School Segregation Cases*.² But, while putting the onus on other branches of the government to fulfill the hopes raised by these opinions, Bickel asks for still more from the Court: "The Court ought to address itself squarely to the problem of pupil placement tokenism,"³ and, "It is time also for an authoritative word on the grade-a-year plans."⁴ At the same time, "It is not to be expected . . . that the Supreme Court can, by speaking out now on problems that seem soluble, solve all remaining problems."⁵ This is not empty rhetoric. His arguments are well bolstered by a detailed study of relevant factual data. Bickel has another master in Brandeis.

Some may find Bickel's treatment of the civil rights problems during the Kennedy administration defensive and apologetic. A comparison with the Eisenhower administration reveals the vast gulf between the executive branch's avoidance of issues and recognition of them. No direct comparison is offered between the confrontation of problems by the Kennedy administration and the accomplishments of his successor. Excuse is made: "The Administration broke no lances in Congress. As to this one need say no more than that President Kennedy was a realist"⁶ Was there a lack of realism in

² *Brown v. Board of Educ.*, 347 U.S. 483 (1954). See also the appendix containing Bickel's extraordinarily influential history of the fourteenth amendment as it relates to school segregation. BICKEL 211-61.

³ *Id.* at 24.

⁴ *Id.* at 25.

⁵ *Id.* at 26.

⁶ *Id.* at 57.

Johnson's bill that became the Civil Rights Act of 1964? Bickel treats this statute more as a Kennedy accomplishment than what it was, a tribute to the political capacity of Johnson to make reality out of what had theretofore been only unfulfilled campaign promises.

Again, of the 1965 Voting Rights Act, Bickel writes: "The Kennedy administration was moving in the necessary direction in June, 1963."⁷ It is implied that the new administration's task was much easier: "The President's bill, therefore, could afford to be all muscle, and it was."⁸ Despite Bickel's obvious commitment to the greatness of the New Frontier, even in preference to the Great Society, he is critical of the Kennedy appointments to crucial places on the federal bench in the South. And it must be said that the strength of these chapters is to be found not in the validity of the distribution of accolades, but rather in the lucid explanations of the contents of the statutes, the background against which they must be construed, and their potential accomplishments. Even when his emotions are committed, Bickel displays a capacity for scholarship.

Bickel's one real quarrel with the Court reported in this book is over the *Reapportionment Cases*.⁹ Again, his comments must be distinguished from those who complain because it was their ox that was gored. His position is principled—it is that the Court has acted without principle:

Courts are fit to render judgment on questions of principle, which we do not, in our tradition, relegate to the political market place, to be disposed of on the basis of one of those not irrational, but it may be intuitive or otherwise unverifiable, choices. Principle is what is expected of courts. Perhaps some principle applicable to apportionment can be worked out, which goes beyond the requirement merely that the executive be majoritarian. If so, the first wisdom is to look at the reality of our allocations of power to govern, not at paper provisions and statistical nightmares. . . . If a tenable principle is ever to emerge, it will proceed from an understanding of the realities of power, of the role of parties and how they are run, of the role of money and of various relevant skills, of the state-wide influence of urban homerule governments and of various groups and factions, and so forth and so on. When we know, to revert to Dahl's questions, "Who Governs?", we may begin to be in a position to lay down a constitutional principle that

⁷ *Id.* at 119.

⁸ *Id.* at 121.

⁹ *Roman v. Sincock*, 377 U.S. 695 (1964); *Davis v. Mann*, 377 U.S. 678 (1964); *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656 (1964); *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

tells us who should govern. Until then our imperfect representative institutions are better fitted than courts to tinker with the system.¹⁰

Even those who are deeply committed to the Court's role in reapportionment of legislatures because of the alleged absence of an alternative means of curing the defects would do well to read this chapter.

The book is not unflawed. One should not expect that, especially of a volume that is concerned primarily with explaining constitutional jurisprudence to those not specially versed in legal lore. One might wish, however, that one occasional cavalier treatment of judicial precedents had been eliminated. In his treatment of the problem of the religion clauses and federal aid to parochial schools, Bickel writes:

Yet when this great nationalizing force threatened to engulf pluralistic influences by making public school education not only compulsory but exclusive of private schooling, the First Amendment prevented, for in addition to forbidding "an establishment of religion" it also protects "the free exercise thereof." The Court intervened in 1925, in *Pierce v. Society of Sisters*. Two years earlier the Court had foreclosed state control of a parochial school's curriculum.¹¹

Was it not incumbent on Bickel to reveal that neither of the cases to which he makes reference rested on consideration of the first amendment's religion clauses?¹² Myths have developed that these cases, like *Cochran v. Board of Educ.*,¹³ have resolved some of the knotty problems involved in federal aid to parochial schools. Bickel is too fine a student to continue their perpetuation.

The Court has among its ardent admirers two very different groups. First, there are those who are described by Holmes' language: "It is not enough for the knight of romance that you agree that his lady is a very nice girl—if you do not admit that she is the best that God ever made or will make, you must fight."¹⁴ Then there are those in the image of Felix Frankfurter as Dean Acheson described him:

The attachment [to the Supreme Court] was passionate and idealistic. He loved the Court not so much for what it was as for what it could be. If he felt on occasion that it fell short of his ideal, he scolded, pointing to what he believed to be faults and defects. For in the Court, the object of his passion, he could find no shortcomings tolerable. He had a vision, at once splendid and precise, re-

¹⁰ BICKEL 188-89.

¹¹ *Id.* at 202.

¹² See KURLAND, *RELIGION AND THE LAW* 26 (1962).

¹³ 281 U.S. 370 (1930).

¹⁴ Holmes, *Natural Law*, 32 *HARV. L. REV.* 40 (1918).

stricted and magisterial, of the greatness of the Court's calling. Greatness for this Court, he held, was not a mere aspiration, but a duty and a necessity.¹⁵

Bickel belongs to the second group. He must if he is to be true to his inheritance. And it is safe to predict that he will be.

PHILIP B. KURLAND *

PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS. By THOMAS F. BERGIN AND PAUL G. HASKELL. The Foundation Press, Inc., Brooklyn, 1966. Pp. 237. \$6.00.

The sole function of the book, as we see it, is to arm the student, *in advance of in-depth case analysis in class*, with language and concept tools necessary to cope with the cases. . . . Our hope is that by the time a student has carefully read (and perhaps once re-read) an assigned part of the book, the teacher may safely assume that it is unnecessary to cover the same material in the classroom. By the use of this book in our own first-year property courses, we expect to free from 12 to 20 hours for serious work with cases.¹

This prefatory statement suggests much of the nature of the new Bergin and Haskell text.

Lest this quotation be taken to suggest that the book's utility to students—and hence to teachers—is limited to the usual varieties of first-year property courses, this review will begin with a quick summary of the subject-matter coverage. The book is divided into two parts. Part I, consisting of four chapters and 122 pages, is essentially a description of our system of estates in land and its historical development. Part II, five chapters running 115 pages, deals with what might be called modern future interest law. Included are constructional problems, powers of appointment, and the rule against perpetuities. Teachers who might assign or recommend this book should be aware of its possible use not only as an aid in a basic property course but also thereafter as an aid to the study of future interests in a separate offering or in an integrated course covering decedents' estates and trusts.

Inasmuch as this book was written for law students and is designed

¹⁵ 382 U.S. at xxviii (1965) (resolution of the bar of the Supreme Court).

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¹ BERGIN & HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS at ix (1966) [hereinafter cited as BERGIN & HASKELL].