Introduction

Alexander Bickel is perhaps the most influential constitutional theorist of the last half century. He sought to explain how judicial review, a nondemocratic institution, could be justified in a government that derives its legitimacy from majority rule. He describes the problem as the countermajoritarian difficulty, and with this memorable phrase he sets it at the center of constitutional theory's scholarly agenda. Moreover, *The Least Dangerous Branch,* his seminal work, became a model for approaching the problem. Bickel used recent U.S. Supreme Court decisions to illustrate how Justices can decide cases in a manner that contributes to a legitimate system of democratic government. Nonetheless, theorists have rejected Bickel's defense of judicial review. Indeed, for a considerable time Bickel became the symbol of past failures to solve the countermajoritarian difficulty. Theorists would criticize Bickel before venturing fresh solutions to the problem or putting forth claims about why such solutions would inevitably fail. Writing about ten years after Bickel's death, Anthony T. Kronman thought it curious that a scholar of Bickel's stature would have so little influence on the work of his successors.[1]

This book addresses the interesting question of Bickel's legacy. Does Bickel have any significance for contemporary debates forty years after the publication of *The Least Dangerous Branch*? Nine scholars address this question. They consider different aspects of Bickel's work and apply a variety of disciplinary perspectives. Although their contributions indicate that Bickel continues to capture the attention of theorists, an answer to our question remains elusive.

The contributions illustrate how the countermajoritarian difficulty and Bickel's response to it have animated and continue to animate prominent work in constitutional theory: the proceduralisms of John

Hart Ely and Jeremy Waldron; the republicanisms of Bruce Ackerman and Cass Sunstein; and the originalisms of Raoul Berger, Robert Bork, and Keith E. Whittington. Moreover, as in the broader literature in constitutional theory, the particular Bickel who emerges depends on the theorist who engages him. Some view his commitment to constitutional principle as licensing judicial activism; others see it as legitimating a contested status quo. Some join the quest to identify principles that judges can enforce in a government committed to majority rule; others emphasize the role the judiciary might play in a constitutional democracy. Lastly, the contributions reflect concern about whether Bickel addresses the right issue when he frames the question of judicial review, and whether the debate concerning this question has been detrimental to the broader constitutional culture.

Perhaps we should attribute Bickel's elusiveness to the breadth of his project. This breadth contributes to the difficulty of specifying exactly what it is that Bickel argued. His argument encompasses both abstract claims about how to conceptualize judicial authority and concrete strategies about how the Court should minimize conflicts with other institutions of government. He describes the Court not only as a dynamic force distilling society's principles and introducing them into the political process, but also as a conservative force embodying and sustaining society's traditions. Thus, we can see how Bickel became a target for both conservative and liberal theorists. Bork, for example, attacked Bickel for justifying the Court's lawmaking role, while Skelly Wright criticized Bickel for arguing that the Court should avoid most important policy questions. The tensions in Bickel's argument remain evident in the contributions to this book just as they have been present in the wider discussion of his place in constitutional theory.

The contributors emphasize three aspects of Bickel's work. First, he frames the problem of justifying judicial review from a perspective that focuses on constitutional adjudication. He asked why a nonelected judiciary should be able to substitute its judgment for that of elected institutions. In so doing, he puts the Court at the center of constitutional theory. This volume reflects the tension between theorists who define the Court's role in terms of the particular principles of constitutional law that it enforces and those who assess the Court as a single component in a broader system of constitutional government.

Bickel's focus on the Court explains the second aspect of his work. He believed that the judiciary contributes to a legitimate system of gov-

ernment by enforcing those constitutional principles that elected institutions tend to ignore. This claim leads scholars to assign great importance to questions of constitutional interpretation, and, consequently, the debate about the countermajoritarian difficulty has evolved into a quest to identify judicially enforceable principles. According to this view, the Court gains democratic legitimacy by enforcing principles that should supplant those advanced by elected institutions. Scholars looked to reason, nature, and tradition to defend potential principles. They also defended principles that they claimed were supported by popular consensus; they sought consensus in the political community's past, present, and even its future.

The third aspect of Bickel's argument follows from his recognition of limits on the Justices' authority to resolve disputes about the meaning of the Constitution. He asserted that the principles that judges enforce must be acceptable to a contemporary majority. He examined techniques the Court might use to delay the enforcement of an asserted principle, mainly jurisdictional devices that allow the Court to avoid issuing a decision. Such delay could advance a broader discussion among the Court, elected institutions, and the public and thereby help citizens to embrace the principle the Court seeks to enforce. Bickel described these techniques as "passive virtues," and the core of *The Least Dangerous Branch* illustrates their use.

Robert F. Nagel's contribution reflects the first aspect of Bickel's work. He addresses the question of how we should resolve disputes about the meaning of the Constitution, and describes *The Least the Dangerous Branch* as one of the intellectual fountainheads of the judicial activism that characterized the post-*Brown* Supreme Court. He rejects Bickel's defense of broad judicial authority to resolve such disputes; he contends that Bickel exaggerated the Court's willingness to subject itself to the discipline of the passive virtues. Nagel suggests that Bickel underestimated the attraction of the reformist principles that animated both the Warren Court and Bickel's defense of its jurisprudence. He believes that the nature of one's commitment to such principles would inevitably weaken the restraining force of the passive virtues. Therefore, in contrast to early critics who criticized Bickel's discussion of the passive virtues for sacrificing principle to prudence, Nagel contends that Bickel's concern for principle spawns unrestrained activism.

Mark Tushnet also considers Bickel's argument from a perspective that emphasizes the Court's role in resolving conflicts about the meaning

of the Constitution. But rather than consider constitutional theory's influence on the broader political culture, he explores how such political forces influence constitutional theory. Tushnet agrees with Nagel that the passive virtues pose at best a limited restraint on judicial power. He contends that Bickel's defense of judicial review failed, because it assumed a societal consensus about constitutional principles. According to Tushnet, the weakness of Bickel's approach became evident as the emergence of a new regime exposed the dissensus underlying the old one. Similarly, he contends that the recent trend toward judicial minimalism, particularly the work of Sunstein, reflects a different epoch. Sunstein, he argues, transforms Bickel's conception of the passive virtues to suit the needs of the current regime, one in which there are manifest divisions concerning questions of constitutional principle. Although Tushnet believes that Sunstein fails to sustain his defense of minimalism as a theory of constitutional adjudication, he concludes that minimalism describes the diminished aspirations of this regime.

The contribution of Christopher Peters and Neal Devins focuses on the third aspect of Bickel's work. In contrast to Nagel and Tushnet, they suggest that his discussion of the passive virtues supports an attractive conception of judicial restraint. Peters and Devins distinguish Bickel's "procedural minimalism" from the substantive minimalism that characterized traditional constitutional theory and from the recent trend that Tushnet discusses. They endorse Bickel's attempt to define a role for the Court in which it plays an active though not dictatorial role in identifying constitutional values. While earlier proponents of restraint thought that the Court should defer to the substantive decisions of elected institutions, Bickel believed the Court should check the will of the majority when it is in conflict with constitutional principle. But the Justices also should use the passive virtues to mitigate the impact of such intervention. Peters and Devins criticize the "New Minimalists" to the extent that they return to the substantive minimalism of old, and conversely, because they are not adequately sensitive to the political antagonisms that arise when the Justices make decisions beyond their competence.

The contributions of David M. Golove and Stanley C. Brubaker address the second aspect of Bickel's argument: both seek to identify the types of principles that the Justices should enforce to sustain their authority in a democratic government. Golove explores the relationship between Bickel and Ackerman. He illustrates that their conceptions of democratic constitutionalism complement one another. Bickel, according to Golove, views constitutional change as a fluid process; he

believes that the Court satisfies a test of democratic legitimacy when it enforces constitutional principles that reflect the evolution of our political tradition. Ackerman, on the other hand, emphasizes the importance of rare moments of heightened popular mobilization. He believes that the Court derives authority when it enforces principles that express a popular will, principles defined in periods in which citizens have engaged in intense deliberations about constitutional meaning. Golove claims that Bickel and Ackerman capture different dimensions of democratic constitutionalism and that a defensible conception should draw from both views.

Brubaker contrasts Bickel's traditionalist approach with originalist attempts to justify judicial authority. Brubaker considers two originalist critiques of Bickel: that his approach requires judges to play a nonjudicial—political—role, and that it fails to recognize the authority of the popular will expressed in enacting and amending the Constitution. Brubaker argues that neither Bickel nor the originalists provide an adequate solution to the countermajoritarian difficulty because they fail to provide an account of what the Constitution really means, an account that takes seriously the notion of a moral reality that is independent of our ideas about and descriptions of moral subjects. Brubaker, however, believes that their arguments point to the existence of such a reality and indicate the direction in which we must move to find a solution.

The remaining contributions consider how constitutional theory might move beyond Bickel and the countermajoritarian difficulty. Terri Peretti and Kenneth D. Ward retain the Court-centered focus that characterizes the first aspect of Bickel's work; they consider the countermajoritarian difficulty as a framework for assessing judicial authority. Keith E. Whittington directs constitutional theorists to a scholarly agenda that encompasses a richer idea of constitutionalism.

Peretti argues that Bickel's failure to reconcile judicial review and democratic values follows from empirical error. She identifies key assumptions that underlie Bickel's conception of the countermajoritarian difficulty: that (1) legislation reflects majority preferences; (2) Supreme Court decisions are inconsistent with majority preferences; (3) Supreme Court decisions are final; and (4) the Supreme Court, by virtue of its countermajoritarianism, is a deviant institution in American government. Peretti draws on recent work in political science to illustrate that these assumptions fail to reflect the reality of American constitutional politics. She concludes that this failure explains why the countermajoritarian difficulty has been a dead end for constitutional theory.

Ward picks up this theme, suggesting that the quest to solve the countermajoritarian difficulty leads right back to Bickel's starting point. Most commentators, he argues, assume that the countermajoritarian difficulty is resolved by identifying the substantive principles that judges should enforce. Bickel, by contrast, viewed the difficulty as the Court preempting political participation that strengthens citizens' commitment to the political community. The discussion of the passive virtues, according to this view, illustrates how the Court can complement elected institutions while maintaining sufficient opportunities for participation. Ward also notes a tendency among contemporary theorists to reject the conventional view of the countermajoritarian difficulty and to pursue Bickel's original path: they assess judicial authority based on its contribution to a system of legitimate government and not based on the particular principles that judges enforce. Nonetheless, many of these theorists retain the Court-centered perspective that characterizes Bickel's argument. Ward argues that it is Bickel's focus on the Court that leads theorists to misread his argument, and that this perspective continues to confuse contemporary debates. He examines the recent work of Ronald Dworkin and Jeremy Waldron to illustrate how a focus on the Court makes it difficult to grasp arguments that ground judicial authority in considerations that are independent of adjudication.

In the concluding contribution, Whittington introduces an agenda for constitutional theorists that moves beyond adjudication. He believes that constitutional theory has been decisively shaped by the image of conflict between the Court and the political branches during the New Deal. Scholars have concentrated on the ways the Constitution acts as a higher law constraining political actors and the benefits and problems associated with a countermajoritarian Court armed with a judicial veto. Whittington illustrates how constitutions also shape political outcomes by other means. Notably, constitutions help structure how political preferences are expressed and help constitute such preferences. Whittington contends that constitutional theorists need to examine these other faces of constitutionalism.

Taken together, the contributions provide a sense of where constitutional theory has been and some indication of where it might go. We see that Bickel has influenced various aspects of its development. He even anticipated its future evolution when he justified judicial authority based on its contribution to a legitimate system of government. We,

alas, also see that he has shaped the perspective from which theorists view this development and that to progress, the discipline must transcend this perspective.

Notes

1. Anthony T. Kronman, "Alexander Bickel's Philosophy of Prudence," *Yale Law Journal* 94 (1985): 1567.