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Online Alexander Bickel symposium: Bickel and Bork beyond the academy

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A spirited debate over judicial review was unfolding in the legal academy when Alexander Bickel's *The Least Dangerous Branch* appeared in 1962. Often abstract, arid, and abstruse, the cottage industry that followed will likely be the focus of others in this symposium, coming as they do from that world. I've had the good fortune to spend the better part of my career beyond those ivied walls where, as Judge Robert Bork and Justice Antonin Scalia have said, few have had the time or inclination to follow such arguments. Yet Bickel's thesis, at least, did have real world consequences – through the offices of his close Yale Law School friend and colleague, Judge Bork, who has written that Bickel taught him “more than anyone else” about the Constitution. Because I've been intimately involved in that outside debate, that will be my focus here.

I allude, of course, to the fact that Bork, after he left Yale, and whatever his several differences with Bickel, drew nonetheless on Bickel's two main themes – the “countermajoritarian difficulty” and the “passive virtues” – to become the dominant figure in the rising conservative legal movement, with its call for “judicial restraint” – a direct response to the “judicial activism” and the “rights revolution” conservatives saw coming from the Warren and Burger Courts. Whether in the pages of *National Review* from the late 1950s, in the aftermath of the Goldwater takeover of the Republican Party in the late '60s and on through the '70s, the emergence of the Federalist Society in 1982, or through the Reagan administration's judicial appointments, Bickel's influence on the Bork brief for “judicial restraint” was at the center of the increasingly influential conservative political debate concerning the courts.

But a funny thing happened along the way. During the mid-'70s a tiny band of libertarians, rooted for the most part in that emerging conservative political movement and, in academia, in philosophy and law, began to question the conservative thesis. After all, didn't the nation spring from the idea of natural rights? And weren't courts instituted to secure those rights by limiting government power? Indeed, what was it with this judicial “deference” to majoritarian democracy, the very process that had given us the Leviathan against which conservatives (and libertarians) were otherwise railing?

Thus the debate over the conservative movement's jurisprudential soul began. Long dominated by Borkian conservatives, it has slowly shifted over the years in the libertarian direction – not entirely, to be sure, but significantly. Drawing on both theory and history, libertarians have called for a more “active” judiciary – not to be confused with liberal “judicial activism” – first to defend rights, as in *Lucas v. South Carolina* (1992) and *Lawrence v. Texas* (2003), then to challenge powers, as in *Lopez* (1995), *Morrison* (2000), and the *Obamacare* cases, where six of the twelve judges who had ruled on the merits by the time the Supreme Court granted cert. were sufficiently “engaged” to hold that Congress had exceeded its power under the Commerce Clause, as the Court itself just ruled and as libertarians had argued long before conservatives came to that view for fear of unleashing the courts. Two years ago, nearly all academics and many conservatives gave that argument little chance.

It's that story, about how the Bickel-influenced Bork thesis has played out, and declined, over the several decades during which the conservative legal movement has grown, quite outside of academia, that I want to tell, in the limited space I have, and at least as I saw and lived it. But let's start by putting Bickel in a proper setting, and that takes us far back.

Back to Bickel

To summarize and vastly oversimplify, Bickel's often subtle arguments – in fact, the very idea of a “countermajoritarian difficulty” and of the need, accordingly, for courts to indulge the “passive virtues” – taken together speak volumes about his constitutional vision. He's not an originalist, as Bork has convincingly demonstrated. He's a small “d” democrat, his intellectual roots in the Progressive/Populist movement that in time would invert the Framers' Constitution through the New Deal's constitutional revolution – the Populists believing themselves vindicated, even as actual power shifted to Progressive elites who would sit on everything from the New Deal's National Labor Relations Board to *Obamacare's* Independent Payment Advisory Board.

The intellectual underpinnings of that movement drew variously from German ideas about good government (Bismarck's social security scheme), British utilitarianism (replacing natural rights theory), and the emerging social sciences (enter the social engineer), all of which infused the idea of law as policy and hence as legislation aimed at providing the greatest good for the greatest number. That vision stood in sharp contrast with the older idea of law as principle, grounded in liberty, property, and contract, secured by courts enforcing those rights

as well as such legislation as might be necessary to flesh them out, to provide a limited set of “public goods,” strictly defined, and to do whatever else might otherwise be constitutionally authorized.

Such was the main business – although, alas, not the only business – of the “Old Court,” nowhere more evident than in its splendid *Lochner* decision in 1905. But as legal realism, with its conflation of politics and law, took hold in American legal thought, the Court began to cave, doing so systematically after FDR’s Court-packing threat, as we know. The Constitution’s core doctrine of enumerated powers was eviscerated in 1937; the Bill of Rights and judicial review were bifurcated in 1938, with economic and property rights the main victims; and the nondelegation doctrine was jettisoned in 1943, giving us the modern executive state. To oversimplify, but not by much, the Constitution became a largely empty vessel, to be filled by transient majorities, though more realistically by those best situated to work the new system – and the courts were restrained from hearing a vast array of regulatory and redistributive complaints.

The democratic fig leaf that purported to justify this new order dominated both academic and popular opinion for decades thereafter – and still does to a large extent – but it began to slip embarrassingly as the civil rights movement came on the scene. Majoritarian will might suffice to restrict disfavored economic liberty and property rights – if you didn’t think too deeply about it – but “fundamental” rights were another matter, especially those of people unable to get redress through the democratic process – unlike property owners and business people, presumably. In this context, the most important test of the judicial restraint that flowed from the New Deal came, of course, in *Brown v. Board of Education* (1954). Steeped in this intellectual and jurisprudential tradition, and clerking at the time for Justice Felix Frankfurter, who had serious reservations about the opinion, if not the decision, Bickel would later try to square that decision with his majoritarian principles and with his belief that the Court got it right also, a Term later, when it refused to hear *Naim v. Naim*, a challenge to Virginia’s anti-miscegenation statute.

The effort was less than successful. Bickel granted that the principle was the same in both cases, but given the intensity of the opposition to *Brown*, especially in the South, he asked whether it would have been “wise,” in that context, for the Court to have decided *Naim*. That’s a political question, of course, which the Court answered, implicitly, by ducking the issue, which Bickel defended. When he wanted or needed to, therefore, he could rise “above” principle, and he could because he seems to have been working with multiple principles, not all of them grounded in the Constitution. Given that he believed also that judicial review needed to be “consistent with the theory and practice of political democracy,” he was able to be selective with his “enduring principles,” as he was in rationalizing the Court’s handling of *Naim*. All of which brings us back from his “passive virtues” theme and its nonjusticiability elements, indulged in *Naim*, to the theme that seems most to have animated Bickel’s thinking, the “countermajoritarian difficulty.”

Why a “difficulty”? The most plausible explanation, I believe, is the simplest, as is often the case: He really was a small “d” democrat, which means, as a practical matter, a majoritarian. Not that he was oblivious to the “majoritarian difficulty,” of course, but it’s far and away the minor theme – and, still more, an unfocused theme. Nor was he oblivious to the problem of “factions,” though he minimized it. For Bickel, “the heart of the democratic faith is government by the consent of the governed.” To be sure, “the good society will not only want to satisfy the immediate needs of the greatest number” – he located legitimacy in the consent “of a present majority” – “but will also strive to maintain enduring general values,” for which courts are “better fitted” than legislatures, he wrote. Still, nothing in the complexities of our system “can alter the essential reality that judicial review is a deviant institution in the American democracy.”

Indeed, he went out of his way to press that point, repeatedly. It’s as if he latched on to the “countermajoritarian difficulty” early in his thinking and it became the prism through which all else was seen – including the Constitution itself. For Bickel, as for Bork, it was all about majoritarian democracy. They parted over originalism: Bickel’s Justices would extract his “enduring principles” less from the document than from “the tradition of our society and of kindred societies that have gone before, in history and in the sediment of history which is law, and . . . in the thought and the vision of the philosophers and the poets.” Bork’s Justices would extract them from the Constitution, or so he believed.

The Madisonian Constitution

Fast forward to 1990 and the echoes of Bickel in Bork’s seminal statement, following his failed Supreme Court nomination: In *The Tempting of America*, which inspired the growing conservative legal movement for years, Bork wrote that the central problem for our constitutional courts is the resolution of “the Madisonian dilemma,” namely, “that in *wide areas* of life majorities are entitled to rule, if they wish, simply because they are majorities,” yet there are “*some things* majorities must not do to minorities, *some areas* of life in which the individual must be free of majority rule” (emphasis added). Responding shortly thereafter in the *Wall Street Journal* (“Rethinking Judicial Restraint”), I wrote that “that gets Madison’s vision exactly backward.” Madison held that in *wide areas* individuals must be free because they’re born free, but in *some areas* majorities may rule, not because they’re inherently entitled to, but because we’ve authorized them to. That gets America’s presumptions and burdens right.

In so writing I was simply drawing on work that I and others had been doing since the 1970s, if not before, to resurrect the Madisonian Constitution – the “Constitution in exile,” as Judge Douglas Ginsburg put it in a 1995 *Cato* publication. That meant criticizing the modern liberal inversion that had dominated the field since the New Deal – both the pre- and the post-Warren Court versions. And it meant taking on the more recent conservative version as well, which made peace with the demise of the doctrine of enumerated powers (a “lost cause,” Scalia said over lunch at *Cato* in 1993), but then urged courts to enforce only those rights that were fairly clearly “in” the Constitution while remaining otherwise “restrained” and deferential to the political branches.

“A pox on both your houses,” we said, and here are just a few early illustrations of that undertaking – again, as I’ve seen and lived it. In the ’70s at Chicago I was writing my dissertation on the theory of rights, drawing in part on Richard Epstein’s early work in torts across the Midway. Meanwhile, a young Harvard Law student, Randy Barnett, was rethinking criminal law, while out in San Diego the late Bernie Siegan was writing his majestic *Economic Liberties and the Constitution*, published by Chicago in 1980. The year before he’d attended a rights conference I organized out there, which plumbed the epistemological depths of the subject and included Epstein on property, all of

which appeared that year in a special issue of the *Georgia Law Review* dedicated to the new rights theory – a volume the Institute for Humane Studies circulated long thereafter.

We all, plus others, came together again in Washington in 1984 for a conference Cato sponsored on “Economic Liberties and the Judiciary,” the outline for which I sketched on the back of a paper napkin a year earlier, over lunch with Cato’s president, Ed Crane. The conference opened with a spirited debate between then-Judge Scalia and Epstein, who said upon moving to the podium that after listening to Nino (who’d worked the Bickel/Bork thesis) he’d thrown away his notes (when did Richard ever use notes?!) so he could respond afresh, and so he did. Thus was Washington introduced to this “third way” – this unfashionable idea that the courts, per Madison, should be “an impenetrable bulwark against every assumption of power in the legislative or executive.” Epstein’s *Takings* (1985); Stephen Macedo’s *The New Right v. The Constitution* (1986); Crane’s *Wall Street Journal* critique of Bork, “Soul of a Congressman” (1987); Siegan’s and my ABA Bicentennial showcase program speeches on “Economic Liberties and the Judiciary” (1987); a Federalist Society conference on the same subject (1987); Epstein on the Commerce Clause (1987); Cato’s Center for Constitutional Studies established (1989); Barnett’s *The Rights Retained by the People* (1989); Barnett’s and my ABA Bicentennial showcase program speeches on “The Forgotten Ninth and Tenth Amendments” (1991); the Institute for Justice established (1991); and on it has gone, with a growing group of younger libertarian scholars, lawyers, and judges now well established, and a growing list of publications, including the *Cato Supreme Court Review*, launched during the Court’s 2001 Term.

In sum, Bickel, the uneasy liberal, drew from Felix Frankfurter, Learned Hand, Herbert Wechsler, and others in the judicial restraint school that followed the New Deal constitutional revolution, developing in the process a theory of judicial review aimed at addressing the Warren Court’s activism, but one on which his friend Bork, the easy conservative, would go to school, rejecting some elements, but keeping its core, all to inform the conservative critique of that new activism. There things stood, far removed from Madison’s Constitution for liberty through limited government, until a new school emerged to call all of that into question.

Progressives and their liberal progeny were all process, the substance to be supplied by popular will, in theory, more often in practice by elite forces. Bickel and Bork rejected such forces, for the most part, but not the wide scope for majoritarian process. They failed to sufficiently appreciate that the Constitution’s theory of legitimacy is grounded in the Lockean theory of rights, that the Ninth and Tenth Amendments reflected and instituted the moral and political theory of the Declaration of Independence, our founding document, and that the Civil War Amendments completed the project by applying that theory against the states. Popular will fills offices and, to that extent, authorizes officeholders to act. It does not authorize their offices or actions. If it did, a much shorter constitution would have served. As the Obamacare litigation of the past two years has shown, those first principles are back in play. Madison understood the document he’d drafted: the powers of the federal government, properly understood, are indeed “few and defined,” leaving us otherwise free to plan and live our own lives.

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