

Bickel's Judgment of this Court

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The Judgment of This Court

Judicial review "has the power to construe and apply the Constitution in matters of the greatest moment against the wishes of a legislative majority" (235). Bickel believes that justices must not simply draw upon textual and doctrinal interpretations, but "immerse themselves in the tradition of our society and of kindred societies that have gone before." Chafee: A judge "is likely to be resorting to a body of principles which may have no physical location, but neither has courage nor loyalty nor love of truth" (237).

Bickel wants to know: If there are universal moral truths to be considered in constitutional law, why is it that moral and reasonable people can differ so frequently? (Most cases are not unanimous.) Renan: Truth is constituted of nuances, and these are not equally visible to everyone. Chafee: "We cannot get outside ourselves to do our thinking and each of us inevitably puts something of himself into the general principles"

Frankfurter: Judgment must "rest on fundamental presuppositions rooted in history, to which widespread acceptance may fairly be attributed." Why not let a political institution do this? No, Congress and White House are only suited to find the existing consensus. "The Court should declare as law only such principles as will-in time, but in a rather foreseeable future-gain general assent." Should the court really seek to guide public opinion? This seems far out of line from any judicial I have heard about.

However, consider this example of the value of public opinion. Prof. Black argues that the Supreme Court (1962) would not consider striking down all capital punishment under due process or cruel and unusual punishment. However, it would have been intelligent to say at that time that capital punishment will always be tolerated by U.S. constitutional law. For myself, an easier example is that of Texas v. Johnson, the flag burner arrested at the 1984 national GOP convention. I doubt very much flag burning would have been protected before the 1960s (during WWII or the McCarthy investigations?) Yet now the Supreme Court has recognized it as protected speech.

Composing for the Anthologies

Bickel: What passes for "ultimate, final judgment of the Court is quite frequently a judgment ultimate and final for a generation or two" (244). That is fine though, and raises the interesting issue of how much can change in 1.5 generations.

School Segregation Cases (17 May 1954) resulted in no real change in school policy but it was critical because, as Lincoln had said of slavery, "where the public mind shall rest in the belief that it is in course of ultimate extinction" (245-6). By Jan 1955 more than 500 school districts had abandoned segregation, however small a fraction of total segregated school districts. This decree was not the final action of the court on segregation. The force of law is yet to come.

All Deliberate Speed

The court usually gives very specific orders with regard to the circumstances presented by the evidence. However, its power does not derive from circumstantial adjudication but rather from the interpretation and construing of const. law, and the establishment of theory to navigate new and difficult terrain. Bickel (247):

1. may only decide concrete cases and may not pronounce general principles at large
2. but it may decide a constitutional issue only on the basis of general principle

In desegregation, ruling on behalf of a few dozen minority children is not too difficult. ("Send them to a white school.") However, this does not provide a guide for future integration. Will all black students go to white schools and overload the previously white schools. Will 50% of each school swap places to produce racial equity at both schools? If the previously black school is in much worse condition than that for whites, who is to move and who is to stay? Also, some deficient black schools would not be fully successful in transferring their students to a school whose students enjoy a head start in academic, social, and cultural matters. Successful integration practices are necessary to fulfill the principle of racial equity. The local school bureaucracies are so entrenched in the politics as to be unreliable and the court is forced to detail how segregation will be achieved, but must apply general principle to determine "who, what, where, when, how."

Occasionally, all courts may call for a result within their jurisdiction which is impossible to immediately achieve. Bickel cites anti-trust orders against American Tobacco Co., GM Corp., and DuPont as examples. The court is once again required to set a time table for specific action when the executors of the court order are also defendants.

In addition to accomplishing the effect of the ruling, the court must "gain assent, not necessarily to have it." In drafting judicial orders, the court ignores foreseeable opposition to the detriment of its own objective: the rule of constitutional law. Criminal law succeeds because a very small minority is prosecuted in accordance with the wishes of the overwhelming majority. Prohibition laws relating to sex and gambling usually fail because one large population attempts to prosecute another large population. (Or, in more ironic cases, those prosecuting eventually suffer prosecution under their own prohibition.) Segregation was practiced widely in the South just as drinking and gambling have been popular in the US in most places. Thus segregation is difficult to prohibit directly and some cooperation of the guilty parties becomes prerequisite to integration. Finally, the court does not wield any police power of its own. It assumes that the executive branch will enforce its rulings. In cases which may

involve unusual resistance, cooperation in the letter *and* the spirit is needed from bureaucrats and police. (Bickel notes "there are degrees of enthusiasm in rendering executive support.")