History of the Supreme Court of the United States. Volume IX: *The Judiciary and Responsible Government, 1910–21*. Parts One and Two. Part One by Alexander M. Bickel; Part Two by Benno C. Schmidt, Jr. (New York: Macmillan Publishing Company; London: Collier Macmillan Publishers, c. 1984. Pp. xiv, 1,041. $75.00.)

When he died in 1974, Alexander Bickel had finished the seven 100-page chapters of this volume of the Holmes Devise series that cover appointments to the Supreme Court and cases concerning social and economic issues, except race. As a judge's history, concentrating on printed materials and the manuscripts of the Justices, Part One is trenchant and often delightful. Case by case, vignette by vignette, Bickel had no peer for clarity, brevity, shrewd judgments, and wit. Yet unlike his mentor Felix Frankfurter, Bickel rarely stepped back and considered overarching issues of political and constitutional theory, and he made no effort to master post–World War II versions of the history of the so-called Progressive Era. These chapters constitute an authoritative reference work for details, an unself-consciously traditional series of well-crafted set pieces to be dipped into for specific information, not consulted for broad generalizations or read page by page. There is no Bickel thesis here and little direct questioning of anyone else's thesis, either. On Bickel's account, the Court in these years was just inconsistent—sometimes for, sometimes against various sorts of regulations, sometimes deferential to other branches, sometimes assertive of judicial power, sometimes slavishly following precedent, sometimes creative and responsive to new arguments. There were apparently no pronounced trends. Perhaps this was the way the period really was, but Bickel's narrow focus shrouds any possible larger themes from view.

Part Two, three chapters of 90 pages each on racial issues by Bickel's former student and chosen successor in this work, Benno Schmidt, is entirely different, and, given its themes, undoubtedly of more interest to the readers of this journal. Schmidt's sustained, revisionist, but carefully qualified argument is that during Louisianian Edward Douglass White's chief justiceship, the Court reversed the erosion of black constitutional rights. From *Slaughter House* (1873) to *Civil Rights* (1883) to *Plessy* (1896), *Cumming* (1899), and *Giles* (1903), the Supreme Court had stripped the federal government of the power to protect blacks from individual, and later, from state-sponsored assaults. But in *Bailey* v. *Alabama* (1911), the peonage case; *Guinn* v. *U. S.* (1915), the grandfather clause case; *Buchanan* v. *Warley* (1917), the Louisville segregated housing ordinance case; and a few other decisions, the Court set limits on *de jure* apartheid and discrimination. Blessed by a Constitution and a court finally willing to provide some protections for nonwhites and noncorporations, the American South would not become South Africa.

Like Bickel, Schmidt glories in detail and close argument. In contrast to his teacher, he marshals both in the service of a larger theme. Thus Schmidt argues persuasively that *Buchanan* should not be read purely as a property rights case, nor *Bailey* as one on freedom of contract, the precise words of the opinions notwithstanding. Neither they nor *Guinn* nor the decisions in related cases were inevitable. Questions of standing to sue, of the nature of liberty of contract, and of statutory construction of the remaining federal civil rights laws could easily have blocked or reversed the outcomes. But Schmidt does not claim very much for the Court's liberalism in these years. None of its decisions, he admits, seriously challenged the basic legal structures of discrimination, and all were acceptable to many white southerners and often paralleled or followed similar outcomes in southern courts. The

semislavery of peonage was the stuff of muckraker scandal, and the Oklahoma permanent grandfather clause was too blatant an evasion of the Fifteenth Amendment.

The Supreme Court took these moderate, tentative steps against extreme legalized racism not because of personnel turnover—justices' racial views were irrelevant to appointments at this time—or changes in public attitudes, which did not become more racially liberal during the decade. Instead, Schmidt argues, the Court applied to race cases the doctrines of laissez-faire constitutionalism and judicial activism previously used to overturn economic regulations. The "conservative" decision in *Lochner* (1905) may not have dictated the "liberal" one in *Bailey*, but it made the peonage decision more probable.

But to demonstrate the inadequacy of conventional categories is not to explain. If beliefs in laissez-faire and black rights naturally cohered, why did the Supreme Court wait until 1911 to make the connection, and why was it largely abandoned during the 1920s? Were judges who were willing to allow economic regulation particularly likely to approve racially discriminatory laws, and vice versa? Such questions cannot even be posed, much less answered, within this temporally subdivided series, concentrated as it must be on only the highest court. But Schmidt's interesting hypothesis and compelling reinterpretation of decisions deserves more attention than it may receive in this format. Perhaps Macmillan can be convinced to issue Part Two separately.

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