

Alexander Bickel

Alexander Mordecai Bickel (1924-1974) was a renowned commentator and scholar who studied and wrote about the role of the U.S. Supreme Court in American life. Bickel was born in Bucharest, Romania, but immigrated to the U.S. with his parents in 1939. He received his undergraduate degree from City College of New York in 1947 and graduated in 1949 from Harvard Law School with highest honors after serving as editor of the school's law review. Bickel then went on to serve as a law clerk to Justice Felix Frankfurter from 1952 to 1953. While working for Justice Frankfurter, Bickel was involved in assisting the justice as the Supreme Court debated the historic school desegregation decision, *Brown v. Board of Education*, 347 U.S. 483 (1954).

In 1956, Bickel accepted a position as a professor at Yale University Law School, where he taught until his death. It was during this time that Bickel had his most enduring impact on the scholarly community. One of Bickel's contributions was his coining of the phrase "the countermajoritarian difficulty," a phrase still widely in use today. This phrase represented the concept that there is an inherent tension between the exercise of judicial review and the democratic principles on which the U.S. is founded. Judicial review is the idea that the federal courts can strike down legislation passed by Congress if it violates the Constitution.

Bickel also presented a solution to lessen the tension between these two ideas that was at the core of his main scholarly contribution. Unlike many at the time, Bickel did not believe the Supreme Court should be an unimportant part of the government. At the same time, however, Bickel believed that in many regards the Supreme Court had extended itself too far in major national controversies such as school desegregation and affirmative action. The Court's main role, for Bickel, was one where its wisdom and isolation from elections allowed it to defend historic moral virtues from the short-term desires of the public and elected officials.

Another contribution made by Bickel was his theory of the "passive virtue" of judicial decision making. Under this logic, the Supreme Court should decide cases on the narrowest grounds possible. Justice Byron R. White, who served on the Court from 1962 to 1993 is an example of a judge whose legal beliefs were generally supportive of Bickel's viewpoint. Justice White would frequently admonish his colleagues who used broad constitutional reasoning in an opinion when a much narrower approach would suffice.

Bickel was also involved in several Supreme Court cases while he was a law professor. The most important, however, was a Supreme Court case involving free speech and national security. Bickel represented the *New York Times* at oral argument in *New York Times v. United States*, 403 U.S. 713 (1971), which addressed whether the government could prohibit newspaper publication of allegedly sensitive war materials during the Vietnam War (Bickel's side prevailed).

Just three years later, in 1974, Bickel died of cancer at the age of 50 in New Haven, Connecticut.

For more information:

Ward, Kenneth D. and Cecilia R. Castillo, Eds. 2005. *The Judiciary and American Democracy: Alexander Bickel, the Countermajoritarian Difficulty, and Contemporary Constitutional Theory*. Albany, NY: SUNY Press.

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