Attacks on the Supreme Court

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ATTACKS ON THE SUPREME COURT*

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According to an old dictum, it makes a difference whose ox is being gored. In the past few years the Supreme Court has gored some oxen (plus, now and then, a sacred cow), and the proof of the proverb lies in the sustained attack which has been mounted. The common judgment is that contemporary criticism of the Court has few parallels for scope and intensity in American history.

Disparagement of court decisions is not a new phenomenon, of course. Criticism of the high Court has flashed like summer lightning through the nation's history, and one ordinarily need go no further than his favorite historical character to find some juicy tidbit of invective. Indeed, a case might be made against the present expressions of pique solely on the grounds of their pedestrian tenor.

Senator William E. Jenner has characterized the Court's work as lacking "solid foundation in either legal principles or common sense." Professor Edward S. Corwin has suggested that the justices "bone up a little on the history of the Constitution before trying to remake it." Journalistic pundits have alternatively explained their disagreement with the Court's opinions by claiming that the justices are sadly deficient in scholarship, or haven't had sufficient lower court experience to function properly on the high bench.

The unique status of the Court makes it a scapegoat for any group in our society. Unlike politicians, the Supreme Court cannot be all things to all people. The nature of the institution impels judgment and decision — the deliberate choice between competing claims and theories. And what pleases the Civil Liberties Union is apt to wrap a fog of gloomy debate around the next American Legion convention.

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A focal point of modern tensions, the Court is vulnerable to attack from all sides. In the important policy questions which the Court must decide substantial group interest can be identified with both sides — the losing as well as the winning side. The Constitution is very often invoked to protect the rights claimed by the minority or the unpopular side of public issues. It is, thus, inevitable that the Court will decide against some powerful and vocal groups. Just a glance at some of the recent decisions which feed the contemporary controversies is sufficient to show the type of problem with which the Court is confronted, and the variety of social groups which it has antagonized.

Cases Reviewed

Segregationists and state rights groups are still smarting from the 1954 opinion of the Supreme Court in Brown v. Board of Education\(^1\) which held the racial segregation of students in public schools to be a violation of the equal protection clause of the fourteenth amendment. Some of the attacks were of the emotional sort, including the perennial question, “Would you like your sister to marry a Negro?” Others reached for the cloak of constitutional respectability with claims that the fourteenth amendment had never been properly ratified, that the Court failed to follow its own prior decisions by rejecting the “separate but equal” doctrine, and that the Court had used “sociological” rather than legal criteria to determine the meaning of “equal protection of the laws.”

Perhaps the most publicized decision of the past term of the Court was the case of Jencks v. United States.\(^2\) Both law enforce-

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\(^1\) 347 U.S. 483 (1954).
\(^2\) 353 U.S. 657 (1957).
United States\textsuperscript{3} which limited the investigative powers of Congressional committees. The decision reversed a conviction for contempt of Congress based on the defendant's refusal to answer some of the questions posed by the House of Representatives' Committee on Un-American Activities. The Court traced the history of legislative investigations from the English Parliament through to recent congressional hearings and found a new tendency in the investigations which "involved a broad-scale intrusion into the lives and affairs of private citizens."\textsuperscript{4} The constitutional infirmity in the conviction of Watkins, the Court found, was rooted in the vagueness and the sweeping character of the House resolution creating the Committee; this made it impossible for the witness to know the extent of the Committee's authority to command his cooperation in answering the questions propounded. The Court reasoned that Congress has no power to expose for the sake of exposure:

The theory of a committee inquiry is that the committee members are serving as the representatives of the parent assembly in collecting information for legislative purpose. . . . An essential premise in this situation is that the House or Senate shall have instructed the committee members on what they are to do with the power delegated to them. . . . Those instructions are embodied in the authorizing resolution.\textsuperscript{5}

The Court after investigating the resolution creating the Committee on Un-American Activities found: "No one could reasonably deduce from the charter the kind of investigation that the Committee was directed to make."\textsuperscript{6} The Court concluded:

Petitioner was thus not accorded a fair opportunity to determine whether he was within his rights in refusing to answer, and his conviction is necessarily invalid under the Due Process Clause of the Fifth Amendment.\textsuperscript{7}

The Court also stated that Congress in its investigations must not encroach unreasonably upon the individual's privacy or upon his liberty of speech, press, religion or assembly.

Groups preoccupied with security against the menace of communist subversion were once more disturbed at the Supreme Court's reversal of the conviction of fourteen West Coast communists for conspiracy to violate the Smith Act. The decision in \textit{Yates v. United States}\textsuperscript{8} defined the statutory term "organize" to include only initial organization. As a result parts of several indictments were declared invalid as covering acts beyond the three-year statute of limitations. By this holding the Court rejected the government's interpretation of the Smith Act and applied the familiar rule of law that criminal statutes are to be construed strictly. The Court also made a distinction between teaching the violent overthrow of the government as an abstract doctrine in the academic sense and advocacy that incites to illegal action. This distinction was applied to the Smith Act which was interpreted to allow academic discussion of communism while prohibiting incitement to overthrow the government. The distinction is not only a valid one but essential if the truth of a philosophical or theological position is not to be decided by legislative fiat. The government which is competent to declare Marxism false is able to say the same of Thomism. This does not, however, pre-

\textsuperscript{3} 354 U.S. 178 (1957).
\textsuperscript{5} \textit{Id.} at 200-01.
\textsuperscript{6} \textit{Id.} at 204.
\textsuperscript{7} \textit{Id.} at 215.
\textsuperscript{8} 354 U.S. 298 (1957).
vent the government from prohibiting speech that incites illegal action, as the Court had earlier held in *Dennis v. United States*. This important distinction was forgotten by alarmist critics excited to discover that fourteen communists were not yet jailed.

Some of the groups which are concerned with civil liberties found cause for dissatisfaction in the Court’s handling of obscenity in *Roth v. United States*. Occasional blasts from the other side of the fence came from those who agreed with the Court’s opinion that “obscenity is not within the area of constitutionally protected speech or press,” but who disagree with the standard approved by the Court for defining obscenity. The standard applied by the lower court was “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”

While it is true that this might not be an ethician’s definition of obscenity, ethicians do not make up the juries that have to rule on the charges. Some of the groups devoted to civil rights were also disturbed at *Kingsley Books, Inc. v. Brown* which allowed an injunction against the sale of obscene books. Here the objection was that prior restraint on the press violated freedom of press guaranteed by the first amendment. Justice Frankfurter’s opinion attempted to meet the objections against prior restraint with this argument:

Instead of requiring the bookseller to dread that the offer for sale of a book may, without prior warning, subject him to a criminal prosecution with the hazard of imprisonment, the civil procedure assures him that such consequences cannot follow unless he ignores a court order specifically directed to him... Veterans’ organizations—as well as those who in general distrust foreign justice—were incensed at the action of the Court in denying relief to an American soldier whom the United States Army proposed to deliver to the Japanese government to be tried for the killing of a Japanese woman in Japan. The issue was complicated by the 1951 Security Treaty and an Administrative Agreement with Japan. Under this Agreement a joint committee of the two countries met but was unable to decide which nation should prosecute the soldier, Girard. The Secretary of Defense and the Secretary of State determined that the United States would waive jurisdiction. It was the waiver of jurisdiction which brought forth the cries. In the Court’s opinion the United States could waive jurisdiction under an article of the Agreement which provided:

The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

The Court expressed its belief that “the wisdom of the arrangement is exclusively for the determination of the Executive and Legislative Branches.” Here it is ironic that the Court is criticized for not interfering with the action of Congress and the Executive, whereas the usual complaint is that the Court is guilty of usurpation of the powers of the coordinate branches.

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12 Id. at 489.
16 Id. at 529.
17 Id. at 530.
A section of the business and industrial community was dismayed at the Court's finding in *United States v. E. I. du Pont de Nemours and Company*\(^{18}\) that Section 7 of the Clayton Anti-Trust Act prohibited the lessening of competition through the holding of stock in a customer corporation (i.e., prohibited "vertical" stock acquisition). Section 7 of the Act makes it unlawful

to acquire ... the whole or any part of the stock or other share capital of another corporation ... where the effect of such acquisition may be ... to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.\(^{19}\)

The Act was adopted in 1914 and the earlier applications of the section had been made to prevent the lessening of competition through holding of stock in a competing corporation (i.e., to prohibit "horizontal" stock acquisitions). The Federal Trade Commission had not applied the section to vertical stock acquisitions, and it is safe to say that the section was generally thought not to apply to such acquisitions. The Court further held in the *du Pont* case that the question of whether competition was lessened could be made at the time the government filed the suit and did not have to be made at the time of original acquisition. The Court said the statute was applicable "whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce."\(^{20}\)

It is hard to deny that the *du Pont* case expands the meaning of the Clayton Act, but it must not be overlooked that the case was brought at the instance of the Executive Branch of the government and that the Congress can readily modify the Act if it believes that the Court has erred.

Taking a broad view of the decisions here noted, one is struck by the kind of problem with which the Court is saddled. These cases called for judgments on core issues of our society: procedural rights of the individual faced with the massed power of the state; limits of free expression in a pluralistic society; irreducible minimums of minority interests; permissible affiliations of economic blocs; propriety of method in combatting subversion. These involuted questions underlie the facts of the cases. They call for specification and resolution, not in the sweet-sounding phrases of the speculative, but in the harsh irrevocable words of decision.

At any given time the diverse principles and overlapping assumptions which constitute a functioning government are in a precarious and shifting balance; this state of affairs is more, not less, true in a democracy. The task of the Supreme Court is nothing less than the articulation of this amorphous public philosophy and the application of it to the controversies which are properly brought before the bar.

Much of the present criticism can be traced, then, to an ignorance of what the judicial act entails, or to an unwillingness to accept the system of government which provides for a Supreme Court with power of review.

The popular notion of law demands a code of well-defined and finished rules under which all imaginable problems fit with snug exactness. Thus men who in their daily lives suffer agonies of indecision over which suit to buy expect that a Justice can interpret the Clayton Act "correctly." Those who conscientiously grapple with

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20 Id. at 592.
large but individual problems of moral
conduct are chagrined when the Court can-
not produce some slide-rule to determine
the meaning of "obscene" for 170,000,000
of us.

The fact that lower courts are reversed
in their decisions is a scandal of a sort.
"Don't lower court judges know law, too?
How, indeed, can there be disagreement
over what the law is?" The supposition be-
hind the objection is obviously that courts
are invading the province of Congress, con-
trary to all the principles of government
which are summarized in the textbooks:
"the legislator makes the law, the executive
enforces it, and the judiciary determines
violations." Do we have a government of
law or of men, runs the complaint.

This view—which, incidentally, is not
necessarily restricted to those outside the
legal fraternity—assigns to the judge merely
the elementary task of applying law to facts
and transcribing the results. Whatever va-
lidity such a philosophy has for the routine
class of lawsuits, it fails miserably as an ex-
planation of the operation of a Supreme
Court. For the Supreme Court also has as a
primary function the interpreting of a writ-
ten Constitution, with the gloss that such
interpretation is authoritative.

Constitutions are not the same type of
animals as other laws. They are not de-
signed to detail the solutions of every prob-
lem that can arise. Instead, they set down
norms and guideposts within which particu-
lar decisions must be reached. All of this is
elementary.

Yet even when the Court is not exercis-
ing itself on a specific constitutional issue,
it is normally concerned with problems that
in their scope and complexity inevitably re-
quire a system of values and a list of priori-
ties. Legal questions are in their essence
manifestations of value clashes within our
society itself. Only infrequently do legisla-
tors resolve these clashes comprehensively.
The legislative process requires that the dif-
ferent interests be reconciled and that a law
regulating an area of human conduct be ex-
pressed in terms which reflect a consensus
required for its enactment. But the Court
cannot stop when it has found the law's
area of common agreement; it must judge
the issue which has been presented to it.
And the mere fact that the issue has reached
the Supreme Court is some evidence that
the statute gives only equivocal answers.

A failure to realize what the Court is
called upon to do leads to frustration and
annoyance. The innocent observer can only
explain judicial disagreement, as Holmes
put it, "as if it meant simply that one side
or the other were not doing their sums
right, and if they would take more trouble,
agreement inevitably would come."

Depending on whether one agrees or dis-
agrees with the decision, the Court is, in
this simple view, either a society of god-
like creatures, or a club of nodding mortals.

Yet even those who have a sophisticated
understanding of the vital elements of ju-
dicial decision sometimes close their eyes
to the structure of our American legal sys-

The Supreme Court is a consequence of
the need for an impartial and a detached
evaluation of governmental activity in the
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perspective of the Constitution. If the na-
tion acts in haste, it has a Court to prevent
an extended repentance. But, additionally,
the Court serves the real need of bringing
issues to a conclusion. However it may gall
us at the time, "the buck stops here."

A distinguishing mark of our legal sys-
tem is the precedence of process over
power. The Court may make a decision,
but its enforcement lies basically in a will-
ingness of the people to give that respect
which is due the system itself. This respect
does not hinge on agreement with any in-
dividual mandate of the Court, but on the
knowledge that problems must be resolved
by law.

The carping which overlooks the nature
of the judicial process, or which balks at
the meaning of the system, is dangerous
precisely because it tends to destroy and
not to improve law. No one would seri-
ously preach the heresy that the Court is
above criticism. The current problem is
quite to the contrary. Many of those who
have attacked the Court in past months
have actually forestalled effective criticism.
As one lawyer put it, "I wish some of these
people would shut up so that I could take
issue with some of the Court's opinions.
But I don't want people thinking that I'm
in agreement with the rash charges that
have been made."

The charge that the Court is playing a
creative role, rather than a mechanical one,
is noteworthy only for its naïveté. Those
who think that disagreements can be elimi-
nated by requiring the justices to have a
given amount of lower court experience are
only deceiving themselves. They cannot see
what Justice Frankfurter means when he
writes: "One is entitled to say without quali-
fication that the correlation between prior
judicial experience and fitness for the func-
tions of the Supreme Court is zero." And
why is this true? Because, he tells us,
the Court's preoccupation today is with the
application of rather fundamental aspira-
tions and what Judge Learned Hand calls
'moods,' embodied in provisions like the due
process clauses, which are deliberately de-
signed to supply only general norms of
decision. The judicial process in applying
them involves a judgment on the processes
of government. The Court sits in judgment,
that is, on the views of the direct representa-
tives of the people in meeting the needs of
society, on the views of Presidents and
Governors, and by their construction of
the will of the legislatures the Court
breathes life, feeble or strong, into the inert
pages of the Constitution and the statute
books.

Similarly naïve is the mock horror with
which other critics of the Court contem-
plate the immense power which the justices
wield. Among the crass remedies which
some disgruntled critics would apply is a
periodic reconfirmation of the justices by
the Senate. Thinking the bath water foul,
they are momentarily not concerned that
the baby will be dumped out as well. At
bottom their complaint is not that there is
a Supreme Court but that the present Court
does not reflect their views.

To be effective, the critic of the Court
must appreciate the complex processes of
human judgment; he must also concede the
imperative need for finality in resolving
vexatious problems.

There is no guarantee that the values
which the judges apply are the proper ones.
Every decision, then, should come under
the closest scrutiny. Nor is there harm when
decisions are taken to another (for exam-
ple, the Congressional) arena. But criti-
cism must have direction, or it will be
worse than futile. It will be simply destruc-
tive.