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THE SUPREME COURT AND ITS LAWYER CRITICS

ROBERT B. McKAY*

In the midst of the controversy that centers upon the Supreme Court of the United States—now and perennially—there would presumably be general agreement on one point, and perhaps only one. The Supreme Court has consistently been more influential in shaping the course of governmental action than would have seemed predictable from the slim power-potential committed to the Court by the spare language of the Constitution. In a nation newly dedicated to the experiment of representative democracy, an observer would scarcely have anticipated that the branch of the tripartite government most completely insulated from the democratic process should be given the most completely unchecked power. Yet the function of judicial review by a Court of tenure-secured Justices, final save by the cumbersome technique of constitutional amendment, is the central and inescapable fact about the Court as originally conceived, and as practiced since at least 1803. Neither friend nor foe of the Court seriously suggests alteration of this scheme whereby presidential programs with strong popular support have been rejected for lack of authority, and Congresses have been for a considerable time frustrated in the achievement of the manifest popular will. A probable reason for the almost surprising acquiescence in such judicial decisions is the fact that there has been, at least until recently, an enormous reservoir of public respect for the Court as an institution. In turn this "mystique" of the Court's rectitude, if not necessarily its infallibility, is supported by what must be an intuitive understanding that the Court is not undemocratic after all, despite the seemingly nonrepresentative character of the federal judiciary. Judge Wyzanski has expressed the idea as follows:

[B]y necessity the legislature represents rather than reflects the people. Once this is recognized, it is not a far cry to say that the judiciary also represents the people. It is true that the people do not elect and cannot retire a federal judge. But it may not be presumptuous to suggest that the majority of the people are as satisfied with their judges as with their congressmen.

This of course is not to suggest that the Court has ever been consid-

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3. E.g., the invalidation of substantial portions of the New Deal program in 1935 and 1936.
ered above criticism. Far from it, as can be readily discerned from an
examination of any period of American constitutional history. More-
over, the criticism—often excoriation would be the more accurate term—
has been by experts in that sometimes not so gentle art. Presidents
from Thomas Jefferson through Franklin Delano Roosevelt have often
expressed dissatisfaction with particular decisions in terms that sounded
like general condemnation of the Court.\footnote{Some of the more extreme examples are cited by Cohn & Bolan, The Supreme
Court and the A.B.A. Report and Resolutions, 28 Fordham L. Rev. 233, 237-41 (1959). It is only fair to add, however, that no President has denied the right or propriety
of the doctrine of judicial review. Complaint has always been leveled at specific decisions. See, e.g., the views of Jefferson in 1 Warren, The Supreme Court in United States History
264-65 (rev. ed. 1937).} Judges of state and lower federal courts have similarly spoken out, from the time of Virginia's
Spencer Roane\footnote{Id. at 516-18, 554-56.} to the more restrained, but nonetheless emphatic,
demands for Supreme Court "self-restraint" urged by the Conference of
Chief Justices\footnote{Report of Committee on Federal-State Relationships as Affected by Judicial Decisions,
adopted in August 1958 by Conference of Chief Justices (mimeo.).} and by Judge Learned Hand,\footnote{Hand, L., The Bill of Rights (1958).} both in 1958. Indeed,
some of the sharpest thrusts have come from members of the Court itself,
typically, but not exclusively, in dissent.\footnote{See Cohn & Bolan, note 5 supra, at 241-44.} Congress and state legislatures
have similarly felt no constraint in voicing frequently strong, sometimes
vituperative,\footnote{E.g., the Resolutions of Interposition adopted by a number of southern legislatures
following the decision in Brown v. Board of Educ., 347 U.S. 483 (1954). See McKay, "With All Deliberate Speed": A Study of School Desegregation, 31 N.Y.U.L. Rev. 991, 1017-39 (1956).} criticism of the Court. And, of course, we of the academic
community, and particularly the law faculties, have claimed a special
competence to advise the Court (in fulsome detail) of its errors of
omission and commission. Wary lest others intrude upon our self-
appointed position as guardian of the Court's rectitude, "we" have always
regarded "objective" criticism of all courts, and especially the Supreme
Court, as our particular obligation. Needless to say, "we" could have
done it better. While this assertion of special competence might be
disputed by others among the Court's critics, does not each complainant,
consciously or unconsciously, believe that if the assignment of decision
had but fallen to him, it would have been better done?

While much of the intemperate criticism may be deplored, on the
whole this lively and continuing discussion should be encouraged.
Nearly every complaining witness produces in time his more or less equal
and opposite reaction with the result that the ensuing vigorous debate
may possibly instruct—or at least entertain—the members of the Court. The one certainty is that law reviews and bar journals would scarcely survive except as vehicles of the "higher criticism."

It is in this context that the 1959 criticism of selected Supreme Court decisions by the American Bar Association should be noted. It is remarkable that during the eighty years in which the A.B.A. has been the principal organization of American lawyers, the Association as a whole before 1959 had never taken a stand substantially critical of the Court. Indeed, during the so-called "Court-packing" plan of 1936-1937, the A.B.A. stood resolutely with the Court and against the President. Friends of the Court may then be concerned at the recent, apparently official, A.B.A. dissatisfaction with the work of the Court. Has the Court broken faith with its distinguished tradition thus to embitter its slow-to-anger former supporter? Or, to put it less delicately, but in the popular idiom, is this just another case of "Whose ox is being gored?" It is the purpose of this article to explore those questions, with particular reference to the detailed defense of the A.B.A. position by Messrs. Roy M. Cohn and Thomas A. Bolan in their article, The Supreme Court and the A.B.A. Report and Resolutions.

Following a brief summary of the A.B.A. position, as set forth in its 1959 resolutions, an attempt will here be made to evaluate their significance and practical impact. It should be noted, however, that no attempt will be made to answer in detail the charges of the Report of the Special Committee, the Resolutions themselves, or their defense by Messrs. Cohn and Bolan. That vital work has been performed so well, in the Report of the Committee on Federal Legislation of the Association of the Bar of the City of New York, that repetition would be supererogation. Rather, the present inquiry will focus primarily on the legitimate purposes which can be served by criticism of the high Court and whether the A.B.A. resolutions have satisfied these criteria.

I. THE A.B.A. RESOLUTIONS: AN EXERCISE IN FUTILITY

Since only the State and Assembly Delegates are elected directly by lawyer members of the A.B.A., the House of Delegates is only indirectly representative of the views of the entire membership. For this reason, some have thought that the House of Delegates should not be accepted as an authoritative spokesman for the American legal profession. But the fact is that there is no other organization which purports to reflect even an approximation of the lawyers' viewpoint; so the pronouncements of the House of Delegates must be regarded as important evidence of views which are widely, if not universally, held by American lawyers.

Accordingly, official statements of the House of Delegates carry special authority and rightly receive considerable attention from Congress and the press. In this context, the resolutions relating to the Supreme Court, adopted by the House of Delegates at its midyear meeting on February 24, 1959, must be regarded as specially significant. A brief background will be relevant.

Shortly before the midyear meeting, the Special Committee on Communist Tactics, Strategy and Objectives submitted to members of the House of Delegates its report on the threat to internal security presented by international communism. The tenor of the report is indicated by an excerpt from the foreword:

Our internal security has been weakened by a lackadaisical attitude on the part of the public and technicalities raised in judicial decisions which too frequently in the public mind have had the effect of putting on trial the machinery of the judicial process and free the subversives to go forth and further undermine our nation.\(^1\)

Dissatisfaction with the Supreme Court of the United States is a recurring theme of the report, as suggested by the following not unrepresentative passage:

Many cases have been decided in such a manner as to encourage an increase in Communist activity in the United States through invalidation of state sedition statutes, and limitation of state and federal investigating powers in the field of subversion although these cases might readily have been disposed of without so broadly limiting national and state security efforts.\(^7\)

Twenty-four cases "illustrative of how our security has been weakened," all decided between 1956 and 1958, were enumerated in the report.\(^\text{18}\)

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16. Report of the A.B.A. Special Committee on Communist Tactics, Strategy and Objectives I (mimeo.).
17. Id. at 9.
The cases complained of dealt with a variety of substantive issues, including prosecution for subversion, loyalty-security discharges, labor relations, congressional investigations, deportations, requirements for admission to a state bar, and denial of passports. The only elements common to all were the involvement, directly or indirectly, of an individual or group alleged to have a present or past connection with the Communist Party, and the rejection of one or more arguments advanced by the federal government or by a state. No criticism was offered—indeed no mention at all was made—as to the cases during the same three years in which a variety of government contentions were upheld against the claims of the alleged subversives. In short, this is “result” jurisprudence. The Government is always right—at least so long as the opposing party, regardless of issue, is a person or organization of alleged present or past Communist Party relationship. With such an extreme *ad hominem* approach, it is not surprising that the constitutional and statutory interpretations on which the Supreme Court, often unanimously, believed these cases turned should be described by the Special Committee as “technicalities” designed to weaken internal security and “free the subversive to go forth and further undermine our nation.”

Happily for the Court, and, indeed, for the A.B.A., the Special Committee spoke only for itself; it lacked authority to commit the A.B.A. to these extraordinary complaints. Nevertheless, the report is significant in that much of the recommended language was incorporated into the final resolutions adopted by the A.B.A.; and there is no doubt but that many who voted for the more restrained criticism contained in the

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20. See note 16 supra.
ultimate resolutions had in mind approval of the stronger language of
the Committee. Indeed, Messrs. Cohn and Bolan stand foursquare
behind the sweeping charges of the report, and one suspects that they
regret the fact that the House of Delegates did not do the same.

As is often the case where criticisms are couched in strong terms, the
complaints of the A.B.A. reveal more about the critics themselves than
about the target of the criticism. In important areas of judicial action,
where technical legal expertise is surely needed, and all too often missing,
such as intergovernmental tax immunities, fair allocation formulas for
state taxation of interstate commerce, pre-emption under the National
Labor Relations Act, and conflicts of federal and state jurisdiction over
maritime matters, the A.B.A. apparently has little advice to offer. But
where problems were already confused by unclear statutes and uncertain
legislative intent, the House of Delegates proved all too willing to follow
the doubtful lead of its Special Committee.

The resolutions finally adopted, although less than fully clear them-
selves, entered complaints and offered solutions in six areas:

1. **Particularity of Congressional Authority.** Contending that the deci-
sions in *Watkins v. United States* and similar cases "tend to impede the
work of the Congress through its Committees," the A.B.A. recommended
that the House of Representatives rewrite its basic resolution of authority
for the Committee on Un-American Activities in order to set out in more
detail the scope of investigative authority. Two matters deserve notice.
In the first place, it is interesting that this was the only committee singled
out for comment, despite the fact that a number of Senate and House
committees engage in investigations which impinge on internal security.
Moreover, despite the urgent tone of the A.B.A. warning, the House of
Representatives has taken no action of the character recommended, and
congressional investigations continue under the sponsorship of that and
other committees without apparent crippling effect.

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   Township of Muskegon, 355 U.S. 484 (1958); United States v. City of Detroit, 355 U.S.
   466 (1958).
22. See, e.g., Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450
   (1959). See also note 37 infra.
   236 (1959); Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 U.S. 20 (1957);
   Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957). See also note 40 infra.
24. For recent cases, see United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki, 358
   U.S. 613 (1959); The Tungus v. Skovgaard, 358 U.S. 588 (1959); Romero v. International
27. See Barenblatt v. United States, 360 U.S. 109 (1959), where the Court refused to
In a related proposal, apparently designed to protect against invalidation of charges of contempt of congressional committees generally, the A.B.A. recommended that

whenever any of its Committees subpoenas a witness to appear and testify or to give evidence, such Committee should furnish the witness at the time he is subpoenaed with a copy in writing of the precise terms of the basic authority of the Committee.28

Needless to say, this is not only responsive to the prompting of judicial decisions, but constitutes what had long been urged by disinterested observers as a step toward achieving elemental fairness.

2. Amendments to the Smith Act. In Yates v. United States;29 the Court, in interpreting congressional intent, with only Mr. Justice Clark dissenting, gave a dictionary-strict definition of the word "organize" as it appeared in the Smith Act.30 In the same case, the Court differentiated between incitement to action, which was punishable, and mere advocacy, even of overthrow, which was not. The A.B.A. recommended legislation to extend the permissible area of punishment in both particulars. Again, it is interesting to observe that Congress did not respond to this invitation for action in its 1959 session, with the result that the Supreme Court enunciations of congressional purpose remain controlling.

3. Response to Congressional or Executive Inquiries Into Subversion as a Condition of Government Employment. In apparent reliance on the oft-repeated proposition that government employment is a privilege and not a right, the resolutions recommended that Congress impose as a condition of government employment a guarantee of willingness to answer congressional and executive inquiries as to any matter bearing upon loyalty to the United States. Because there has been no legislation of this type in the past, the Court has had no occasion to deal with this question; so one can scarcely find in this proposal a criticism of the Court itself. Congress, however, apparently mindful that such a requirement might amount to a limitation on the privilege against self-incrimination, took no action in 1959.

4. Restrictions on Aliens. Although it has been recognized, at least since 1952, that Congress may provide for deportation of aliens who were communists at the time of entry or became such thereafter,31 the A.B.A. recommended the further relatively unimportant step of restricting

invalidates investigations made by the House Un-American Activities Committee, but approved the principles enunciated in Watkins v. United States, 354 U.S. 178 (1956).

28. 45 A.B.A.J. at 408.
aliens from "engaging in any activities identical or similar to those upon
which the aliens' deportation order was based...." And it recom-
mended that interrogation of aliens be permitted during that period
concerning subversive associations or activities. Here, too, Congress
failed to respond to the invitation.

5. Requirement That Propaganda Sent Into the United States by
Foreign Agents Be Labeled as Such. This minor amendment to the
Foreign Agents Registration Act was recommended to Congress, but
was not acted upon by that body.

6. Continued Investigation Into Subversive Activities. Commending
the investigative work of the Internal Security Subcommittee of the
Senate Judiciary Committee and the House Un-American Activities Com-
mittee, the A.B.A. recommended the continuation of the work of these
committees in close liaison with the intelligence and security agencies
of the executive branch. This recommendation has been carried out by
Congress, if only negatively. That is, the committees have not been
discontinued; and they continue their investigative operations as before,
apparently not influenced one way or the other by the A.B.A. urgings.

Adoption of a series of recommendations, such as the foregoing, by
a presumably responsible group of senior lawyer citizens, would seem to
be intended to achieve one or more of the following objectives: (1) con-
gressional action; (2) self-reversal by the Court; or (3) education of
the public as to the alleged deficiencies of the Supreme Court. Accord-
ingly, the ultimate success or failure of the proposals must be tested
against the realization in whole or in part of these objectives.

1. Congressional Action

It is obvious that the A.B.A. resolutions and recommendations were
designed to induce congressional action. This seems to have been their
primary import, since all were directed at areas in which the Court had
imposed no absolute constitutional barrier and as to which Congress was
thus free to act. As already noted, however, the resolutions must to date
be adjudged a complete failure in this regard, since Congress did not in
1959 enact a single law which could be credited to the A.B.A. recom-
recommendations. This inaction of course was not for want of such proposals
in legislative form, but simply because Congress did not sufficiently

32. 45 A.B.A.J. at 408.
33. The purpose was to reverse the decision in United States v. Witkovich, 353 U.S.
194 (1957).
35. E.g., S. 527 and S. 1305 (to amend the Smith Act), S. 1301 (to make full dis-
closure respecting loyalty a condition of government employment), 86th Cong., 1st Sess.
(1959).
share the fears of the A.B.A. with respect to the need for legislative action. The result is particularly striking in view of the fact that more than half the members of both the Senate and the House are lawyers; and presumably most of them are A.B.A. members. Certainly Congress has shown no lack of concern for the proper needs of security in other situations where tightened security controls were called for. In short, the observer can only conclude that the A.B.A. resolutions misfired in what must have been their principal aim, the shaping of legislation.

Moreover, in 1959, Congress demonstrated, in at least two important areas, its ability to act, and quickly, in response to decisions of the Supreme Court. On February 24, 1959, the Court held that net income from the exclusively interstate operations of a foreign corporation may be subjected to state taxation that is nondiscriminatory and properly apportioned to local activities within the taxing state. Within a few months, Congress effected a partial reversal of the decision and set in motion a study looking to the fixing of a comprehensive policy with regard to the entire question of state taxation of interstate commerce. Similarly, where the Court, in applying the doctrine of pre-emption to labor disputes, described as "no-man's-land" a situation in which the National Labor Relations Board might not act and yet as to which the states were also forbidden to act, Congress gave at least some relief from the difficulties which the Court had confessed its inability to resolve.

2. Self-Reversal by the Court

The A.B.A. may also have contemplated that if the resolutions could demonstrate to the members of the Court their past mistakes, they might be induced to take self-corrective action. If there was indeed any such hope, present indications are that either the message did not get through to the Justices, or that they were not persuaded. In any event, the record of subsequent Supreme Court decisions through the remainder of 1959 suggests that the resolutions had no appreciable impact on the Court.

40. In two cases decided in the spring of 1959, the Court had occasion to review decisions which the Special Committee had criticized as weakening internal security, but in neither instance was there a retreat from the earlier opinion. In Barenblatt v. United States, 360 U.S. 109 (1959), the Court upheld a contempt of Congress conviction under the circumstances of the case, but specifically reapproved the principles previously announced in Watkins v. United States, 354 U.S. 178 (1957). In Uphaus v. Wyman, 360
3. Influence on the Public

The A.B.A. resolutions may have been intended to reach and influence, more or less directly, the public at large. Manifestly, when the principal lawyers' organization calls for congressional action because Supreme Court decisions have weakened internal security, one may anticipate that nonlawyers are likely to accept such criticism as fact and to reflect nervous misgivings about the functioning of the Court. There is no positive indication that such an undermining of public confidence in the Court was intended by those who drafted or by those who voted for the resolutions. But the suggestion is here advanced that this possibility should have been considered. Even if such strong language as "weakening internal security" might have been permissible hyperbole in seeking to impress upon Congress the urgency of the need for revisory legislation, the language approaches the irresponsible when its potential impact on nonlawyers is considered. Indeed, this may well have been the only consequence of the resolutions in the last analysis—an undermining of public confidence in one of the three branches of government. For, as already noted, Congress did not take the legislative steps which were the specific object of the resolutions; and the Court appears to have been totally unmoved in the course of its decisions by either the specifics of the resolutions or their general censorious tone. There remains then only the public; to this general audience the matter was presented by the press in generalizations strongly condemnatory in tenor. If this be the result intended by the supporters of the resolutions, the objective must be deplored as unworthy of the distinguished body from which the resolutions came. There is, however, much evidence that such was at least not the conscious intention. The prefatory clauses of the resolutions (not much noted in the press) were conciliatory in tone:

WHEREAS . . . it is the duty of the members of the Bar to defend the Institutions of the Judiciary from unfair and unjust attack; and . . . 41

WHEREAS, While members of this Association view some of the decisions to be unsound and incorrect, they deem such broad omnibus proposals [for restriction of Supreme Court jurisdiction] at this time unwise and likely to create more problems than they will solve:

THEREFORE, BE IT RESOLVED that the American Bar Association disapprove proposals to limit any jurisdiction vested in the United States Supreme Court. 42

U.S. 72 (1959), while noting that the states were not forbidden by the doctrine of preemption to investigate into possible subversion within their borders, the Court did not depart from its conclusion in Pennsylvania v. Nelson, 350 U.S. 497 (1956), that the states may not punish conspiracies or attempts to overthrow the federal government.


The fact that there was no intention to "attack the Court," however, misses the mark. The very fact that confusion was possible between the intemperate language of the report as a statement of A.B.A. position and the more guarded language of the final resolutions offers sad commentary on the ineptness of lawyers in the very stuff of their profession—the meaningful use of words. If erroneous impression there was in the mind of the public, the fault lay not with the press but with the opportunity for misunderstanding which these representatives of the American bar made possible.

Still there remains a disquieting concern that the press was not even wrong, that behind the facade of support for the "institution" of the Court, a very real criticism was intended as to the present incumbents in that high office. A nagging suspicion will not be stilled that many, perhaps most, of those who voted for the resolutions in their final form were expressing genuine dissatisfaction with the current trend of decisions. It is in this sense that Messrs. Cohn and Bolan have done a misservice in insisting upon a meaning which the A.B.A. itself rejects. When they assert an intention to castigate the Court, a reply becomes necessary from those who believe that the Court, acting courageously and with dignity, deserves the support and constructive criticism of the bar toward the successful fulfillment of its difficult mission. Insistence upon impugning the motives of the Court cannot help, but can only do harm.

Whatever may be the truth as to the motivations underlying the resolutions, there is no escaping the fact that they were unlawyerlike in conception, inept in execution, ineffective in achieving their goals, and generally unfortunate. Even if this criticism of the A.B.A. criticism of the Court (or this attack upon the attack on the Court) should be accepted as well-founded, there still remains the central problem: is criticism of the Supreme Court permissible and appropriate? If so (and all agree that criticism is not only appropriate but essential), what person or group may rightfully indulge in this heady exercise of omniscience in regard to that body which is constitutionally designated as "Supreme"? And finally, what should be the form and function of this higher criticism?

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Bar Association, the House of Delegates accepted for filing a report by the Standing Committee on the Bill of Rights, which concluded that the twenty-four decisions complained of by the Special Committee on Communist Tactics, Strategy, and Objectives, "did not in any way weaken the national security of our country." 45 A.B.A.J. 1102 (1959).
II. CRITICISM OF THE SUPREME COURT: ITS PROPER FORM AND FUNCTION

The Supreme Court of the United States has traditionally offered a convenient target for the dissatisfactions and frustrations of presidents and governors, as well as federal and state legislators, to say nothing of other criticism found in the press and among disgruntled lawyers and laymen. Much of the criticism has been justified and indeed has served a useful corrective function. Too often, however, the criticism has been result-oriented and lacking in analysis of the statutory or constitutional issues involved. Such criticism is a waste of time—and worse—because of its possible effect on those not equipped to judge for themselves. Into this category one must reluctantly classify the ill-conceived 1959 resolutions of the A.B.A. It is readily imaginable that a careful and provocative analysis of the same cases would have produced a lawyerlike study critical of the Court. But such a study would at least merit careful examination and discussion, and might induce agreement and correction of error. Instead, the resolutions demonstrate a shallowness of approach that invites easy refutation. In short, the resolutions trivialized the serious and important function of searching criticism which should be the high obligation of the bar.

In the minds of many, a prima facie case of judicial wrongdoing, or at least of irresponsibility, can be made out by a showing of any one or more of the following judicial "sins": (1) disregard of the principle of stare decisis; (2) failure to exercise proper judicial "self-restraint" in reviewing the constitutionality of federal and state legislation; (3) too frequent use of concurring and dissenting opinions. The suggestion here is that these three long-time staples of legal criticism are no longer particularly significant as guideposts to the quality of judicial performance. The reasons for this possibly presumptuous conclusion are given below.

A. STARE DECISIS AND CONSTITUTIONAL CHANGE

It is no longer heretical, as it once was, to state that rigid adherence to precedent, the orthodox requirement of stare decisis, is not necessarily a function of sound judicial craftsmanship for the United States Supreme Court. There is now ample precedent for the proposition that precedent itself need not be unyielding. This is not to suggest, however, that precedent can or should be disregarded. The regular reliance by the Court upon precedent as binding authority is ample testimony to the

43. See note 14 supra.
important role of stare decisis. To the extent that the so-called common law courts, and particularly state courts, consider themselves bound by the dictates of earlier generations to reach a contemporary decision which they think wrong, the Supreme Court is happily freed from that dogma by the concept of a flexible and developing Constitution, adaptable to the changing needs of differing times. Mr. Justice Brandeis made the point effectively:

The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function. It is appropriate to conclude that Supreme Court adherence to rigid concepts of stare decisis offers no clue of significance by way of legal criticism.

Even that, however, is not the whole story. When the Supreme Court's performance is measured by a count of overrulings, or departures from stare decisis, the report reveals a surprisingly low number, particularly in recent terms. From 1789 through June 1957, only ninety overruling decisions had been recorded; and there seem to have been no additional instances of overruling between that date and the end of 1959. Particularly interesting is the fact that since Earl Warren became Chief Justice in 1953 there have been only three. Of these, one was of manifest importance in overturning the "separate but equal" doctrine as a basis for state-supported segregation. The other two instances involved less significant reversals, on rehearing, of cases decided the previous term.

One might find in these figures a suggestion that the present Court is unusually sensitive to stare decisis; thus there should be few complaints from those who conceive the Court's functions in narrow common law terms. Such an analysis would be wrong on both counts. Members of the Supreme Court—not unlike those of other courts—are skilled in the art of distinguishing one case from another. So it remains perfectly

45. One may suspect that state courts, too, are sufficiently ingenious in distinguishing cases and in recognizing the growth and development of the common law to avoid those strictures of stare decisis which they find too burdensome.
possible to keep within the technical limits of precedent while deciding something quite different. This is nothing new and scarcely a matter for praise or blame as such. As will be noted more fully later, the significant point of inquiry by the intelligent critic should not be: how often does the Court in fact or by artifice overrule existing law? Rather he should ask: how well does the Court decide and dispose of each case before it, and what sense can be made of the entire current of its decisions?

B. Judicial Review and Judicial Self-Restraint

In the mid-thirties the Supreme Court was severely castigated—and threatened with "packing"—largely because it held unconstitutional so much federal legislation as an invasion of state sovereignty, as a violation of due process, or as an improper exercise of the commerce or taxing powers. The complaint essentially was that the Court had abused its high office of judicial review by passing on the wisdom, rather than the constitutionality, of legislative acts. Whether the charge was valid or not—and no certain formula has been devised for testing the limits of these undefined and undefinable constitutional concepts—it was at least a demonstrable fact that large portions of the unquestionably popular New Deal program were swept away by judicial rulings in 1935 and 1936. In at least ten cases, congressional enactments of the period from 1933 to 1935 were invalidated in whole or in part. The Court was stoutly defended by the A.B.A. against the presidential attack, and the Court-packing plan was defeated. Whether Supreme Court decisions were affected during this interval either by the strong indictment drawn by the Roosevelt Administration or by the strong defense generated by the American bar has long been a matter of keen speculation. The probable truth, while not subject to categorical demonstration, is that the change in the course of decisions, evident by the spring of 1937, was not induced by the threat of "packing," but was instead the product of a number of factors coinciding at that time.


51. See note 12 supra.

52. See e.g., Burns, The Lion and the Fox ch. 15 (1956).

Equally interesting as a matter of speculation is the fact, too little noted, that only four acts of Congress were held unconstitutional between the beginning of 1937 and the end of 1959; and no one of them was of major importance in the sense that was true of those invalidated in 1935 and 1936. Indeed, since 1936 no federal statute involving a program of social or economic welfare has been held unconstitutional. Perhaps even more significant, in view of the present criticism of Supreme Court decisions, no federal legislation relating to internal security has ever been held unconstitutional. No one of the cases complained of in the A.B.A. resolutions, or even in the more extensive report of the Special Committee, held unconstitutional a federal or state law.

No comprehensive study has been made of Supreme Court invalidations, in recent years, of state legislative action, comparable to the analysis just suggested as to the limited overruling of federal acts. Unquestionably, the number of state acts held unconstitutional is larger, but even here the available evidence is that, as compared with the period of the 1930's and earlier, the Court now invalidates only a relatively small number of state acts. But still, at least in the judgment of the Conference of State Chief Justices who in 1958 urged the Court to impose upon itself standards of "self-restraint," the number is too large. To state the objections in quantitative terms, however, is not

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54. Section 2(f) of the Federal Firearms Act of 1938, 52 Stat. 1250, establishing a presumption of guilt based on a prior conviction and present possession of a firearm, was held to violate the due process clause of the fifth amendment in Tot v. United States, 319 U.S. 463 (1943).

Section 304 of the Urgent Deficiency Appropriation Act of 1943, ch. 218, 57 Stat. 431, providing that no salary should be paid to named federal employees out of moneys appropriated was held to violate article I, section 3, clause 9 of the Constitution, forbidding enactment of bills of attainder and ex post facto laws in United States v. Lovett, 328 U.S. 303 (1946).


55. The change in standards of judicial tolerance dates roughly from Nebbia v. New York, 291 U.S. 502 (1934), after which state social and economic welfare programs have been reviewed with tolerant latitudinarianism. See also Lewis, A Newspaperman's View: The Role of the Supreme Court, 45 A.B.A.J. 911 (1959).
fully accurate. The real complaint underlying both the A.B.A. resolutions and the report of the Chief Justices, although not specifically articulated in either, appears to be a dissatisfaction with particular instances in which the Court has exercised the prerogative of judicial review rather than with the concept itself. Thus, for example, invalidation by the Supreme Court in the 1930's of a rather substantial number of federal acts was regarded as understandable, even proper, because there the rulings were thought to protect against the potentially dangerous intrusion of government into private economic affairs. When finally these issues were resolved against the contentions of the then-supporters of the Court, it must have seemed to them a cruel irony that the instrument of judicial review, which they had endorsed, should be turned in the nearly opposite direction of judicial concern over governmental limitations imposed upon individual liberties in the name of internal security. In short, the objectionable change is a shift in the focus of judicial emphasis from primary concern for the protection of rights in property to concern for the rights of individuals, often those who are otherwise friendless because poor, uneducated, believers in unpopular causes, or subscribers to minority religious convictions. Stripped to its essentials, the controversy is between those who welcome this shift of emphasis and those who deplore it.

There is at least one other important difference between the exercise of judicial review in the 1950's and that in the 1930's. In recent years, as already noted, the Court has exercised particular care to avoid direct rulings of unconstitutionality. As a by-product, the state and federal governments are being given more than ever before advice obiter dictum as to the means by which desired governmental objectives can be secured without constitutional offense. What the Court deserves, then, is encouragement toward the successful fulfillment of this program of minimal interference with governmental plans along lines that are nevertheless consistent with proper constitutional concern for the rights of individuals.

C. Judicial Disagreement: Concurrence and Dissent

The least substantial criticism advanced against the Court today, but still often expressed, is the somewhat vague charge that there is too little unanimity on the bench and that the resulting disagreements are fragmented in too many separate dissenting and concurring opinions. Apart from a certain loss of symmetry which could be achieved through unanimous decisions, one is hard pressed to find any real disadvantage here that can be overcome without attendant difficulties of a still more serious nature. Of course, no one denies that more unanimity would be desirable
in the abstract. Surely the Justices are even more sensitive to this objective than outside observers, for the members of the Court inevitably appreciate more fully than their critics the disadvantages of disagreement and the difficulties of preserving clear and consistent ratio decidendi through the years, despite changes in the Court’s membership. But the question cannot be answered with an abstraction. Where a Justice is aware that the expressed rationale of a case can be pressed in another instance to its logical, but dangerous limits, should he withhold his hand from expressing disagreement with either the result or the reasoning? To be sure, it may occasionally be more important that a question of statutory interpretation be settled definitively than that it be correctly decided; and there may be other kinds of cases where the result is more important than the reasons for reaching that conclusion. But is there any doubt that the members of the Court do withhold separate expressions of differing opinion in such cases even now? What is worth remarking is that there are currently a significant number of cases of unanimity or near agreement.

The difficulty is that there are few cases which come before the Supreme Court now which are significant only as to result or which are likely to commend themselves equally to all members of the Court as calling for a single result attainable by a single path of judicial reasoning. In this respect the business of the Supreme Court has changed significantly, even within recent years. Since the Court properly considers itself obligated only to furnish leadership in the law, and not to correct mere errors below,56 and since the Court is today master of its calendar as never before,57 the only proper policy for it to follow in selecting cases is to choose those whose solution is not self-evident to state and lower federal courts. Since the personnel of the Supreme Court similarly reflects most of the views likely to be held by various protagonists, it is far from surprising that most cases are decided by split votes. Internal security cases furnish an apt example. Although the difficult issues there presented have proved divisive within the Court, who would suggest that each of the opposing viewpoints should not be fully and effectively stated?

Until those who complain of expressed dissent and concurrence can themselves agree which opinions in which cases should not have been filed, the present practice, with its admitted vexations and imperfections, must be upheld. There is indeed some prospect of amusement in contemplating the critics’ efforts to formulate such a standard, since of

56. Stern & Gressman, Supreme Court Practice 107 (2d ed. 1954).
57. Id. at 103-10.
course there should logically be neither dissenting nor concurring expression of sentiments in this regard.

D. The "Higher Law" and the "Higher Criticism"

In rejecting the standards for critical appraisal of the Supreme Court's performance which have just been discussed, there is no intention of suggesting that the Court is or should be considered above criticism. There is no intention to concede inability to postulate a workable formula for constructive criticism. Indeed, the suggestion will be here advanced that such a basis for intelligent and helpful criticism has always been understood and is fortunately now being more extensively utilized.

Before offering standards for such a formulation, however, a caveat should be entered at least for this commentator. With all deference, it is suggested that a similar qualification should be read into the judgment of all other self-appointed critics—and aren't we all just that?

My reservation is simply this: who among us can claim such objectivity that he reads Supreme Court opinions solely with an eye for continuity of principle, workmanlike analysis of issues, skillful development of legal reasoning, and sound disposition? Are we not all to some indefinable extent, and in some ineradicable ways, value-oriented in our approach to the Court? This involves no measurable dishonesty, nor even self-deception, because in the critical areas of Supreme Court decision the constitutional guidelines are obscure to the point of near non-existence. Thus, as new problems arise, and as old solutions are challenged, does not candor demand an interior confession from each of us that we are to an extent influenced in our judgment of the skill factors by our own subjective agreement or disagreement with the result?

It may well be that in thus committing myself in print on this delicate matter, I give away too many debating points so that my expressed views become yet more vulnerable to challenge by those who do not share my doubts, but who are heart-sure that there are discoverable rights and wrongs in the canons of judicial workmanship. If so, the revelation has not been vouchsafed to me; and in the absence of such inspiration I can offer only the tentative suggestions that seem to me helpful in approaching judicial criticism.58

No other court has so creative a role to play as the Supreme Court. To no other court are given such policy strings with so great a freedom of manipulation. In this unique power there also resides great responsi-

58. It should be emphasized that the suggested criteria relate only to the Supreme Court and would not necessarily be equally appropriate as standards for judging the work of state courts or even lower federal courts.
bility—the power to reshape in considerable part the form of our constitutional democracy, and the responsibility to see that the inevitably continuous process of reshaping is done wisely and well—neither too quickly, nor too slowly. The difficulty of judging performance by such a quicksilver standard is more readily demonstrated than is the selection of objective principles to guide the task of assessment. Yet the attempt must be made. A standard must be erected so that there can be a reasonably common-sense appraisal of the Court's performance. Evaluations of such an impersonal quality have always been attempted; but it is here submitted that a new perspective as to the proper criteria is emerging, and the requisite skills of judgment now appear to be in prospect. There are increasing signs of maturity in criticism from some of the bar associations, the law schools, and special-interest groups with expertise to make judgments in particular areas. The emerging standards, scarcely novel individually or even in composite, would seem to be the following.

1. Effective Management of the Supreme Court Docket

It has already been pointed out that the Court is today very much in control of the matters it will hear and decide. Since 1925, when the Court was given discretionary control of cases coming to it by certiorari, it has selected each term from several hundred petitions for certiorari a few dozen cases which it will hear and decide on the merits. Nearly all the remaining cases on which the Court hears oral argument and decides by written opinion are those brought before the Court by the appeal route. As a matter of statute, the Court must review cases properly within the appellate jurisdiction; but it has been demonstrated that this part of the docket, too, is subject to considerable discretionary manipulation. By failure to find a substantial federal question, the appeal can be dismissed altogether; and by affirmance or reversal per curiam the Court can, and often does, avoid oral argument and the necessity for writing opinions on difficult matters. There remain only the mandatory original jurisdiction and certain special writs which may be filed directly with the Supreme Court; but these have never furnished a substantial portion of the cases on which written opinions are filed. Thus, it has been urged by some that the Court takes too few cases, and

59. See note 57 supra.
60. 43 Stat. 93 (1925). For the most important present provisions relating to certiorari, see 28 U.S.C. §§ 1254(1), 1257(3) (1958).
More recently the argument has been advanced that the Court is unable to do a technically competent piece of work because it takes too many cases, and in part the wrong ones. Obvious the matter deserves further objective study of the kind that the Court cannot itself undertake, but which is ideally suited for conscientious bar groups and the academic community.

2. Continuity of Principle in Reasoned Opinions

It has been suggested earlier that formal adherence to the common law tenets of stare decisis need not be a central proposition in the Supreme Court's book of rules. At the minimum, however, there must be a discernible thread of consistency in the dominant principles which emerge at any one period as compared with principles said to control the solution of related problems arising during the same period. There must also be a measurable continuity with the past; and the stated principles should provide a satisfactory point of departure for transition from present to future. In short, there must be a sense of the continuity of history in the movement of the law.

That the command thus expressed is somewhat imprecise makes no less imperative the necessity for bearing in mind the fact that this must be the goal of Supreme Court adjudication of constitutional issues, and, accordingly, the standard against which performance must be tested. Even though there may be disagreement with the test when applied by any one individual, the difficulty of assessment is no excuse for failing even to make the attempt. Through reasoned discussion among those who conscientiously strive for enlightenment along these lines, a consensus should develop that can help the Court, the bar, and indeed the nation.

3. Effective Disposition of All Docketed Cases

From a technical standpoint, the most difficult and least understood aspect of the Supreme Court's work is the troublesome problem of dis-
posing effectively of the nearly 2,000 cases that crowd the docket each term. Ordinarily there is no particular difficulty in disposing of the cases (as opposed to the manifest difficulty of deciding them) which are argued before the Court and decided with full opinion. The reasons for affirmance or reversal are set forth in the opinion with such clarity as the author of the opinion can command; and where a remand is appropriate, the directions to the lower courts are ordinarily reasonably clear. But cases in which opinions are prepared constitute on the average not more than ten to fifteen per cent of the cases docketed each term. Although a large number of the remaining cases are disposed of simply by a denial of the petition for the writ of certiorari, there are yet many cases each term which require carefully thought out orders of disposition. These include the disposition of appeals other than by argument and written opinion and the substantial number of petitions for writs on the Miscellaneous Docket.

The Appellate Docket presents the most serious questions because of the statutory command for their resolution on the merits, unless no substantial federal question is presented. Even dismissal of an appeal on these grounds may have significance as a ruling that the issues said to be raised either are not federal questions at all or are so well settled as to require no further argument. Still more troublesome are the per curiam affirmances or reversals. If no reasoning or authority is given in such an affirmance, does this constitute an adoption in toto of the reasoning of the court below? Or is it simply an approval of the result? On the other hand, a cryptic statement of reasons or authority is apt to be even more misleading. At least equally troublesome is the per curiam reversal. Similarly, where a lower court order is to be vacated, there are serious problems of prejudicing future proceedings in the lower courts and even the danger of inadvertently mooting such proceedings altogether. In these areas in which expertise is all-important, the Court deserves the assistance of competent criticism from disinterested observers. Fortunately, increasing attention is being given by scholars-critics to the technical functioning of the Court.

We may anticipate that such critics of the Court, even when their judgments are confined to the several areas of criticism outlined above, may differ considerably in their assessment of the Court's performance at any particular moment. Though disagreement among students of the Court is not necessarily the preferred route to final consensus, yet divergent points of view do not mean that such study and analysis are unproductive. Surely intricate questions such as these cannot be resolved

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70. See Brown, Process of Law, 72 Harv. L. Rev. 77 (1958).
a priori. After all, the central areas of dispute depend ultimately upon values which cannot be reduced to measurable elements as component parts of the deciding process. Within only the narrowest limits can certitude be substituted for the tentative probing of the careful critic. It is this humility in the face of the nearly unknowable, the almost unresolvable, which calls for rejection of sweepingly censorious criticism. Because such unreasoned criticism suggests no doubts of self and offers no hope of compromise, it must be finally rejected as meaningless and without value.