1961

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The Supreme Court and Its Critics

As Supreme Court correspondent for the New York Times, Mr. Lewis has daily to grapple with both the substance of the Court's decisions and the impact of those decisions on our society. In this Article, his treatment of those critics who reason from results (or who fail to reason at all) reveals the sure hand of one who is accustomed to assessing public reaction to social change. His penetrating analysis of the Court's many-faceted social role—in answer to those who would restrict the Court's power of judicial review—displays a perspective that can perhaps come only to one as close to the Court as is Mr. Lewis. And that perspective stands him in as good stead in his examination of informed and academic criticism as of "know-nothing" criticism. It entitles him to conclude that while the Supreme Court seriously needs continuous and searching criticism, its critics must understand that the practical necessity of reaching agreement and the moral necessity of resolving great social issues often severely limit the Court's ability adequately to rationalize its results.

Anthony Lewis*

INTRODUCTION

Criticism of the Supreme Court of the United States is, of course, no new phenomenon. More than a century ago Jefferson called federal judges "a subtle corps of sappers and miners" working to undermine the republic.¹ His language was relatively mild for that day.² John Marshall became so discouraged that he wrote his colleague Justice Story gloomy letters forecasting an early and successful effort by Congress to "prostrate the judiciary."³


¹ HUGHES, THE SUPREME COURT OF THE UNITED STATES 46 (1928).
² See generally Warren, Legislative and Judicial Attacks on the Supreme Court of the United States, 47 AM. L. REV. 1, 161 (1913).
³ 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 727 (rev. ed. 1937).
The criticism today falls into three broad categories: abusive criticism motivated largely by the results reached in particular cases, criticism of the Court’s exercise of the power of judicial review of legislation, and academic criticism directed chiefly at the reasons the Court gives for its results.

I. RESULT-ORIENTED CRITICISM

The body of criticism that is the largest in volume, and the loudest, is what might be termed result-oriented. The fundamental characteristic of this type of criticism is that it is more concerned with the results reached by the Court than with the reasons for those results. Thus the Jencks case, holding that federal criminal defendants were entitled to check pre-trial statements by government witnesses against their trial testimony, was attacked in good part because Mr. Jencks was allegedly a Communist. One wonders what the critics would have said if the principle had been laid down in the case of a criminal antitrust action against a large corporation.

Decisions involving, one way or another, Communists and suspected Communists have been a major target of vituperative, unreasoned criticism. A good example was an editorial in the New York Daily News, which began:

Everywhere you go, almost everyone you know has his or her own theory as to what's wrong with the Earl Warren Supreme Court. (A handful of people—mainly Communists and fellow-travelers—think the Court is strictly okay.)

Perhaps the ultimate example of result-oriented criticism was a chart made by a United States Senator showing the number of times each member of the Court had “voted in accordance with the position advocated by Communists.” The complete assumption there was that facts and law are irrelevant if Communists support the position of one side in a pending case. That side must lose, or else the Court is pro-Communist.

5. In a column on Watkins v. United States, 354 U.S. 178 (1957), David Lawrence wrote:

The Supreme Court of the United States has crippled the effectiveness of congressional investigations. By one sweeping decision, the court has opened the way to Communists, traitors, disloyal citizens and crooks of all kinds . . . to refuse to answer any questions which the witness arbitrarily decides for himself are not “pertinent” to a legislative purpose. . . . Naturally, Moscow should be happy. . . .

The Communist “Daily Worker” editorials have assumed all along that the court would decide some day as it did this week, that a man can betray his country and in certain circumstances get away with it. Washington Evening Star, June 19, 1957, p. A27, col. 1 (metropolitan ed.).
7. The chart was the work of Senator Eastland of Mississippi. See 104 Cong. Rec. 13343–44 (1958).
The school segregation cases, decided in Brown v. Board of Education,\(^8\) undoubtedly represent the single most important reason for contemporary animosity toward the Court. Southern judges and lawyers who might be expected to know better have joined Southern politicians and newspaper editors in denouncing the Brown decision as immoral, illegal, even unconstitutional.\(^9\)

One of the curiosities of the attack has been the veneration paid by these Southern critics to the rule of separate but equal accommodations for Negroes which the Supreme Court abandoned in 1954. This veneration is a little tardy, to say the least. The South in fact made no real effort to provide equal schooling for Negroes during many decades after Plessy v. Ferguson\(^10\) established the separate but equal doctrine in 1896. As recently as 1944 the average current expenditure per pupil in six Southeastern states was less than half as much in Negro schools as in white.\(^11\) Figures from earlier in this century are even more shocking.\(^12\) It was only when the trend of Supreme Court opinions beginning in the 1930's and 1940's made it clear that the legal basis of segregation was threatened that the South began spending those vast sums on Negro education that we now hear so much about.

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\(^8\) 347 U.S. 483 (1954).

\(^9\) See, e.g., Act No. 2, 1960 Extraordinary Session, Louisiana Legislature, "An Act to interpose the sovereignty of the State of Louisiana against the unlawful encroachments by the judicial and executive branches of the Federal Government in the operation of public schools of the State of Louisiana, which constitute a deliberate, palpable and dangerous exercise of governmental powers not granted to the United States by the United States Constitution . . . ." Or see Resolution Requesting Impeachment of Six Members of the United States Supreme Court, 1 Georgia Laws 1957, 553–68, accusing the Justices inter alia of "undertaking by judicial decrees to carry out Communist policies." Or see the Southern Manifesto, 102 Cong. Rec. 4460 (1956). Or see the Augusta (Ga.) Courier, Oct. 13, 1958: "His [man's] rights and his liberties are in the laps of the nine crazy men who sit on the Supreme Court bench. . . . They are the most dangerous tyrants that ever existed. Like Hitler, Mussolini and the other modern-day tyrants, they are mentally deranged . . . ." (Quoted in Freund, The Supreme Court Crisis, Address at Brandeis University, Nov. 12, 1958, p. 2 (mimeographed text).

\(^10\) 163 U. S. 537 (1896).

\(^11\) SWANSON & GRIFFIN, PUBLIC EDUCATION IN THE SOUTH 63 (1955). A table shows average expenditures per pupil of each race from 1931–1932 to 1951–1952 in Alabama, Arkansas, Florida, Georgia, North Carolina and South Carolina. The Negro figure rises from 29.6 per cent of the white in 1931–1932 to 44 per cent in 1941–1942 and 73.4 per cent in 1951–1952. Another table shows that average annual teachers' salaries in the eleven Southern states and Oklahoma in 1939–1940 were $505 for Negro teachers and $962 for white. Id. at 59.

\(^12\) In 1915 in South Carolina the expenditure per pupil was $23.76 in white schools, $2.91 in Negro schools; on the average there were 36 white children per teacher, 64 Negro children; the value of school property per child was $32.11 in the white schools, $2.57 in the Negro schools. HARLAN, SEPARATE AND UNEQUAL 208 (1958).
Although the result-oriented critics often talk about the need for "self-restraint" on the part of the Supreme Court, even self-restraint does not please them when it leads to the wrong result. An example was Frank v. Maryland. Over the strong protest of four dissenters, the Court held that the federal constitution does not compel every local health inspector in the country to obtain a warrant before gaining entry to a house which he has good reason to believe is a source of disease. Logically, one should call the decision a triumph of self-restraint, not to mention states' rights. The majority declined to put another constitutional limitation on local action. But the day after the decision Dale Alford, a segregationist Congressman from Little Rock, Arkansas, said of the decision: "Once again the oath-breaking usurpers destroyed one of our basic freedoms . . . ." 

This is know-nothing criticism. It is nonintellectual, indeed anti-intellectual. It often includes the suggestion of bad motives on the part of the Justices, a suggestion conveyed by such language as "judicial usurpation" and "judicial tyranny." Robert A. Girard has said that such epithets—

signify nothing more than that their author either agrees or does not agree with a particular decision or group of decisions by the Court. If he thinks the court should not have interfered as it did, then you have "judicial legislation" or, even worse, "judicial usurpation," depending upon the intensity of the author's conviction. If the court should have stepped in when it did not, the result is "judicial abnegation." On the other hand, if the Court's response meets his fancy, then you are blessed with "judicial restraint" or "judicial statesmanship." It has always seemed to me that if all an author has to say is that he thinks the Court is mistaken or unwise in its decisions, he would do a great service by speaking in concrete terms of mistake or absence of wisdom which are at once more meaningful and less likely to inflame than such provocative terms as "judicial usurpation," "judicial abnegation," and the rest. 

But it goes without saying that Mr. Girard's plea is not likely to get very far with the know-nothing critics. Their very purpose is to inflame. Epithets are more useful for that purpose than reasoned argument.

Under the same general heading of result-oriented criticism must go some efforts which bear more impressive intellectual credentials. Among these are the 1958 report of the Conference of (State) Chief Justices' Committee on Federal-State Relationships as Affected by Judicial Decisions, the 1959 report of the Ameri-

can Bar Association's Committee on Communist Tactics, Strategy and Objectives; and the work of some newspaper columnists who write frequently about the Supreme Court.

The report of the chief justices' committee is a hybrid document. After a historical outline of our federal system the report cites a number of areas of the law in which Supreme Court decisions during the last few decades have altered the federal-state balance. There are lengthy discussions of cases imposing restraints on state legislative investigations, state control of admissions to the bar and state administration of criminal law. The tone is reasoned, if critical. But then comes a section labeled "Conclusions." These are, inter alia, that the Supreme Court "too often has tended to adopt the role of policy-maker without proper judicial restraint," that "the overall tendency" of its decisions "over the last 25 years or more has been to press the extension of federal power and to press it rapidly," that the Court "in many cases arising under the 14th amendment has assumed what seem to us primarily legislative powers," and—last but not least—that "any study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity" of the "boast that we have a Government of laws and not of men."

Preliminarily, one may raise an eyebrow at the propriety of any report by state chief justices on the behavior of the Supreme Court of the United States. The result is to make the conference of chief justices, as Paul Freund put it with characteristically gentle wit, "a corporate body one of whose functions is to vote in review of..."
the performance of their reviewer." The conclusions, moreover, do not follow from the earlier discussion in the report and often seem to bear little relation to it. Their sweeping character and emotional tone are hardly good examples of judicial restraint. Is it helpful—or lawyerlike—to throw at the Supreme Court such slogans as a government of laws, not men? And in complaining that the Court has nibbled at states' rights the report skips lightly over highly significant areas in which the present Supreme Court has been much more deferential to the states than were its predecessors. Professor Freund points out that the Court has greatly enlarged the power of the states to impose economic regulation, to tax businesses engaged in interstate commerce, and to tax property despite a degree of federal ownership. Are those powers really not more important to state government than a right to harry a man invited to lecture at a state university about whether he once belonged to the Progressive Party?

The report of the American Bar Association committee similarly uses a broad and unlawyerlike brush, generalizing about problems that are particular and distinct. The conclusion that got the headlines was: "Many cases have been decided in such a manner as to encourage an increase in Communist activity in the United States. . . . The paralysis of our internal security grows largely from construction and interpretation centering around technicalities emanating from our judicial process which the Communists seek to destroy, yet use as a refuge to masquerade their diabolical objectives." Apart from the impenetrable syntax, it is distressing

27. Freund, The Supreme Court Crisis, Address at Brandeis University, Nov. 12, 1958, p. 1 (mimeographed text).
28. Id. at 15.
29. E.g., Safeway Stores v. Oklahoma Retail Grocers Ass'n, 360 U.S. 334 (1959) (Oklahoma law forbidding price cuts by chain which does not offer trading stamps in order to compete with those which do held no violation of the fourteenth amendment).
31. E.g., Detroit v. Murray Corp., 355 U.S. 489 (1958), rehearing denied, 357 U.S. 913 (1958) (state property tax upheld as applied to "privilege of using or possessing" United States property, although the state statute did not expressly cover such privilege).
33. The report of the chief justices itself briefly mentions two other areas in which Supreme Court decisions have represented dramatic victories for "states' rights": the series of cases, climaxcd by McGee v. International Life Ins. Co., 355 U.S. 220 (1957), relaxing restrictions on the in personam jurisdiction of state courts over nonresident defendants, and the abandonment of federal decisional law as the rule of decision in diversity cases, Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
to see a group of lawyers describe statutory and constitutional guaranties of fair procedure and reasonable governmental action as "technicalities." And the contention that the Supreme Court has caused a "paralysis" of our internal security, a paralysis evidently not visible to the naked eye, was devastatingly answered in a report by a committee of the Association of the Bar of the City of New York.34

Of newspaper columnists who appraise the work of the Supreme Court the most prominent is probably David Lawrence. He has had this to say about the Court:

Traditionally, the spirit of America has been that if you do not like the rules of the game, change the rules—but don't soak the umpire. For generations the Supreme Court of the United States has been the umpire in deciding what are and what are not valid acts of the government within the meaning of the supreme law of the land—the Constitution.35

... .

To say that this tribunal of nine men shall not henceforth declare the supreme law of the land is to say in effect that we must change our form of government and substitute the rule of passion for the rule of reason.36

If the quotation surprises those who are regular readers of Mr. Lawrence's column, it should be added hastily that he made the comment in 1937 in a book dedicated to "nine honest men." He approved, then, of the Court's intervening to protect economic rights. Today he heartily disapproves of the frequent intervention by the Court to assure fair criminal procedure,37 free speech,38 and freedom from racial discrimination.39

35. LAWRENCE, SUPREME COURT OR POLITICAL PUPPETS 1 (1937).
36. Id. at 39.
37. E.g., Washington Evening Star, June 27, 1957, p. A19, col. 1 (metropolitan ed.): "The Supreme Court goes on releasing Communists as well as various types of criminals, including a confessed rapist, on technical grounds described conveniently as 'individual rights.' The idea that society as a whole needs protection against traitors and crooks is brushed aside, and the 'individual right' is ruled to be supreme." The mention of a "confessed rapist" is apparently a reference to Mallory v. United States, 354 U.S. 449 (1957), reversing a conviction and death sentence for rape because of the use of a confession obtained during an unnecessary delay in the prisoner's arraignment.
38. E.g., from the column quoted in note 37, supra: "The edict also is issued by the Supreme Court that free speech includes the right to preach forcible overthrow of the Government and that only when the conspiracy is well under way and there is an actual step taken to overthrow the Government can effective steps be taken to protect the Nation." This is apparently a reference to Yates v. United States, 354 U.S. 298 (1957), holding (in sharp contrast to Mr. Lawrence's version) that the Smith Act does not prohibit advocacy of the abstract doctrine of overthrow of the government but applies only to speech which is an incitement to action.
39. E.g., Washington Evening Star, Aug. 29, 1958, p. A17, col. 1
Once again, then, the results reached by the Court appear to dictate the verdict of the critic. Many years ago Charles Warren, the historian of the Court, concluded that most of the attacks made upon it throughout its history had been based not on any consistent legal theory or philosophy but on "the particular economic, political or social legislation which the decisions of the Court happened to sustain or overthrow"—in short, on whose ox was gored. The situation today is no different. While the most highly publicized attacks have come from the right, there has also been a chorus from the left to deplore any decision sustaining governmental exercise of power against individual challenge.41 Henry M. Hart, Jr. has accurately parodied the typical result-oriented comment: "‘One up (or one down) for subversion,’ ‘One up (or one down) for civil liberties’. . . ."42

II. CRITICISM OF JUDICIAL REVIEW

A second category of Supreme Court criticism is assuredly not based on results. It takes the position that the Court has too broadly exercised its great power to review the constitutionality of legislation. The foremost exponent of this viewpoint is, of course, Judge Learned Hand. Disinterested, nonpolitical, intellectually the most eminent of critics, he has given his position added force by holding to it through all the changing results of the last several decades.

In his Holmes lectures,43 delivered at the Harvard Law School in 1958, Judge Hand examined the origins of the doctrine of judicial review and the exercise of the power over the years. He found the doctrine legitimate, but it is fair to say that his acceptance was grudging:

The arguments deducing the court's authority from the structure of the new government, or from the implications of any government, were not valid, in spite of the deservedly revered names of their authors. . . . On the other hand it was probable, if indeed it was not certain, that without some arbiter whose decision should be final the whole system would have collapsed. . . . In construing written documents it has always been thought proper to engrat upon the text

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40. 1 WARREN, op. cit. supra note 3, at 388.
such provisions as are necessary to prevent the failure of the undertaking. That is no doubt a dangerous liberty, not lightly to be resorted to; but it was justified in this instance, for the need was compelling. 44

As Herbert Wechsler pointed out in his Holmes lecture of 1959, Judge Hand's views on the source of the Supreme Court's power to review legislation condition his approach to the exercise of the power. 45 Judge Hand says it "was absolutely essential to confine the power to the need that evoked it," 46 a need which he has described as the preservation of the government. He says the Supreme Court should intervene only to keep a governmental department within its "frontiers," not to reappraise "the propriety of its choices within those frontiers." 47 That view is hardly self-explanatory, but Judge Hand's examples are revealing. He frowns, for example, at what must have been one of the Supreme Court's least controversial decisions of recent years, Butler v. Michigan, 48 holding that a state might not prohibit the sale to adults of books found objectionable for children. 49 Judge Hand concludes that the Court has used the power of judicial review so broadly as to become, again and again, "a third legislative chamber." 50 For nine men in lifetime appointive positions to exercise such power, he says, is not only inconsistent with democratic government but harmful to the Court, because involvement in what are essentially political matters inevitably lessens public reverence for the judiciary. 51

The proper role of the Supreme Court in our system of government is too large a topic for this summary discussion. But it is necessary to indicate briefly, with all deference, where one disagrees with Judge Hand.

If his lectures are taken at large as a warning against excessive reliance on the courts to do the work of democracy, then it is difficult to quarrel with the theme. Certainly it is too easy to say, as so many libertarian observers seem to content themselves with saying, that judicial activism in behalf of property rights a genera-

44. Id. at 28–29.
47. Id. at 29–30.
49. "It may indeed well be asked why, if the end was lawful, as the Court assumed, there should be a judicial review of the means adopted by the legislature." HAND, op. cit. supra note 43, at 62. If Judge Hand intends what he implies, that the means chosen by a legislature to reach a valid end should be constitutionally irrelevant, he is certainly at odds with the entire history of the exercise of the review power.
50. HAND, op. cit. supra note 43, at 55.
51. Id. at 72–73.
tion ago was bad, but intervention in behalf of "personal rights" today is admirable. But the negative tone taken by Judge Hand really goes farther than a simple caution. It goes too far, in fact, for there are more positive values in judicial review than he would concede.

A. THE COURT AS A FORUM FOR MORAL PROTEST

For one thing, the American tradition of courts serving as forums for moral protest may not be unhealthy. In a country as large as this one, and with legislatures—both state and national—so frozen by inertia, litigation is often the best device to focus attention on moral considerations. In considering a general immigration statute, for example, individual members of Congress are unlikely to give much thought to a provision requiring the deportation of aliens who at any time belonged to the Communist party, however long their residence here and however brief and remote their party membership. In the abstract—where it is likely to re-

52. Perhaps the most cynical justification for intervention in behalf of civil liberties is to be found in Black, Old and New Ways in Judicial Review, Bowdoin College Bulletin No. 328 (1958). Professor Black says:

Now we are sometimes told that we must be very careful not to favor judicial vigor in supporting civil liberties, because if we do we'll be setting a bad precedent. Later on, we may get a bench of judges whose personal philosophy on economic issues is strongly conservative, and they will avail themselves of the precedent of strong judicial review to strike down needed economic legislation. ... [But] suppose the present Court were to shrink from vigorous judicial action to protect civil liberties? Would that prevent a court composed of latter-day McReynoldses and Butlers from following their own views ... ? Can you imagine that a judge whose whole training and philosophy led him to the honest conviction that minimum-wage laws were unconstitutional would hold back from implementing this conviction merely because Mr. Justice Frankfurter, years before, had commendably restrained himself from using the judicial power vigorously to protect free speech?

Id. at 16–17.

One comment that can be made on this remarkable passage is that it deals with an imaginary horror. If Justice Frankfurter, to use Professor Black's example, has an honest conviction that a statute abridging speech is unconstitutional, he does not hold back from implementing the conviction. See, e.g., Butler v. Michigan, 352 U.S. 380 (1957). The question is whether a governmental act can be said to violate the Constitution. In answering that question any judge must appraise the importance of the interests at stake, and he will value some interests more than others. But surely a judge's approach to the exercise of judicial review must be less simple and less cynical than riding his prejudices as far as possible because some day other judges with other prejudices will be riding theirs. For an excellent discussion of the problem of weighing interests in constitutional litigation, and a demolition of the claim by some judges that they apply absolutes, see Karst, Legislative Facts in Constitutional Litigation, 1 The Supreme Court Review 75, 78–80 (1960).

main in the mind of the busy legislator—the provision has the appeal of being tough on communism. But as applied to a real human being, who came to the United States at the age of eight months, 50 years ago, and has known no other land, the statute's cruelty is easier to see. Of course a court is not empowered to reappraise the moral quality of every legislative decision. But is it not true that the relative remoteness of the judicial forum from political excitements, the security of federal judges' tenure, their freedom from sectional and party ties, and—most important—the slow, deliberative quality of the judicial process all tend to insure a greater concern for fairness to the individual than is ordinarily found in legislatures?

B. The Court as a Catalyst

Judicial review is sometimes mistakenly discussed as if it were an all-or-nothing proposition, in which statutes are either upheld or struck down. But in operation the power is much subtler, its radiations broader. For one thing, a court's attitude in construing a statute is significantly affected by existence of the authority to invalidate it. In recent years some of the Supreme Court's most significant decisions have been statutory constructions designed to avoid constitutional questions—constructions that could fairly be called strained. The effect of such decisions is to put the problem before Congress again, but to put it in such a way that Congress is more likely to be aware of the values at stake when it acts.

The Passport Cases and their aftermath provide an example of the Court's role as a legislative catalyst. The Secretary of State had claimed broad, indeed virtually unlimited, statutory authority to prevent the travel of American citizens outside the Western Hemisphere whenever he decided—often on the basis of undisclosed information—that their "activities abroad would . . . be

54. These are the facts of Niukkanen v. McAlexander, 362 U.S. 390 (1960).
56. Does not the availability of broad judicial review induce all agencies of government, legislative and administrative, national and local, military and civil, to proceed more openly, with more conscious measurement of competing values and sacrifices, and with a deeper awareness of the moral responsibility inherent in all choice?
prejudicial to the interests of the United States.” The Court found no such authority. When Congress undertook to repair the asserted breach in national security, the bill which passed the House narrowly defined the circumstances in which travel could be prohibited and required the Secretary, if sued over the denial of a passport, to disclose all information on which he relied.

The same kind of catalytic action may take place between the Supreme Court and the Executive Branch. In June, 1959, in Greene v. McElroy, the Court, construing the statutes and executive orders strictly in the light of constitutional problems, held that there was no authority for an industrial security program which denied suspected defense plant workers the right to confront their accusers. It took the Executive Branch eight months to draft a substitute program; for the first time its officials had to address themselves to the difficult problem of balancing the needs of security against fairness to the individual. The resulting order assured confrontation except in unusual cases and on the personal direction of a department head. Of course it was sad that it took a Supreme Court decision to make the President and his aides face up to a responsibility that had been pointed out by many critics, but surely intervention by the Court was preferable to continued inaction.

The Supreme Court may affect governmental policy by calling attention to moral considerations even when it upholds a challenged action. Examples are Bartkus v. Illinois and Abbate v. United States, in which the Court upheld the constitutionality of successive federal and state prosecutions of the same man for the same criminal act. Immediately after the decisions Attorney General Rogers, concerned by the possibility of prosecutorial abuse of this newly confirmed power, announced a policy against federal-following-state prosecutions. The next term he went so far in applying the policy as to ask the Supreme Court to set aside a conviction which resulted from a second federal prosecution of a defendant on the same facts—a conviction which apparently vio-

60. 22 C.F.R. § 51.136 (1958).
64. 359 U.S. 121 (1959). Bartkus was acquitted by a federal jury on the charge of robbing a federally insured bank and then convicted of robbery in a state court on the same facts.
65. 359 U.S. 187 (1959). Abbate pleaded guilty to a state indictment charging a conspiracy to destroy telephone lines and was sentenced to three months in prison. Thereafter he was indicted for the same conspiracy under a federal statute making it a crime to destroy communications facilities operated by the United States; he was convicted and sentenced to three years in prison.
lated no statute or constitutional provision and which was really beyond the announced principle against successive state-federal prosecutions.\footnote{Petite v. United States, 361 U.S. 529 (1960) (motion of the Solicitor General to vacate the judgment and dismiss the indictment granted).} Even more interesting is the fact that the Illinois legislature, a few months after Bartkus was decided, passed a law barring the prosecution of any person for a criminal act which had previously been the basis of a federal prosecution.\footnote{See ILL. REV. STAT. ch. 38, § 601.1 (1959). Counsel appointed by the Supreme Court to represent Bartkus, Walter T. Fisher of Chicago, sought commutation of his sentence. On Jan. 3, 1961, Governor Stratton commuted the sentence to time served. Letter From Mr. Fisher to the writer, Jan. 8, 1961.}

Even though the states have especially resented Supreme Court interference in the administration of state criminal law, the best of their officials might admit that the Court has inspired correction of what are, after all, not states' rights but states' wrongs. As scattered and haphazard as the cases on forced confessions and denial of counsel have been, surely they have encouraged the improvement of state criminal procedure. Even as enlightened a state as New York has been found wanting in recent years in its handling of criminal suspects.\footnote{See Spano v. New York, 360 U.S. 315 (1959); Leyra v. Denno, 347 U.S. 556 (1954).} It seems beyond argument that the growth of federal habeas corpus as a remedy for constitutional flaws in state convictions has served to reduce the number of those flaws and to stimulate the development of state post-conviction procedures.\footnote{See Schaefer, Federalism and State Criminal Procedure, 70 HARV. L. REV. 1, 24–26 (1956). For a discussion of the effect of Supreme Court decisions in spurring adoption of the Illinois Post-Conviction Hearing Act, see HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 513–16 (1953).}

C. THE COURT AS A NONPOLITICAL ARBITER

There are issues which are better left to the ivory tower handling of a court than thrown into political debate. Take the divisive questions of church and state, such as the extent to which the Constitution permits official assistance to religious schools. Paul Blanshard has written that Congress is happy "to have an impartial agency speaking without passion in so controversial an area."\footnote{BLANSHARD, GOD AND MAN IN WASHINGTON 57 (1960).} And that position has more to commend it than congressional timidity. The 1960 Presidential campaign has given us a taste, a small taste, of religion as a political issue. Would it really be wise, in a country of diverse races and creeds, to seek political decisions on such questions as the permissibility of released-
time programs for religious education?72 The unhappy history of bitter national conflict over the church-state relationship in the countries of Europe argues strongly to the contrary. The Court's relatively remote position, protected from political pressures, may also enable it to deal more rationally and fairly with the problem of internal security measures as they affect individual rights. Louis Henkin has wisely observed that, in this security area, "one sometimes suspects many in Congress are pleased to have the Court save them from follies which they deem politically necessary."73

One wonders whether race relations is not also a problem that Congress has been just as happy to leave to the Supreme Court. Certainly Congress abdicated to the Court from Reconstruction days until 195774 the responsibility for enforcing the fourteenth and fifteenth amendments, and acquiesced in the long line of decisions that resulted.75 Perhaps issues so divisive were thought better entrusted to the Court than argued and forced to a conclusion in Congress, with all the strains the latter course would necessarily put on the legislative process. Southern Senators confide today that they would rather see the President or the Supreme Court accomplish some purpose for the Negro, however objectionable, than have the end achieved through legislation which will put them through a Senatorial replica of the War Between the States.


75. The case-law developed as follows: Strauder v. West Virginia, 100 U.S. 303 (1880) (statute excluding Negroes from jury service violates fourteenth amendment); Guinn v. United States, 238 U.S. 347 (1915) ("grandfather clause" permitting white persons to qualify as voters without literacy test required of Negroes violates fifteenth amendment); Buchanan v. Warley, 245 U.S. 60 (1917) (ordinance prohibiting white and Negro residence on same city block violates fourteenth amendment); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938) (state must provide equivalent legal training for Negroes within its own borders and does not satisfy fourteenth amendment by paying tuition for Negroes to attend out-of-state law school); Sweatt v. Painter, 339 U.S. 629 (1950) (Texas law school for Negroes does not satisfy fourteenth amendment because it offers fewer educational opportunities than white law school and does not have "qualities which are incapable of objective measurement but which make for greatness in a law school"); McLaurin v. Oklahoma, 339 U.S. 637 (1950) (Negro admitted to state university may not be required to use segregated seats in classroom and cafeteria).
D. THE COURT AS AN INSTRUMENT OF NATIONAL UNITY

Finally, there is the Supreme Court's vital and probably irreplaceable role as an instrument of national unity. Justice Holmes doubted that the United States could survive as a nation if the Court lost its power to invalidate state statutes.\textsuperscript{76} For all the growth of federal power in recent decades, regional prejudices and parochialism have hardly disappeared. It still takes a decision of the Supreme Court to prevent a state from changing city boundaries so as to exclude Negro voters,\textsuperscript{77} or to prevent a state from banning a film deemed "sacrilegious" by a politically powerful minority in that state.\textsuperscript{78} At least it is hard to conceive of Congress playing this role. Even Judge Hand saw possible justification, because of the dangers of sectionalism, for the Court's early\textsuperscript{79} construction of the commerce clause to permit a judicial negative on state regulation of commerce.\textsuperscript{80} Nor has the need for Supreme Court intervention in the field of state taxation and regulation of commerce ended.\textsuperscript{81} Congress has certainly shown little desire or capacity to deal with the multitudinous and subtle problems involved.\textsuperscript{82} One reason is that state and sectional pressures remain powerful in Congress; the Supreme Court is freer to place national above local interests.

III. THE NEW ACADEMIC CRITICISM

With that inadequate discussion of Judge Hand's fundamental challenge to most of our assumptions about the role of the Supreme Court, we turn to the third and last category of the contemporary criticism. It comes largely from law professors, and it can conveniently be labeled the new academic criticism. Perhaps in response to expressions of regret at the amount and quality of

\textsuperscript{76} I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperilled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views . . . .

\textit{Holmes, Law and the Court} (1913), reprinted in \textit{Holmes, Speeches} 98, 102 (1934).


\textsuperscript{78} See Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

\textsuperscript{79} Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

\textsuperscript{80} \textit{Hand, op. cit. supra} note 43, at 32–33.

\textsuperscript{81} An illuminating recent case in the commerce area is Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959).

\textsuperscript{82} \textit{But see Pub. L. No. 272, 73 Stat. 555} (1959), limiting state power to tax net income derived from interstate commerce and authorizing congressional studies of the problem.
professional comment on the Supreme Court's work, such comment seems to have proliferated in the last few years. The Law School of the University of Chicago recently published the first volume of a projected annual journal devoted entirely to appraising the Court's performance.

Like Judge Hand, the academic critics do not talk in terms of particular results. Their premise is that the process through which the Supreme Court reaches a result is more important than where the Court comes out. The issue is not who won but why, and how.

The depth of this belief was illustrated in Professor Wechsler's 1959 Holmes lecture. He discussed three Supreme Court decisions on race relations—the cases outlawing the white primary, restrictive real estate covenants, and segregated public schools. As to their results, he expressed a personal belief that the three cases had "the best chance of making an enduring contribution to the quality of our society of any that I know in recent years." But he went on to question the results because he found the reasoning of the opinions inadequate.

A common theme among the academic critics is that the present Court cares too much about results and not enough about reasons. As Alexander M. Bickel and Harry Wellington put it:

The Court's product has shown an increasing incidence of the sweeping dogmatic statement, of the formulation of results accompanied by little or no effort to support them in reason, in sum, of opinions that do not opine and of per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they reach.

83. E.g., Hart, supra note 42, at 125: "[N]either at the bar nor among the faculties of the law schools is there an adequate tradition of sustained, disinterested and competent criticism of the professional quality of the Court's opinions."
84. The first volume of The Supreme Court Review was published in December, 1960.
85. It should be noted that the academic critics do not share Judge Hand's skepticism about the utility of judicial review in general or his belief that the Court has abused the power and made itself into a third legislative chamber. Professor Wechsler indeed began his Holmes lecture by disagreeing with Judge Hand's view that there is no basis for the doctrine in the text of the Constitution itself; he also disagreed with the approach to exercise of the power which necessarily follows the Hand view. Wechsler, supra note 45, at 2-10.
86. Wechsler, supra note 45.
90. Wechsler, supra note 45, at 27.
This branch of the new academic criticism can be captioned: "The Court is saying too little." Unsigned and unelaborated per curiam opinions and orders are particular targets. Professor Wechsler cited the series of per curiams following the Brown decision. The opinion in that case emphasized the special nature of education and the psychological effect of segregation on school children. Then, in subsequent cases, the Court struck down segregation on beaches, golf courses and street cars—all in per curiam opinions simply citing Brown. What did the invidious effects of segregated classrooms upon children have to do with the segregation of adults on trolleys? The opinions did not say.

The Supreme Court's occasional use of per curiams in summary reversals of lower court decisions, without briefs or oral argument, has been widely attacked, notably by Ernest J. Brown. He wrote:

The very effectiveness of the tribunal, the respect and authority accorded its decisions, may be increased or diminished as its procedures are or are not thought open and fair. Meticulous care to give adequate hearing is consistent with—though it may not prove—the open mind usually thought appropriate for judicial authority.

If one complaint is that the Court is not saying and explaining enough, another is that the Court sometimes says too much. The Chief Justice's opinion in Watkins v. United States has been criticized on this ground. It dealt in the main with the whole question of legislative investigations, suggesting that the Constitution puts strict limits on congressional committees but coming down at the end to what was really quite a narrow holding—that a committee must explain to a witness the purpose of its questions. That some of the opinion was dictum unsupported by a faithful majority was demonstrated two years later, in Barenblatt v. United States, when a five-to-four majority upheld the power of the House Committee on Un-American Activities to question a teacher about Communist associations.

92. Wechsler, supra note 45, at 22.
99. The tone of the two opinions is so wholly different that it is difficult to isolate particular conflicts. Watkins gave a passing nod to the need of Congress to obtain information, 354 U.S. at 187, but emphasized the possible damage to individual interests: [After World War II] there appeared a new kind of congressional inquiry . . . [involving] a broad-scale intrusion into the lives and affairs of private citizens.

Id. at 195.

The mere summoning of a witness and compelling him to testify,
Professor Freund, a warm supporter of the Court, has been mildly critical in this area. He has written:

What gives concern is . . . a tendency to make broad principles do service for specific problems that call for differentiation, a tendency toward overbreadth that is not an augury of enduring work . . . . The law of the future is likely to be the law which earns its perdu-
rance by the solidity and strength of its workmanship no less than by its appeal to our ethical sense.  

Workmanship is a word heard often from the academic critics. It is prominent in an article by Professor Hart which is probably the most critical of all the new criticism. Among other things, Professor Hart says:

[F]ew of the Court's opinions, far too few, genuinely illumine the area of law with which they deal. Other opinions fail even by much more elementary standards. Issues are ducked which in good lawyerly and good conscience ought not to be ducked. Technical mistakes are made . . . [T]hese failures are threatening to undermine the professional respect of first-rate lawyers for the incumbent Justices of the Court, and this at the very time when the Court as an institution and the Justices who sit on it are especially in need of the bar's con-
fidence and support.  

Professor Hart's article is devoted in good part to the heavy burden of work on the Supreme Court. He reiterates the often-

against his will, about his beliefs, expressions or associations is a meas-
ure of governmental interference.

Id. at 197.

In Barenblatt, on the other hand, Justice Harlan emphasized the evil nature of communism and the broad power of Congress to legislate and investigate in relation to the danger. 360 U.S. at 127–29. Without any real discussion of the interests, both individual and national, favoring pri-

vacy of belief and association, the opinion concluded:

[T]he record is barren of other factors which in themselves might sometimes lead to the conclusion that the individual interests at stake were not subordinate to those of the state. . . . We conclude that the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended.

Id. at 134.

The Watkins opinion was also highly critical of the House resolution authorizing the Committee on Un-American Activities and defining its purpose: "It would be difficult to imagine a less explicit authorizing reso-
lution." 354 U.S. at 202. "An excessively broad charter . . . . [makes it] impossible . . . [for the courts] to ascertain whether any legislative pur-
pose justifies the disclosures sought. . . ." Id. at 205–06. All this was explained in Barenblatt with the statement that the Court in Watkins had discussed the authorizing resolution "only as one of the facets in the total mise en scene in its search for the 'question under inquiry'. . . ." 360 U.S. at 117.

100. Freund, supra note 27, at 21.
101. Hart, supra note 42, at 100–01. An amusing rebuttal to the Hart article is Arnold, Professor Hart's Theology, 73 Harv. L. Rev. 1298 (1960).
heard complaint, made by some of the Justices among others, that the Court is partly responsible for the burden because of its prof-
ligacy in granting review of trivial cases. The issue here, of course, is the Court's now apparently well-established habit of granting

certiorari to review the evidence in railroad injury cases under the Federal Employers Liability Act. To a majority of the

Justices such review is necessary to keep lower federal and state judges from whittling away at the statutory right to jury deter-

minations. To a minority on the Supreme Court and to many outside observers the practice is, as Professor Hart puts it, "a griev-

ous frittering away of the judicial resources of the nation." Moreover, the Court is accused of bending the law in FELA cases to achieve the sympathetic end of succor for the victims of rail-

road accidents, with inadequate regard for the propriety of the means used.


The whole question of judicial ends and means was explored by Professor Wechsler in his Holmes lecture. In politics, he said, one can perhaps tolerate ad hoc decisions, "with principle reduced to a

manipulative tool." But "the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result." It is Professor Wechsler's complaint, and others', that the Court has been rendering too many ad hoc decisions, based not on neutral and general principles but on the desire to help some litigant or class, without working out the implications of the decision for other kinds of cases and the law in general.

These few samples of the third category of criticism should in-
dicate that, for all its scholarly origins, it is by no means gentle. The academics would surely accept as rigorous scrutiny of their own work, especially because the imprimatur of scholarship gives

103. For an able defense of the practice see Arnold, supra note 101, at 1302–04.
104. Hart, supra note 42, at 98.
105. Wechsler, supra note 45, at 15.
it a special air of authority. Some observations therefore are in order.

One objection that can fairly be made to the recent academic writings is that they often do not take cognizance of the difficulties, surely understood by the authors, under which Supreme Court Justices labor. The pressure of time, for example. Justice Douglas, among others, has argued that the Court would not significantly lighten its workload if it abjured FELA cases. But even if the Court were as rigorous as Professor Hart would wish in limiting grants of certiorari, a Justice would seldom have the time to spend on an opinion that a professor would take for a law review article on the same subject. How can a similarly exhaustive analysis be expected? Another difficulty is simply that there are nine members of the Court. It is easier to please one editor than eight. Opinions that are hazy or duck issues may be so because a majority cannot agree on something more definitive. Even if it is desirable to make an opinion a general treatise on an aspect of the law, the writer may be unable to do so without treading on the prejudices of his colleagues and losing his majority. It was Justice Story who said that if the Court had twelve members, "I verily believe...we should do no business at all, or at least very little." And the Court gets inadequate assistance from counsel; as the critics appreciate, the quality of advocacy is often low. Any regular observer of the Court in session can testify that briefs and oral argument in too many cases throw little if any light on the problem, so that the Court is effectively told: "Here, we don't understand it. You solve it."

Occasionally also there creeps into the new academic criticism a breadth of phrasing in contrast to the precise tradition of the scholar. The strictures are so harsh, the language so sweeping as to give the impression that the craftsmanship of the Supreme Court

107. But see id. at 20: "The Court in constitutional adjudications faces what must surely be the largest and the hardest task of principled decision-making faced by any group of men in the entire world." And see Kalven, The Metaphysics of the Law of Obscenity, 1 The Supreme Court Review 1, 45 (1960): "I cannot leave the Court's efforts in this field without a word about the extraordinary difficulty of its task. . . . [A]ny decision must treat so many variables. The rest of us are fortunate indeed that our job is so much easier and less responsible." 108. Harris v. Pennsylvania R.R., 361 U.S. 15, 16 (1959). Mr. Justice Douglas believes, in any event, that the Court is not overworked. See Douglas, The Supreme Court and Its Case Load, 45 Cornell L. Q. 401 (1960).

109. For an argument that this course is undesirable see Arnold, supra note 101, at 1311–12.

110. Letter to Charles Sumner, in 2 Story, Life and Letters of Joseph Story 296 (1851), quoted in Hughes, op. cit. supra note 1, at 238.

111. Hart, supra note 42, at 125.
is at an all-time low. Is that really so? How does the Court's product today compare with that of some other, perhaps golden, age?

A. A Backward Look at a Golden Age

Any careful comparison of the Court's work at some other period with that of today would be an extensive scholarly undertaking. Pending such a study, it may be useful to make a brief appraisal of the work of one representative term in the past. During the 1956 term, in an opinion deploring the Court's continued review of FELA cases, Justice Frankfurter remarked that a comparison of "the current United States Reports . . . with those of even a generation ago" demonstrated a growth in the difficulty of research and decision. The remark serves as a convenient if arbitrary peg for a look at the past. Taking twenty-five years as a generation, let us look back that far from the 1956 term and appraise the three volumes of the United States Reports for the 1931 term.

So far as the intellectual calibre of the Court was concerned, that may well have been a golden age. Hughes was Chief Justice. Holmes was there half the term, succeeded on his retirement by Cardozo. Brandeis and Stone and Roberts were on the Court. The remaining members were those who came to be known as the conservative bloc, Van Devanter, McReynolds, Sutherland and Butler.

The first impression one receives from the 1931 Reports is that the business of the Supreme Court was substantially different from today's. Substantive due process flourished as a protector of economic interests. The Court decided 15 cases in that category during the term. It found unconstitutional a federal tax statute raising the conclusive presumption that a gift within two years of the donor's death was made in contemplation of death. It held that Wisconsin could not, constitutionally, combine the income of a husband and wife for tax purposes if the result was to increase their tax. On the other hand, it happily allowed Utah to ban outdoor advertising of cigarettes. In those primitive pre-Erie days the Justices were still blithely laying down federal general common law. The Court decided five diversity contract cases and three diversity negligence cases. Justice Brandeis, writing for the Court over the solitary dissent of Justice McReynolds, made no reference to state law as he reversed a judgment for plaintiff in a suit on a fire insurance policy. A complicated question of Dis-

District of Columbia common law drew an impressive dissent from Justice Cardozo.\textsuperscript{118} Half a dozen bankruptcy cases were decided.

Many of today's recurrent themes are not to be found in volumes 284, 285 or 286 of the \textit{United States Reports}. In the 1931 term the Court decided not a single state criminal case. Federal law regulating labor relations and wages and hours—now provocative of much litigation that ends in the Supreme Court—did not exist. Internal security was not an issue. There were a dozen cases from the Interstate Commerce Commission but none of the other regulatory agency business that is now such a staple.

Some things, however, have not changed. There were federal tax cases—23 of them, many more than today. There were three cases raising issues of inter-governmental tax immunity, six on state taxation and five on state regulation of interstate commerce. The Court reviewed 11 federal criminal convictions. And, finally, there were FELA cases—at least as numerous as today, but with a different pattern of results. In 12 FELA decisions 11 judgments for plaintiffs were reversed, one affirmed. The Court found no persuasive evidence of employer negligence in cases in which, today, it seems unlikely that a single Justice would vote to set aside the plaintiff's judgment. For example, a brakeman in a caboose was ordered to step off a train at night so that he could assist in an inspection; he was not told that the caboose was on a trestle, and so he stepped into the air and fell down a ravine. No negligence.\textsuperscript{119}

In general, the Court's business in the 1931 term could be characterized as less demanding intellectually and emotionally than today's. This is not to pretend that there were no great cases, no deeply felt issues. Among the opinions that term were two of Brandeis' greatest dissents—from \textit{Crowell v. Benson},\textsuperscript{120} laying down the doctrine that administrative tribunals' findings of "constitutional facts" were subject to judicial review de novo, and from \textit{New State Ice Co. v. Liebmann},\textsuperscript{121} holding unconstitutional a Depression-born Oklahoma statute requiring official permission for entry into the ice business. But there were many more run-of-the-mill cases than there are now—commercial problems of little significance to anyone but the parties, and of little interest. Nor

\textsuperscript{118}. Reed v. Allen, 286 U.S. 191, 201 (1932).
\textsuperscript{119}. Baltimore & O. R.R. v. Berry, 286 U.S. 272 (1932). A 1939 amendment to the FELA abolished the defense of assumption of risk. See 53 Stat. 1404, 45 U.S.C. § 54 (1958). But only two of the reversals in FELA cases in the 1931 term were on the ground of assumption of risk by the employee, and six of the decisions seem to be based simply on appraisals of the evidence by the Supreme Court. It is a fair guess that today's Court would make different appraisals.
\textsuperscript{120}. 285 U.S. 22 (1932).
\textsuperscript{121}. 285 U.S. 262 (1932).
were there so many of the soul-rending issues of individual liberty which fill the docket today, issues which precedents do not resolve, which call upon a judge's deepest resources of wisdom, understanding and experience.\textsuperscript{122}

A second aspect of the 1931 term which quickly impresses the observer is the degree of unanimity in the Reports. There were 152 written opinions. In only 26 cases (or 17 per cent) were there dissents; nine of the dissents, incidentally, were without opinion. There was only one special concurrence.\textsuperscript{123} Contrast the most recent figures, for the 1959 term. There were 105 full opinions, 81 (or 77 per cent) with dissent; and the Justices wrote 27 concurring opinions.\textsuperscript{124}

Aside from the statistical evidence of intra-Court agreement, such dissents as there were lacked the bitter, exaggerated flavor and air of impending doom now occasionally noticeable.\textsuperscript{125} Language was less strident, less argumentative.\textsuperscript{126} The exchange of correspondence between Holmes and the other Justices upon his retirement is so warm as to bring tears to the eyes of the reader.\textsuperscript{127} All this bespeaks a largeness of spirit, a desire on the part of most of the members of the Court, at least, not to let the real differences of view that did exist become divisiveness. It also implies a good deal of restraint on expression of individual views, a restraint lacking today.\textsuperscript{128} Justice Brandeis, for example, surely

\begin{footnotesize}

\textsuperscript{123} Contrary to what may be the impression, even decisions upholding substantive economic rights against governmental action were not all by a divided Court. See, e.g., Justice Brandeis' opinion for the Court in Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239 (1931).

\textsuperscript{124} See Table IV, sections (A) and (C), in Note, The Supreme Court, 1959 Term, 74 HARV. L. REV. 97, 104–05 (1960).


\textsuperscript{126} See, e.g., Justice Holmes' delightful dissent in Hoeper v. Tax Comm'n, 284 U.S. 206, 218 (1931).

\textsuperscript{127} See correspondence printed at 284 U.S. v-vi (1932).

\textsuperscript{128} See, e.g., Meyer v. United States, 364 U.S. 410, 416 (1960) (dis-
did not agree with every word of every opinion which he joined in the 1931 term. But he was sufficiently self-confident to believe his reputation could survive without his recording every trivial disagreement. A recent book⁰ makes clear how often Brandeis had the strength to withhold dissent for the sake of institutional solidarity, reserving disagreement for the great occasions and thus heightening its effect.

A third feature of the 1931 term is the utter lack of sentimentality evidenced. The Court curtly rejected a narcotics offender's protest against multiple penalties for one transaction,¹ an attack on inconsistency in jury verdicts on different counts of an indictment,² an attempt by an alien mother and her daughter to return, after a trip abroad, to the home in New York which had been their residence for many years³ and a claim by a widow for her husband's life insurance.⁴ It just as brusquely reversed a judgment for a five-year-old boy who had lost his leg in a railroad accident,⁵ and it set aside a negligence judgment for a widow because a federal court in New Hampshire had violated the full faith and credit clause of the Constitution in applying New Hampshire law instead of that of Vermont, where her husband's contract of employment had been made.⁶ The FELA cases of


¹ See Blockburger v. United States, 284 U.S. 299 (1932) (Sutherland, J., for unanimous Court).

² See Blockburger v. United States, 284 U.S. 390 (1932). This was Justice Holmes' last opinion; it drew a lengthy dissent from Justice Butler.

³ See United States ex rel. Polymeris v. Trudell, 284 U.S. 279 (1932) (Holmes, J., for unanimous Court).


⁵ See Blockburger v. United States, 284 U.S. 299 (1932) (Sutherland, J., for unanimous Court).

⁶ See Blockburger v. United States, 284 U.S. 390 (1932). This was Justice Holmes' last opinion; it drew a lengthy dissent from Justice Butler.

⁷ See United States ex rel. Polymeris v. Trudell, 284 U.S. 279 (1932) (Holmes, J., for unanimous Court).

⁸ See United States ex rel. Polymeris v. Trudell, 284 U.S. 279 (1932) (Holmes, J., for unanimous Court).


¹ See Blockburger v. United States, 284 U.S. 299 (1932) (Sutherland, J., for unanimous Court).

² See Blockburger v. United States, 284 U.S. 390 (1932). This was Justice Holmes' last opinion; it drew a lengthy dissent from Justice Butler.

³ See United States ex rel. Polymeris v. Trudell, 284 U.S. 279 (1932) (Holmes, J., for unanimous Court).


² See Blockburger v. United States, 284 U.S. 299 (1932) (Sutherland, J., for unanimous Court).

³ See Blockburger v. United States, 284 U.S. 390 (1932). This was Justice Holmes' last opinion; it drew a lengthy dissent from Justice Butler.

⁴ See United States ex rel. Polymeris v. Trudell, 284 U.S. 279 (1932) (Holmes, J., for unanimous Court).

⁵ See United States ex rel. Polymeris v. Trudell, 284 U.S. 279 (1932) (Holmes, J., for unanimous Court).

⁶ See Blockburger v. United States, 284 U.S. 440 (1932) (Sutherland, J., for unanimous Court).

⁷ See Blockburger v. United States, 286 U.S. 440 (1932) (Sutherland, J., for unanimous Court).

⁸ See Blockburger v. United States, 286 U.S. 145 (1932) (Brandeis, J.; Stone, J., concurring specially). Professor Freund has noted how Brandeis developed the full faith and credit clause in a series of cases that resulted, by chance, in rejecting the claims of a widow, an orphan and a working man. Freund, Mr. Justice Brandeis: A Centennial Memoir, 70 Harv. L. Rev. 769, 787 (1957).

[H]e was not a sentimentalist. He had never allowed his energies to be drained, or his greater usefulness debilitated, by yielding to pity for the individual case at the cost of a more inclusive rescue and reform. Least of all on the Court would he compromise his moral authority by succumbing to expediency, though it bore the face of grief.
the term are also good examples; all were decided unanimously, and seven of the 10 Justices who served on the Court that term wrote at least one FELA opinion.\textsuperscript{130} It is not hard to find a contrasting sentimentality in more recent terms.\textsuperscript{137}

Fourth, one is struck by the straightforwardness, the dispatch, the lack of self-consciousness in the opinions of that earlier day. The Justices exercised their power in a matter-of-fact, no-nonsense way, without the fretful examination of the Court's role that is sometimes found today.\textsuperscript{148} It took only a few pages, most of them devoted to a recitation of the facts, for Chief Justice Hughes (writing for all his colleagues) to reverse a state supreme court and find some local real estate assessments unconstitutional on the ground that land of differing values was systematically assessed at the same figure.\textsuperscript{139} The Court unembarrassedly overruled cases upon finding them in conflict with what it considered the main line of precedent,\textsuperscript{140} or simply upon re-examination of the problem.\textsuperscript{141} It did most of these things with astonishing swiftness—less than a month between argument and decision in many cases, just 31 days for \textit{New State Ice Co. v. Liebmann},\textsuperscript{142} less than three months for argument, reargument and decision of another hotly contested case.\textsuperscript{143} Opinions were less sophisticated than they have to be today. They most often laid things out in terms of precedent, with much less examination than today of the reasons underlying the precedent, the considerations of policy.

\textit{Ibid.} On another occasion Professor Freund put it: "To think of Brandeis as a shining white Knight riding off to every call of distress is to confuse the prophet Jeremiah with the all-American boy." Freund, \textit{The Liberalism of Mr. Justice Brandeis}, Address to American Historical Association, Dec. 28, 1956, p. 3.

\textsuperscript{136} Only Justices Holmes, Van Devanter and Brandeis did not write an FELA opinion. Interestingly, the one opinion sustaining a judgment for plaintiff was by that reputed lover of railroad management, Mr. Justice Butler. Minneapolis, St. P. & S. Ste. M. Ry. v. Borum, 286 U.S. 447 (1932).


\textsuperscript{139} See Cumberland Coal Co. \textit{v. Board of Revision,} 284 U.S. 23 (1931).


\textsuperscript{141} See, \textit{e.g.}, Fox Film Corp. \textit{v. Doyal,} 286 U.S. 123 (1932) (opinion of Hughes, C.J.), overruling Long \textit{v. Rockwood,} 277 U.S. 142 (1928).

\textsuperscript{142} 285 U.S. 262 (1932). See text accompanying note 121 \textit{supra.} It seems unlikely that even Justice Brandeis could have produced his 31-page dissent a month after argument unless he had worked on it before the case was argued.

\textsuperscript{143} Burnet \textit{v. Coronado Oil & Gas Co.,} 285 U.S. 393 (1932). The case
B. Judicial Craftsmanship Then and Now

How good, then, was the work of the 1931 term? The absence of divisiveness is appealing to a reader of the Reports today, as is the directness of manner, the unashamed exercise of judicial power. There is a sense of sureness in the opinions dealing with technical problems, though one technically unskilled cannot really appraise their craftsmanship. But just as many opinions as today seem to have brushed lightly over the difficulties, and many ignored policy considerations in a way that would not be tolerated today. One cannot say that the average opinion in 1931 any more than today “genuinely illumine[d] the area of law with which” it dealt.144 Of course there were the Brandeis opinions, but that is only another way of saying that Brandeis was Brandeis, with no equal then or now. Certainly many opinions were on a humdrum level, dreary matter treated drearily, and cannot be fairly described as more intellectually satisfying than today’s. Most important, the issues before the Court were significantly less challenging to mind and spirit than those of 1960.

One last thought. A look backwards in the United States Reports is a reminder that articulation is not everything. Results do count. Take the FELA cases, for example. The FELA opinions in the 1931 term, although somewhat more articulate than today’s,145 did not any more successfully “formulate generalized guides to decision”146 of the question of how much evidence of negligence is enough. But the predominant result—the reversal of plaintiffs’ judgments—itself signified a strict attitude on the part of the Court toward the requirements of proof, just as today’s FELA decisions, however inarticulate, do inform the lower courts of a relaxed attitude toward those requirements.

One may wholly agree with the academic critics that the judicial process must be one of reason and principle and yet recognize that a court may reach a proper result without at once being able to agree on a fully satisfying rationalization. There are many areas of the law, especially of constitutional law, in which it has taken years and decades for the Supreme Court to work out all the implications of a doctrine. The new and emerging problems of

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144. See note 101, supra and accompanying text.
145. At least the FELA opinions in the 1931 term gave the facts of the cases. The frequent practice today is disposition in a per curiam opinion which simply states the result, e.g., Harris v. Pennsylvania R.R., 361 U.S. 15 (1959), or gives a statement of facts so incomplete as to be useless, e.g., New York, N. H. & H. R.R. v. Henagan, 364 U.S. 441 (1960).
146. The phrase is from Professor Hart’s discussion of FELA opinions. See Hart, supra note 42, at 97.
today are as difficult as any in the past, and fraught with the
greatest social implications. Is it not understandable if adequate
articulation has to await a similarly slow, painful, halting process?
The *Brown* decision is an example. Whatever the failings of the
opinion, the result was not only proper but necessary. An earlier
Court, applying the sociology of its day, had found that racial seg-
regation did not deny Negroes the equal protection of the laws be-
cause there was nothing invidious about the arrangement unless
they chose "to put that construction upon it." But could any
rational person doubt in 1954 that racial segregation was a cal-
culated device to exalt one group and debase another, whether
practiced in Mississippi, the Union of South Africa or Hitler's Ger-
many? A Court would have to be obtuse indeed to find nothing
invidious in a rule requiring Negro children—or Jewish children,
say, or Mexican children—to attend separate schools. Surely
Paul Freund was right when he said: "It is proving very hard in-
deed in some quarters to live physically with the Court's decisions;
in another sense would it not have proved even harder to live in-
tellectual and morally with a contrary decision?" The fact
that the opinion in the *Brown* decision was difficult to write, or
that the desired unanimity on the Court was hard to obtain be-
hind a particular form of words, or that all the implications were
not foreseen—none of these shows that the decision should have
gone the other way, or indeed that a contrary opinion would have
been easier to write or more persuasive. It should be added that
neither do the difficulties justify the Court's abandonment of any
attempt at reasoned explanation in the subsequent per curiam.

**CONCLUSION**

This has been, on the whole, a defense of the Supreme Court.
But there is no intention to reject all of the contemporary criticism;
some of the academic strictures are surely justified. Even less is it
intended to suggest in general that it is bad form to criticize the
Supreme Court. On the contrary, no institution in the country
more desperately needs critics. A President or a legislator who
makes mistakes can be voted out of office, but not a Supreme
Court Justice. He is accountable to no one but himself. Nor does
he have the freedom of other office-holders to discuss his work
with experts in the field. He is alone and immune, and he may be

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148. For an excellent discussion of the school segregation cases along
these lines see *Black, The Lawfulness of the Segregation Decisions*, 69
*Yale L. J.* 421 (1960). See also *Pollak, Racial Discrimination and Judicial
peculiarly susceptible to vanity, to basking in the sunshine of his friends' compliments.

So long as the Supreme Court has ultimate power in our system of government, it will need the toughest criticism. So long as it has disinterested judges, they will welcome criticism as intellectual nourishment. But the criticism, like the Court's work, must be held to a standard. It should be particular, not general; dispassionate, not biased; directed at the Justices' performance, not their honor. Judge Hand again has said it for all of us:

[While it is proper that people should find fault when their judges fail, it is only reasonable that they should recognize the difficulties. Perhaps it is also fair to ask that before the judges are blamed they shall be given the credit of having tried to do their best. Let them be severely brought to book, when they go wrong, but by those who will take the trouble to understand.]

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