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The Court Can Do No Wrong

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THE COURT CAN DO NO WRONG?

by

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THE Supreme Court of the United States is today the subject of a great deal of discussion, much of which is criticism. Recently there appeared an article in this law journal the purpose of which was "to put forth a few kind words for the Court."[1] The article decried "the current wave of abuse" of the Supreme Court, and argued, it seems, that the Court has been too much criticized lately, with a resulting danger in fomenting disrespect for our highest tribunal and our law. This writer does not concur in the belief that criticism should be discouraged one iota. It is the contention of the author of this article that whatever danger, if any, there may be in much criticism of the Supreme Court or of anything else of public concern is considerably outweighed by the danger in a citizenry discouraged, even a little, to express itself, whatever its thoughts may be.

The aforementioned article accurately stated that the Supreme Court "has survived the ravages of time, criticism, wars, bitter elections and changes in political administrations" "for more than one hundred and fifty years." I am confident that it will survive for the future and for so long as we have our constitutional form of government. I submit, however, that the Supreme Court has gained in stature from the "ravages of time and criticism," and will cease to gain the day it becomes sheltered from criticism.

Disagreement and criticism can take many different forms and obtain many different results. If there had been neither disagreement nor criticism as a result of the *Dred Scott Case*,[2] probably the history of this nation and of the entire world would have been markedly different, and one of the bloodiest wars in history postponed if not averted. If there had been no disagreement and criticism when the Supreme Court made an attempt to invade the sovereign rights of the State of Georgia in a 1793 split decision,[3] possibly there would not have been the Eleventh Amendment to our Constitution. A

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[1] Thomason, The United States Supreme Court, 10 Sw. L.J. 131 (1957).

[2] Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

[3] Chisholm v. Georgia, 2 Dall. 419 (1793).

substantial number of statutes and constitutional amendments have resulted from disagreement and criticism by various public, commercial, governmental, and legislative groups and institutions—and frequently the catalyst had been the dissenting opinions in key cases, or the unpopularity of the majority decisions. Without criticism or disagreement there would not be the irritant which is so vitally necessary for progress and achievement.

The historic strength of the United States has been its republican form of government, and its evolution from public opinion and wishes, which have seldom been spontaneous, but usually result from the pressures of dissatisfaction. It is only through disagreement and criticism that such dissatisfaction can be effectively expressed or expounded.

Throughout the century and a half referred to it is doubtful that history has ever recorded a time when there has been such widespread criticism of the Supreme Court, its members, their qualifications, and their decisions. Extreme frustration was felt by the abolitionists who had maneuvered the passage of the Fourteenth and Fifteenth Amendments, only to see the Supreme Court limit their scope regarding voting qualifications,[4] and police powers (*i.e.*, anti-Ku Klux Klan act).[5] The New Deal adherents were equally as aroused by nullifications resulting from Supreme Court decisions which eliminated governmental standards for industrial and commercial operations,[6] and a form of socialization in agriculture and marketing.[7] This New Deal dissatisfaction was pointedly expressed by President Roosevelt in March of 1937 when he commented, "We have, therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself. . . . Our difficulty with the Court today rises not from the Court as an institution but from human beings within it."[8]

Only by public expression can be determined the existence of common agreement necessary for legislative action or constitutional amendment to eliminate what seems judicial error or encroachment on legislative or constitutional rights. Those who feel that the Supreme Court overstepped its delegated power in its decision which interferes with the operations of a private educational insti-

[4] United States v. Cruikshank, 92 U.S. 542 (1875).
[5] United States v. Harris, 106 U.S. 629 (1883).
[6] Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
[7] United States v. Butler, 297 U.S. 1 (1935).
[8] Associated Press Service, March 9, 1937.

tution according to the terms of a deceased's will and trust[9] do not necessarily feel that federal interference with the states' administration of public education by virture of the Supreme Court decision on public school segregation[10] is unconstitutional. Perhaps the crucible of public opinion, critical and otherwise, will in time widen, or narrow, or eliminate that existing difference. Even if there were no changes in the *status quo* after full expression, at least the Americans of today would be consistent with the creative and independent personalities of their forefathers, who were not averse to criticism, and occasionally defiance, in the foundation and development of this nation.

It may well be that the vast majority of lawyers is so complacent, of lawmakers so experimental, and of voters so uninformed and disinterested that there will result the further elimination and abandonment of such well-founded and tested judicial processes as precedent and stare decisis, but there is no moral or legal requirement for silence on the part of those who feel otherwise, regardless of how few they be in numbers. Even dissenting opinions of the Supreme Court are not consistent with such thinking, as witness the late Justice Owen J. Roberts' expression that:

> . . . [T]he present policy of the Court [is] freely to disregard and to overrule considered decisions and the rules of law announced in them. This tendency, it sems to me, indicates an intolerance for what those who have composed this court in the past have conscientiously and deliberately concluded, and involves an assumption that knowledge and wisdom reside in us which was denied to our predecessors.[11]

There was "reason, tolerance, and good will" for the Supreme Court a decade ago, and thereafter, by "Senators, Congressmen, lawyers, politicians, newspapers" and by "quite a good many demagogues, radicals, and extremists," to use the words of the article, *The United States Supreme Court,* notwithstanding the words of caution by Justice Roberts. However, there followed in the spring of 1957 a unique decision,[12] without formal opinion or explanatory reasoning, which was highly inconsistent with former opinions which had held the trust and its purposes and requirements valid, even though urged otherwise in one testing by the incomparable Daniel Webster.[13] Should those who now see the reasoning and wis-

[9] Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957).
[10] Brown v. Board of Educ., 347 U.S. 483 (1954).
[11] Smith v. Allwright, 321 U.S. 649, 666 (1944).
[12] See note 9 supra.
[13] Vidal v. Girard's Ex'rs, 43 U.S. (2 How.) 127 (1844); Girard v. Philadelphia, 74 U.S. 1 (1868).

dom of the admonition of Justice Roberts remain silent and in an attitude of "reason, tolerance and good will" toward this latest erosion, or should they not, as free born men who appreciate their heritage, urge preservation of what they feel they are obligated to pass on to future generations, if it is in their power to do so?

Many people feel that the present Court is more political in temperament than judicial. They feel that the steadying influence of historic and constitutional brilliance and knowledge, which had heretofore compensated to a great extent where judicial background was not entirely adequate in the Supreme Court membership, is sorely lacking along with judicial background in recent membership, and contributes greatly to the possibility, if not probability, of a political temperament. Such critics are not entirely without concurrence, sometimes even from the membership of the Court itself, as expressed in minority decisions such as Justice Harlan's opinion that:

> . . . [W]hat the Court has really done, I think, is simply to impose on California its own notions of public policy and judgment. For me, today's decision represents an unacceptable intrusion into a matter of state concern.[14]

Or such as Justices Burton and Minton's opinion that:

> For a state to do so [to make the defendants economically equal] may be a desirable social policy, but what may be a good legislative policy for a state is not necessarily required by the Constitution of the United States. This is an interference with state power for what may be a desirable result, but which we believe to be within the field of local opinion.[15]

Or finally, the late Justice Roberts' expression:

> I venture to say that no court has ever undertaken so radically to legislate where Congress has refused so to do.[16]

Arousing voters to a possible need for action at the polls, or lawmakers to a possible need for reform, is certainly not synonymous with mobs or armed force. So much tradition is based on "the loyal opposition," even in socialistic England, that surely there is still a place for it in America where it has served so well for so long. In a free republic such as ours, there is rather a *duty* to express oneself to inform others of one's views.

There will always be those who are disinterested, just as there will always be those who would experiment. Only by expression of disagreement through criticism can still others keep alive a truism,

[14] Koenigsberg v. State Bar of California, 353 U.S. 252, 312 (1957).
[15] Griffin v. People, 351 U.S. 12, 28 (1956).
[16] United States v. Hutcheson, 312 U.S. 219, 245 (1941).

which was expertly expressed by the comment of John Buchanan, "history gives us a kind of chart, and we dare not surrender even a small rush light in the darkness; the hasty reformer who does not remember the past will find himself condemned to repeat it."

Events of the past notwithstanding, there are yet a remarkable number of Americans who feel that "to suffer the United States' courts to decide on states' rights will, from a bias in favor of power, necessarily destroy the federal part of our government: and whenever the government of the United States becomes consolidated, we may learn from the history of nations what will be the event," just as was declared a hundred and fifty years ago in a special resolution of the legislature of Pennsylvania, which sought to avoid the use of arbitrary power by United States courts.[17] More and more Americans heed the warnings of historians, of legal students, and of Supreme Court members themselves. It is to be expected that these words of caution will be repeated, be it through criticism or other form of expression.

I only hope that the future will retain the pattern of the past wherein judicial decisions have helped to formulate constructive and progressive legislation. Such a result could not stem from automatic acquiescence, but a lack of progressive legislation could. So, whether justified or not, constructive or otherwise, heeded or ignored, let there always be as much criticism as possible, lest we fail in our duties as citizens.

"To sin by silence makes cowards of us all."[18]

[17] Ames, State Documents on Federal Relations, p. 48 (1911).
[18] Usually attributed to Abraham Lincoln.

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