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The History and Role of a Supreme Court in a Federal System

By W. JOSEPH WAGNER*

We in the United States are prone to think of our federal Supreme Court as a unique institution. We tend to laud or criticize the Court, according to our viewpoints, solely with reference to the Court's own history and the legal, social and economic effects of its current policies and decisions. Yet a supreme court presiding over the judicial system of a federal state is not peculiar to the United States. The United States Supreme Court is, however, unmatched by the high court of any other federation in the dominant position it occupies and the influence it wields.

This article, in comparing the supreme courts of other well established federal states with that of the United States, will provide a frame of reference within which the current decisions of the United States Supreme Court—especially in the area of school integration—may be evaluated with a new perspective.

HISTORY AND ORGANIZATION OF THE SUPREME COURTS

Whether the laws of a federal state are interpreted and applied by state courts or a separate set of federal courts or by both of them, there must be a federal body endowed with the ultimate authority to see to it that the federal system be properly understood and enforced. That the best equipped organ to perform this task is a judicial tribunal can hardly be doubted, although the legislative branch of the government was believed, by some theorists and politicians, to be able to perform the job.¹

The United States

One of the most outstanding weaknesses of the Confederation, after the North American colonies proclaimed their independence from England in 1776, was the lack of a steady judicial body, endowed with real powers of adjudication, in the last instance, of controversies provided for by the law, without the necessity of obtaining the consent of the parties to its jurisdiction.

Upon the establishment of "a more perfect Union," it was decided to make the creation of a supreme court of the United States a constitutional mandate, and to delimit the scope of its jurisdiction, in its most important

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This article is based on a forthcoming book, THE FEDERAL STATES AND THEIR JUDICIARY—A COMPARATIVE STUDY IN CONSTITUTION LAW AND ORGANIZATION OF COURTS IN FEDERAL STATES, Mouton & Co., publishers, The Hague, Holland. Discussion of the supreme courts in foreign federal states is more comprehensive in the forthcoming book than in the present article.

¹See, e.g., THE FEDERALIST No. 81 at 523-27 (The Modern Library ed.) (Hamilton) pointing out the weaknesses of such an approach.
features, in the basic law of the country. The number of justices and the organization of the Court was left to be set by statutes. The first Supreme Court consisted of six members, by virtue of the Judiciary Act of 1789. The number was reduced to five in 1801, fixed at seven six years later, and increased to nine in 1837. The largest number of justices, ten, sat in the Court from 1863 to 1866, then it was reduced to seven. Since 1869, the Court has had nine members. There are no indications that this number will be changed in the foreseeable future; on the contrary, there is a tendency to make it stable. It has been pointed out more than once that if the number of justices is not fixed by the Constitution, a new majority governing the country may change previous decisions by increasing the number of the justices and appointing to the Court persons willing to cooperate. This is exactly what President Franklin D. Roosevelt unsuccessfully attempted to do in his famous "court-packing" plan of 1937. Resolutions have been introduced in Congress to have the number of the justices determined by the Constitution, but no action has been taken by Congress. In spite of the fact that the advice and consent of the Senate to the Supreme Court appointees is constitutionally required, the primary responsibility of the Chief Executive in this respect has always been recognized by the Senate, and it seems that there was only one case, in this century, where it rejected the nominee of the President. However, in reaching his decision as to new members of the Court, the President must keep in mind that it is subject to the veto of the Senate, which will conduct hearings on the matter. There was just one instance of impeaching a Supreme Court justice: the accused was Samuel Chase, and he was acquitted in 1805. The affair had a clearly political flavor.

Although neither the Constitution nor any statutory enactment is specific on the problem of appointing the Chief Justice, it was settled, by custom, that this is the Presidential prerogative, so that the Court cannot elect one of its members to that office.

Again, by no legal enactment is the Court required to sit in banc in adjudicating all cases. However, this is what the Court always does. The Court never acts in committees, even while passing on applications to grant

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3U.S. CONST. art. III.
41 Stat. 73, § 1 (1789).
5The rule is embodied today in 28 U.S.C. § 1 (1952).
8In the last years, a constitutional amendment to that effect was being proposed by Representative Dondoro of Michigan. Brown, Proposed Amendments to the Constitutional of the United States, 1947-1953 at 7 (1953).
9U. S. Const. art. II, § 2, cl. 2.
10Rodell, Nine Men 4 (1955). It seems that the Court considers itself as having authority to examine the validity of appointments of its justices; however, the person challenging the appointment "must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." Ex parte Levitt, 302 U.S. 633, 634 (1937).
11For details, see Warren, The Supreme Court in United States History 269 (1947).
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certiorari. Indeed, it was suggested by Chief Justice Hughes that splitting the Court into chambers or divisions would be unconstitutional. This was his personal opinion, but at least some other justices are not willing to disagree with him. Anyhow, no attempts were ever made to make the Court function in any other way than it has worked from its very establishment.

Statutory provisions about the organization of the Supreme Court are very scarce; they are found in the first five sections of the Judicial Code. They set the quorum of the Court at six justices, fix the terms of court and the salaries of the justices, regulate the precedence of the associate justices, and vest the powers of the Chief Justice in the justice next in precedence when the Chief Justice is unable to perform his duties. The rest has been left to the Supreme Court itself. The method of working of the Court developed in a customary way and has not been reduced to written rules, except as to some of its aspects, mostly procedural and important to the litigants, which have found expression in the Rules of the Supreme Court.

The decisions on the merits, reached by the Court, are usually delivered per curiam if not necessitating any opinion, and consisting only of short orders of affirmance, reversal, or dismissal. Others are delivered by written opinions. In the first years of the existence of the Court, no dissenting opinions were filed. It seems that Marshall was bound to disagree, upon many occasions, with his Court once the Jeffersonians gained the

11Jackson, The Supreme Court in the American System of Government 19-20 (1955). In 1921, the American Bar Association sponsored the idea of splitting the Court into divisions. The Court opposed the idea, and a future justice of the Court branded it as a "folly," and added: "This way out is worse than futile; it is mischievous." Frankfurter, Distribution of Judicial Power Between United States and State Courts, 13 Cornell L.Q. 499, 504 (1928).

12Letter from C. E. Hughes, Chief Justice of the United States, to Senator Burton K. Wheeler, March 21, 1937, in connection with the President's "court-packing" plan. S. Rep. No. 711, 76th Cong., 1st Sess., 40 (1941). It was said in the letter: "I may also call attention to the provisions of article III, section 1, of the Constitution that the judicial power of the United States shall be vested "in one Supreme Court" and in such inferior courts as the Congress may from time to time ordain and establish. The Constitution does not appear to authorize two or more Supreme Courts or two or more parts of a Supreme Court functioning in effect as separate courts."

The Constitution does not authorize it expressly, but does not prohibit it, either. Much could be said against the conclusion of the Chief Justice.

13See, e.g., Jackson, op. cit. supra note 11, at 21. The Chief Justice stated in his letter, that Justices Van Devanter and Brandeis concurred in his view.

1428 U.S.C. §§ 1-5 (1952). Section 6, last in the first chapter of the Code, entitled "Supreme Court," deals with the records of the old Court of Appeals, appointed previous to the adoption of the Constitution.

1528 U.S.C. § 1 (1952). Similarly, the first Judiciary Act of 1789 required two thirds of the members of the Court to sit to have a quorum: four out of six. 1 Stat. 73, § 1.


21The number of per curiam decisions increased from 45 in 1945 to 102 in 1954. Report of the Director of the Administration Office of the United States Court 151 (1955).

22In 1945, 170 cases were disposed of by written opinions, as against 86 in 1954. Ibid.
majority in that body," but this fact does not appear in the reports of the Court. Then, the practice of delivering concurring and dissenting opinions developed, and is so well established today that it is unthinkable that it could be otherwise. In the 1948 term of the Court, for 114 signed opinions, 90 dissents were filed in 70 cases. Five years later, on 65 signed opinions, 56 of them were criticized in dissents; besides, 16 concurring opinions were delivered. Granting that banning the dissenting opinions would clearly be undemocratic, that most cases decided by the Supreme Court are difficult, borderline cases, and that some dissents of today become the law of tomorrow, it can hardly be contended that they add much to the prestige of the Court and the weight of its conclusions or make the law certain, particularly when the dissenter distorts the scope of the holding and challenges the soundness of its extended meaning. It seems that it would be desirable that the justices refrain from delivering dissenting opinions in every case where they do not agree with the majority so as to exercise their rights only in instances of particular importance and really strong feeling, on their part, against the reasoning of their brothers.

Argentina

The nearly one century long history of the Argentine Supreme Court was rather stable, in spite of some stormy periods in the history of the nation. The Argentine Judiciary Act of 1950 provides in section 21: "The Supreme Court of Justice will be composed of five justices and one attorney general."

The Constitution of 1863 vested in the Supreme Court the power to "make rules for the transaction of its business," and to "appoint all its subordinate employees."

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Address by Prof. W. W. Crosskey, Association of American Law Schools Annual Meeting, Dec. 28, 1955. Decisions were reported as unanimous, but Story related that they were not.


Note, 68 HARV. L. REV. 96, 192 (1954). Recently the tendency to deliver special concurring opinions has been growing. Freund, The Supreme Court of the United States, 29 CAN. B. REV. 1080, 1084 (1952).

VINSON, op. cit. supra note 24, at IX-XI.

JACKSON, op. cit. supra note 11, at 18-19. The statement by Chief Justice Vinson, referring to a speech delivered by Justice Douglas, that "certainty and unanimity in the law are possible only under a fascist or communist system, where, indeed, they are indispensable," is clearly misleading. First, it makes a virtue of uncertainty of law, which is a necessary evil in all legal systems but should be eliminated whenever possible. Second, it pays an undue homage to totalitarian systems, under which even criminal law which should be more certain than any other branch of law, is usually vague and subject to arbitrary application by the governing party. Thus, e.g., a statute of Nazi Germany of June 28, 1935, introduced the idea of crimes by analogy and made punishable acts deserving a penalty according to basic conceptions of criminal law and healthy popular sentiment. Similarly, § 16 of the Soviet Russia's criminal code made "socially dangerous acts," even though not dealt with in the code, punishable according to provisions dealing with crimes "most closely resembling it." Needless to add, legal rules are notoriously disregarded by the government in most totalitarian systems of law. See, e.g., Campbell, Fascism and Legality, 62 L.Q. REV. 141 (1946), and Marsh, Some Aspects of the German Legal System Under National Socialism, 62 L.Q. REV. 366 (1946).

Law No. 13,988, 2 Legislacion Nacional Argentina 185 (1950).

Article 100. However, the freedom of action of the Court as to its employees was restricted by §§ 12-16 of the Judiciary Act of 1950.
Like most other constitutions, the Argentine basic law did not settle the question how the President of the highest tribunal of the nation should be appointed. In 1930 the Court adopted a resolution stating that the previous practice of appointing the Chief Justice by the President had no legal basis and was contrary to the principle of the separation of powers. Thereupon, for the first time, it elected its President itself. Today, the new rule finds its place in a statutory enactment. The new Judiciary Act recognizes also the old Argentine principle that the Court sits as a body and all decisions must be taken by an absolute majority of the justices who are its members. Decisions are delivered per curiam, but concurring and dissenting opinions are rendered, too.

Mexico

In Mexico today, the membership in the Court is set at twenty-one justices and five substitutes. It sits in banc in order to decide some categories of cases, as specified by law, all those which are not assigned to one of the Chambers, and to handle certain administrative and internal problems. The bulk of its business is expedited by the justices sitting in the four Chambers into which the Court is divided, handling separately civil, criminal, administrative and labor dispute cases. Five judges sit in each of the Chambers; the presence of four is sufficient to transact business.

By constitutional provision the Mexican Supreme Court elects a Chief Justice from among its own members. In contrast to the situation existing in the United States, the Mexican Judiciary Act contains many minute details regulating the functioning of the Court. The decisions of the Court, in banc or in Chambers, are taken by a simple majority of the votes.

Brazil

In Brazil, by virtue of a constitutional provision, the minimum number of justices of the Federal Supreme Court is eleven, and it may be increased by law "upon the proposal of the Federal Supreme Court itself." At present it is composed of thirteen justices. For a long time the Court sat only in banc; today, it may sit also in one of the two Chambers which have, in respect to the whole Court, a position similar to that of an inferior

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Id. at § 23.
Amadeo, op. cit. supra note 30, at 53.
The situation in an earlier period is described in Clark, The Supreme Court of Mexico and the Judicial System of That Country, 8 Green Bag 203 (1896).
Sections 11 and 12 of the Judiciary Act, supra note 35.
Article 94 of the Constitution as amended; §§ 15, 24, 25, 26 and 27 of the Judiciary Act.
Section 15 of the Judiciary Act.
Id. at §§ 4 and 20.
Braz. Const. art. 88. The origin of the Court is discussed in Dawson, Brazilian Law and Judicial Organization, 35 Am. L. Rev. 31, 38 (1901).
judicial body." The bulk of litigation, however, is taken care of in the plenary sessions of the Court.

Brazilian Supreme Court deliberations, in which every justice gives reasons for his opinion and conclusions, are open to the public." As is the usual rule in other countries, decisions of the Supreme Court are taken by majority vote; dissenting opinions are permitted.

**Australia**

In Australia, the High Court consists "of the Chief Justice and six other justices." By virtue of the Australian Judiciary Act, decisions are taken either by one" or by more justices." In cases involving the exercise of the original jurisdiction of the Court, one justice takes care of the question presented. In appellate cases, more members of the Court have to sit: at least two" or three." On some occasions the Court sat simultaneously in two appellate cases appealed from state courts, but this practice was subjected to criticism." Applications for the granting of a leave to appeal to the Privy Council must be heard by not less than three justices." The concurrence of three justices is required to reach decisions in most important constitutional questions." In appellate cases, if there is an equal division of opinion between the justices, the judgments below are affirmed; in other cases, "the opinion of the Chief Justice, or if he is absent the opinion of the Senior Justice present" decides the problem."}

**Canada**

The Supreme Court of Canada had two handicaps, if we consider its origin and position in the whole system of administration of justice in Canada. First, it was not established pursuant to a constitutional mandate, but created by initiative of the legislature; second, actually, it was not a "supreme" court, since, down to 1949, its decisions could be appealed to

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"The Law No. 623 permits appeals from the decisions of the Chambers to the Court sitting *in banc* when these decisions are conflicting with each other or are allegedly contrary to an opinion of the Court reached at a plenary session. D.O.U. of Feb. 24, 1949.


"Then, the High Court sits "in Chambers." *Judiciary Act*, § 16.

"Then, the High Court sits as a "Full Court;" it "may be constituted by any two or more Justices of the High Court sitting together." *Id.* at § 19.

"*Id.* at § 20.

"*Id.* at § 21.


"*Judiciary Act*, § 22.

"*Judiciary Act*, § 23(1), dealing with cases "affecting the constitutional powers of the Commonwealth," provides that in such cases "a Full Court consisting of less than all the Justices shall not give a decision . . . , unless at least three Justices concur in the decision."

"*Id.* at § 23(2).
the Privy Council to an extent still broader than in Australia. Thus, actually, the Court was only an intermediate appellate court in most instances.

The number of judges was fixed in 1949 at nine. Two judges had to be from Quebec; since 1949, at least three come from that province, by virtue of statutory provisions. Following a well-established practice, three other judges come from Ontario. Of the remaining three, one is usually from British Columbia, one from the Mid-West provinces, and one from the East. The Court sits as a body and the quorum is five, or, if the parties consent, four.

The jurisdiction and the procedure before the Court are regulated by the Supreme Court Act. In matters not provided for by legislation, the Court is empowered to make its own rules and orders, power which was taken advantage of by the Court.

Switzerland

The history of the Swiss Federal Tribunal, as the only judicial organ of the Confederation, can be identified with the history of the whole Swiss federal judiciary. A complete equality of the three branches of government was never recognized in Switzerland, the legislature having precedence over the two others and the judiciary being the weakest. The superiority of the legislature was recognized in article 60 of the Constitution of 1848, pursuant to the general conviction that this was what the democratic idea requires, the legislators being elected by a popular vote and representing the people. Even today, the Constitution states that "the supreme authority of the Confederation is exercised by the Federal Assembly." An attempt to establish a federal court was first made in 1832-33, but it failed. The members of the impotent Federal Tribunal, established pursuant to the Constitution of 1848 and devoid of any important duties, were, in majority, members of the legislature. The present tribunal was

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53An Act respecting the Supreme Court of Canada, CAN. REV. STAT. c. 259, § 6 (1952).
54Id. at § 25.
55Id. at § 29.
56Id. at § 103.
57The Rules of the Supreme Court now in force date back to 1945; subsequently a few changes were made.
58RAPPARD, Le contrôle de la constitutionnalité des lois fédérales par le juge aux États-Unis et en Suisse, 53 Z.S.R. (N.F.) 36a, 107a-108a (1934) (Swit.).
59SWIT. CONST. art. 71.
60Coolidge, The Swiss Federal Court, 4 L.Q. REV. 409, 419 (1888) (cont'd 5 L.Q. REV. 149 (1889)).
61This is what an outstanding Swiss scholar had to say about the 1848 Tribunal: "The framers of its status cared less about its independence than about its cooperativeness. Thus, it was provided that the judges would be elected by the legislature for a very short term of years, that they could be selected from among non-lawyers, that they had no assured salary, and that, in consequence, they could have other jobs at the same time... The Tribunal was even deprived of the right to choose its own President and its Vice-President." RAPPARD, LA CONSTITUTION FEDERALE DE LA SUISSE 164 (1948). The Tribunal "was hardly more than a committee of the Federal Assembly entrusted with certain very limited judicial duties." RAPPARD, THE GOVERNMENT OF SWITZERLAND 23 (1936).
62RAPPARD, op. cit. supra note 57, at 110a.
established in 1875. Its membership then consisted of nine judges and nine alternates. By virtue of the Swiss Judiciary Act now in force, there are from 26 to 28 members in the Federal Tribunal, and from 11 to 13 alternates. It sits in departments, except for adjudication of some rare cases as provided by law, and for expediting of its administrative matters, where the sessions are plenary. Then, the quorum is two-thirds of its membership.

Separate departments and chambers handle criminal, civil, bankruptcy, constitutional and administrative and disciplinary matters. To reach a decision, the majority of votes is necessary; in cases of a split the chairman casts the decisive vote.

THE ROLE OF THE SUPREME COURTS

In countries in which there is no set of lower federal courts, the work of the federal judiciary is synonymous with that of the supreme court. In others, the highest federal tribunal leads the way, has the final word on the interpretation of the legal provisions, and is to be followed by inferior courts. Therefore, the role and prestige of the federal judiciary is dependent on that of the supreme court. The work of the highest tribunals falls into one of two categories: its decisions shape the private law of the country, or have a bearing on its politico-legal life.

The United States

In no other state, federal or unitary, have the courts, and particularly the highest tribunal of the country, attained the degree of prestige and importance that they enjoy in the United States. Although in most federal states, the supreme courts have a very effective power to play the primary role in the politico-legal life of the nation—the power of judicial review—, various circumstances prevented some of them from taking advantage of this possibility to the full extent.

Because of the wide powers of judicial review, not only existing theoretically, but actually exercised by the courts, the government of the United States was called a government of judges. A foremost American legal scholar stated that while in the first period of the history of the nation, the legislative branch of the government had hegemony over the two others, the judicial branch won supremacy after the Civil War, and was, in turn, replaced by the executive with the development of administrative agencies in the twentieth century. Thus, for the first time in the history of nations, the judicial branch of the government did successfully

"Id. at § 11.
"Id. at § 12, A.S. 60, 914.
"Judiciary Act of 1943, § 10(2). However, if a deadlock is reached as to an appointment, the decision is taken by lot.
"See Wagner, book mentioned in the first note to this article, chapter VI text and notes.
"Lambert, Le Gouvernement des Juges et la Lutte Contre la Legislation Sociale aux Etats-Unis (1921); Boudin, Government by Judiciary (1932).
"Pound, Federalism as a Democratic Process 14-16, (Rutgers Univ. ed. 1942).
compete with the two others for a leading role. This could hardly be ex-
eted at the time when the Union was being established. In the "Spirit
of Laws," Montesquieu expressed the idea that the judiciary cannot match,
in importance and strength, the legislature or the executive," and Hamil-
ton wrote that "incontestably . . . the judiciary is beyond comparison the
weakest of the three departments of power," and that "it can never at-
tack with success either of the other two."\(^\text{7}^\text{7}\)

It was under these beliefs that the Supreme Court began to work. Its
position seemed to be weak not only as to the two other branches of
the federal government, but also as to the highest tribunals of the States, which
enjoyed a greater prestige than that of the Supreme Court.\(^\text{7}^\text{7}\) And when
Jay was asked, in 1801, to accept a reappointment to the Court, he declined,
saying that under the defective system under which it functions, the Court
would never "obtain the energy, weight and dignity which were essential
to its affording due support to the National Government, nor acquire the
public confidence and respect which, as the last resort of the justice of
the nation, it should possess."\(^\text{7}^\text{7}\)

The predictions of Jay did not materialize, though the position that the
Court enjoys today was not won overnight. It took many years to "strug-
gle for judicial supremacy."\(^\text{7}^\text{4}\) Some decisions of the Court were defied
by state courts and authorities;\(^\text{7}^\text{5}\) some others, by the federal ones.\(^\text{7}^\text{5}\) In
a few other instances, the Court declined to take jurisdiction, couching
its decision on legal grounds, but actually fearing that its decision would
not be carried out.\(^\text{7}^\text{3}\) The Supreme Court and its members were subjected
to bitter attacks and criticism, wrong or just. The best merited is perhaps
that still more often than lower federal judges, the justices of the Supreme
Court lack, upon their appointment, any or sufficient judicial experi-
ence, as they are selected on the basis of political considerations.\(^\text{7}^\text{6}\) The con-
ervatism of the Supreme Court is well known, but is connected, as it may

\(^{7}\)Montesquieu, L'Esprit des Lois (1748).
\(^{7}\)The Federalist No. 78, at 504 (Modern Library ed.) (Hamilton).
\(^{7}\)Wendell, Relations Between the Federal And State Courts 27 (1949).
\(^{7}\)Title of a book by Mr. Justice Jackson, published in 1941. Of course, there can
be no question of "supremacy" of the judicial branch of the government in the full
sense of the word. The power of the courts is essentially negative; they can deny
the force of law to acts of the executive and legislature. The "supremacy" of the
judiciary should be understood as the recognition that they have the last word as
to the legality of acts.

\(^{7}\)For examples, see Warren, The Supreme Court in United States History 530,
768 (1947); Scott, Judicial Settlement of Controversies Between States of
The Union 529 (1919).

\(^{7}\)E.g., Lincoln disobeyed writs of the Chief Justice of the Court. Jackson, op. cit.
supra note 74, at 32 and 324-27. One of the most famous cases is Ex parte Merry-
man, 17 Fed. Cas. 14 (No. 9455) (C.C.D. Md. 1861), where Chief Justice Taney,
sitting as circuit judge, issued a writ of habeas corpus to military authorities who
confined an agitator of the Confederacy at the beginning of the Civil War.

\(^{7}\)Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Cherokee Nation v. The State
of Georgia, 30 U.S. (5 Pet.) 1 (1831); and other cases described by the Court as
raising "political questions."

\(^{7}\)See, e.g., Pearson & Allen, The Nine Old Men 322 (1937); Tunc & Tunc, 2 Le
Systeme Constitutionnel des Etats-Unis d'America 278 (1954). However, Justic
Frankfurter recently asserted that "past party ties as such tell next to nothing
about future Justices." He also stated that "correlation between prior judicial
seem, with that of the whole legal profession." That this conservatism often resulted in an "antidemocratic" position that the Court took likewise hardly be denied, and naturally it appeared in bold relief particularly in some cases holding legislation to be unconstitutional. Cardozo remarked: "The misuse of logic or philosophy begins when its method and its ends are treated as supreme and final." And in some instances, this seems to have been the case with the judgments of the Court.

But, in spite of the fact that in some periods of the history of the Court the intellectual level of its members might not have been high, usually the questions presented to the Court were given not only careful but also intelligent consideration; and the opinions and dissents fairly reflect the contemporary currents of thought in the nation, ably presented and skillfully phrased. The integrity of the justices of the Supreme Court was often emphasized, even though they might be influenced by their political party affiliations or sympathies.

The decisions of the Supreme Court are usually awaited with anxiety, if not by the whole nation, by the members of the legal profession. Opinions of the Court are being praised or criticized, but always commented upon, analyzed, discussed and cited. Unquestionably, the prestige of the Court is higher than that of any other tribunal in the world. And one of the outstanding members of the Court observed that its "extraordinary authority" is due to the fact that it "has found its fortress in public opinion."

It is a historical fact that the decisions of the Court greatly contributed to the creation of the American Nation out of New Yorkers, Virginians, and citizens of other States. At the establishment of the Union,

experience and fitness for the functions of the Supreme Court is zero," and pointed out that out of seventy-five past justices of the Court (the remaining fifteen contemporary and relatively recent occupants of the Court were omitted from consideration), "twenty-eight had not a day's prior judicial service," and that out of twelve most famous members of the Court (Marshall, Johnson, Story, Taney, Miller, Field, Bradley, White, Holmes, Hughes, Brandeis and Cardozo), only five had prior judicial experience. Frankfurter, The Supreme Court in the Mirror of Justice, 105 U. PA. L. REV. 781, 783, 795, 796 (1957).

Among other voices advocating the system of appointing Supreme Court justices not from among expert jurists, but from among persons having had experience in public life, see McWhinney, Judicial Review in the English-Speaking World 177, 188 (1956).

"JACKSON, op. cit. supra note 74, at 313. Besides, for a few reasons, and particularly as federal states have "rigid" constitutions, it seems that "federalism tends to produce conservatism." DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 173 (1892 ed.).


"JACKSON, op. cit. supra note 74, at XVIII. Professor Rodell, a sharp critic of the Supreme Court, branded some justices as stupid, narrow-minded and uninformed. Rodell, op. cit. supra note 80, at 8.

"JACKSON, id. at 312.

"See, e.g., Powell, Vagaries and Varieties in Constitutional Interpretation 44 (1956).

"As a well known example, the Electoral Commission of 1876 may be cited. Five justices of the Supreme Court, appointed to the Commission, voted along the party lines. Bassatt, A Short History of the United States 1492-1938, at 656-57 (1943).

"HUGHes, THE SUPREME COURT OF THE UNITED STATES 24-25 (1936 ed.).
it was questionable whether and to what extent national unity would be established. The construction of the Constitution by the Court, particularly in the first half of the history of the Union, went in the direction of strengthening the federation and endowing it with all powers necessary to run a great modern country. Broad constitutional clauses such as the due process clause or the commerce clause could easily be applied, by a less determined court, narrowly enough to thwart the endeavors of the federal government to cement the Union."

To the general public, the Supreme Court is better known by its politico-legal decisions than by its role in the shaping of the private law of the nation. Indeed, a "profoundest need" was asserted "that the Supreme Court may be free to adjudicate great issues of government," and more than once was the Court called "the umpire in the federal system." The political power of the Court is well known. But the bulk of its business consists of reviewing decisions settling the rights and obligations of private individuals in their disputes with each other. And recently, one of the justices observed that the most important task of the Court is just to decide, in the last instance, legal questions raised by disputes between the citizens rather than answer great problems of government."

All the existing federal states except Switzerland are younger than the United States. The constitutions of most of them were influenced by their North American model. And the supreme courts of other federations often found inspiration in the decisions and attitude of the United States Supreme Court and endeavored to gain a position comparable to that Court.

Australia

Perhaps, after the highest tribunal of the United States, the Australian High Court is the one which gained in its country the most powerful and influential position. From its very establishment, it tried to follow the tradition of the United States Supreme Court. After fifteen years of its existence, it was possible to say: "In the official reports of argument heard and judgments delivered in constitutional cases in the High Court, the abundance and aptness of quotations from decisions of the Supreme Court of the United States on cognate questions is conspicuous." It was pointed out that the High Court was vested with the important function of maintaining the proper balance between the federal and the

"Id. at 78. Cf. 1 Warren, The Supreme Court in United States History 2 (rev. ed. 1947).
"Tung & Tung, op. cit. supra note 78, at 196-202. Rodek, op. cit. supra note 80, at 4 and 33, called the Court the most powerful group of men in the world governing others.
"Jackson, The Supreme Court in the American System of Government 78-83 (1955). For the importance of the Court as a law court, see the same work at 28.
state governments, as provided for in the Constitution; the Court became an "arbiter of the destiny of the component parts of the federation." This duty the Court endeavored to fulfill. However, the great weight of Australian constitutional law students express the opinion that gradually the scope of the federal power increased, at the expense of the state power; it seems that the two world wars were the periods during which this process was fast, and the tide in the other direction, after the cessation of the hostilities, could not bring the balance of powers back to the preexisting situation. It was even asserted that the developments seem to go in the direction of the establishment of a unitary state in Australia.

Various circumstances contributed to this state of things which is not only due to the interpretation of the Constitution as given to it by the High Court. However, undoubtedly the Court substantially contributed to this result by some of its famous decisions in constitutional cases. It seems that the role played by the High Court, in these developments, is comparable to that attributable to the United States Supreme Court.

The position of the High Court was from the very beginning weaker than that of the highest tribunals of most other federations, because in some legal questions there was, and there is still, a higher court than the High Court: the Privy Council. The High Court, aided by the legislature of the Commonwealth, fought a battle to gain the position of the final court in Australia in as many cases as possible. Its fight against any encroachments on its powers by other branches of the Australian government was not less determined. It was even observed that "at times the Court has been over-anxious to consolidate its own position regardless of the effect of some of its decisions upon the working of the other, coordinate organs of the Commonwealth scheme."

The criticism of the High Court, proper and commendable as a constructive element of any progress and improvement, does not diminish the importance of the work of the Court and the prestige it gained in the Australian community.

Canada

The Canadian Supreme Court was handicapped, in comparison with the High Court of Australia and the highest tribunals of other federal

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*Greenwood, The Future of Australian Federalism 58 (1946).*

*Anderson, The States and Relations with the Commonwealth, in Essays on the Australian Constitution 96 (Mitchell ed. 1952); Dixon, Aspects of Australian Federalism, 5 U. Toronto L.J. 241, 242 (1944); Holman, Constitutional Relations in Australia, 46 L.Q. Rev. 202 (1924); McWhinney, Legislative Power in Federal Constitutional Systems—The Experience of the Commonwealth Countries, 14 La. L. Rev. 791, 801 (1954). The only dissent from this view seems to have been expressed by Beasley, Constitutional Interpretation in Australia, 3 U. Toronto L.J. 1, 11, 22, 23 (1939), where it was said that "there is neither a tendency towards, nor yet away from, Commonwealth supremacy over the states," and that "the federal nature of the constitutional system is still potent in Australia."

*McWhinney, id. at 810.*

*See, e.g., Dixon, supra note 94, at 242.*

Therefore, considering the whole work of the Court and the position it gained in the nation, it must be said that it has no such tradition as the highest tribunal of the United States or even that of Australia. With the abolition in 1949 of appeals to the Privy Council from Canada, it is to be expected that its prestige will increase.

In view of the fact that the Canadian Constitution and practice are considerably divergent, it would hardly be possible to require the courts to be "guardians of the Constitution." This state of things would not satisfy anyone. The provisions of the Canadian basic law establish a centralized system of government, whereas the developments went in the direction of decentralization. Therefore, many important questions of public life must be settled out of the courts, the duty of which in the interpretation of the Constitution is much narrower than in the United States. However, one basic question was always submitted to determination by judicial decisions: that of the scope of powers of the Dominion and provincial legislatures.

By construing the respective constitutional provisions, the courts gave to the Canadian federalism the shape it has today.

During the first thirty years of the existence of the Canadian federation, the effect of the judicial decisions was to give the federal government rather broad powers, a result which was warranted by the wording of the Constitution. Although in a few isolated instances some decisions recently have gone in the same direction, the general trend, starting in the 1890's was decidedly in favor of provincial rights.

The powers of the Dominion were gradually reduced, and those of the provinces given as broad a construction as possible, until the whole division of powers between the federal and provincial authorities was reshaped. The Canadian developments went in the opposite direction to those in the United States. The role played by the courts in this process was often criticized, and a constitutional amendment was suggested to enable a re-adjustment of the division of legislative powers. On the other hand, it

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94 See text following note 51 supra. It was often felt, in Canada, that the Canadian judiciary's dependence on the Privy Council accounted for the fact that their contribution to the development of the country was less satisfactory than that of the courts of the United States and some other countries. Prof. C. A. Wright, Dean of the Law School, University of Toronto, wrote recently: "The judgments of our courts cannot, by the widest stretch of imagination, be styled as enlightening or enlightened and in the main consist of a dreary collection of unrelated extracts from judgments of other judges. He expressed the hope that the situation would improve with the abolition of appeals to the Privy Council. Foreward to McWhinney, supra note 94.

95 Laskin, The Supreme Court of Canada: A Final Court of and for Canadians, 29 CAN. B. REV. 1038, 1046 (1952).

96 Smith, Federalism in North America 108 (1923).

97 See, e.g., Eggleston, The Road to Nationhood 36 (1946); McWhinney, supra note 94, at 796.

98 See, e.g., Reference Re the Power of Disallowance and Reservation, S.C.R. 71 (1938), where the Lieutenant-Governor's power to veto provincial statutes was upheld.


100 Scott, Centralization and Decentralization in Canadian Federalism, 29 CAN. B. REV. 1095, 1106 (1951).

was stressed that the criticism was often "misdirected and... founded on a misconception of the processes involved in Canadian constitutional interpretation." As a matter of fact, it seems that judicial decisions in constitutional questions in Canada followed the general feeling of the Dominion's population favoring decentralization and provincial rights.

Latin America Generally

In Latin America, the supremacy of the executive branch of the government is marked, and the usual phenomenon is that the courts try to avoid any conflict with the executive. This is true even when the courts are given the power of judicial review, and the judges enjoy a long term or a life appointment with a guaranty that they will not be removed from office without cause. In spite of the theoretical security in office, the executive can usually find a pretext under which its action against a recalcitrant judge will attain a color of legality, and if the cooperation of the legislature is needed, it being usually controlled by the executive, no great difficulty is presented; should it not be feasible, there remains still the way of clearly illegal action, which no other branch of government will be able to oppose.

With these facts in mind, let us make a few observations about the position of the supreme courts in the three Latin American federations.

Argentina

It seems that in Argentina the situation is better than in most Latin American countries, and that the federal judiciary gained in that country a considerable degree of confidence and prestige, in spite of a frequently expressed opinion, particularly in past times, that minor judges were easily affected by political and personal influences. The superiority of the federal judiciary over the provincial one is marked, the latter being very unsatisfactory.

The important role of the Argentine Supreme Court in the shaping of the law of the country cannot be denied. In general, the principle of stare decisis, one of the pillars of the common law, is not recognized in civil law countries. However, in Argentina, the principle of stare decisis is usually followed. The decisions of the Supreme Court present a good system of case law, well integrated and not improvised. The influence of the United States and the century-long tradition of the Argentine Supreme Court account for the fact that it was able to build up its prestige in the country and, in a long struggle with the executive, to free itself from its

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108 Rowe, The Federal System of the Argentine Republic 107-08 (1921). The corruption of many judges appointed during the Peronist regime to various courts was notorious.
109 This in Barreta v. Cordoba, 183 S.C.N. 409 (1939), the Court stressed the importance of precedents, citing Cooley and Willoughby, and declared that in the absence of special circumstances stare decisis should be applied in constitutional matters. See Amadeo, Argentine Constitutional Law 84 (1943).
subservient position." It was asserted that "the growth in importance and prestige of the Argentine Court has been one of the most significant characteristics of the development of the nation," and that its role in the history of Argentine institutions was extraordinary.

However, the position of the Argentine Supreme Court is hardly comparable to that of the Supreme Court of the United States. In general, the prestige of the courts in common law countries is higher than in civil law countries; and in particular, in the Spanish tradition the executive branch of the government stood always in the foreground. The events of 1947 can serve as a recent example. Three justices of the Supreme Court and the Attorney General, who in a few instances applied the old Constitution in a way unfavorable to Peron's regime, were impeached and removed from office under the pretext that they violated the Constitution.

In the other two Latin American federations, the highest tribunals have not attained the degree of prestige and importance reached by the Argentine Supreme Court.

Mexico

In Mexico, Lic. Salvador Urbina, a scholar in constitutional law, asserted that in the sphere of public law there is in the country no judicial power as a sovereign entity, and the Supreme Court is not fully independent because the executive branch of the government controls it. It seems, however, that while the Court has to bow to the supremacy of the federal executive, it can, with the cooperation of lower federal courts, successfully stop abuses of state governments.

As far as the activity of the Court in settling the disputes between private individuals is concerned, there is no competition from the two other branches of the federal government and it enjoys recognition as a good interpreter of the law.

Brazil

In Brazil, it seems that the lack of high prestige of its highest tribunal, comparable to that of the United States Supreme Court, is due not only to the superiority of the executive, but to some criticism that the tribunal merited. Thus, many Brazilian jurists complained about too frequent reversals of its own opinions by the Tribunal and conflicting decisions which make the law unstable. The Tribunal's work is much more important in the field of private than of public law, where it did not
contribute much to the shaping of the politico-legal system of the country.  

**Switzerland**

In Switzerland, the hegemony belongs to the legislative branch of the government. "[The supreme authority of the Confederation is exercised by the Federal Assembly," which elects the members of the federal executive and the Federal Tribunal, and is free either from judicial review or the veto power of the President of the Confederation." On the other hand, the executive branch of the government was vested with the function of the guardian of the Constitution. Actually, this function belongs to all three branches of government.

In the adjudication of cases, the Federal Tribunal is independent. However, the federal legislature has the duty of "general supervision of federal administration and justice."

**THE PRINCIPLE OF JUDICIAL REVIEW AND THE INTEGRATION DECISIONS**

If the principle of the supremacy of the federal constitution is recognized; if the statutes of a state are to conform to this basic law—it is not enough to proclaim this principle; a body is necessary to carry it into effect, and some procedure is needed to make possible the challenge of enactments contrary to the constitution.

In the United States, no constitutional provision expressly says anything about judicial review. This is usually explained by the fact

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12"de Oliveira Filho, *supra* note 42. It was said, however, by a foreign observer, after the first decade of the work of the highest Brazilian court, that its decisions "have been respected and obeyed by the executive and the nation, and that it has become a forum for the peaceable discussion and determination of matters of the gravest political concern." Dawson, *Brazilian Law and Judicial Organization*, 35 AM. L. REV. 31, 45 (1901).

13"SWIT. CONST. art. 71.


15"SWIT. CONST. art. 102(2); The Federal Council "insures the observance of the Constitution, the laws and ordinances of the Confederation and the provisions of federal concordats."

16"Section 21 (3) of the Judiciary Act: "Subject to Art. 85, clause 13, of the Constitution, the Tribunal decides ex officio about its competence in all questions which are submitted to it; in the exercise of its judiciary functions, it is independent and is bound only by law. Its decisions can be annulled or modified only by itself, conforming to the provisions of law." Art. 83, clause 13 of the Constitution submits to the competence of the Federal Assembly "conflicts of jurisdiction between federal authorities."

17"SWIT. CONST. art. 85 (11), supplemented by § 21 (1) of the Judiciary Act: "The Tribunal is placed under the high supervision of the Federal Assembly." For comments, see SOURIA, *L’ÉVOLUTION DE LA JURIDICTION FÉDÉRALE EN SUISSE* 305 (1909), and FLEISER-GIACOMETT, *SCHWITZISCHES BUNDESSTAATRICHT* 633 (1949).

18"Justice Roberts stated that at the Constitutional Convention, in connection with proposals to vest in Congress the power to veto state legislation, a "suggestion was made that the power of the Supreme Court to pass upon the constitutional validity of national or state laws would be sufficient," and that this view prevailed. However, resolutions which the Justice cited in support of his statement dealt only with state, not with national legislation. Roberts, *THE COURT AND THE CONSTITUTION* 2 (1951).
that most outstanding members of the Constitutional Convention took for granted that such a power does exist without any constitutional provision to that effect. In the Federalist, No. 78, Hamilton wrote that it must be the duty of the courts "to declare all acts contrary to the manifest tenor of the Constitution void," and asserted that the exercise of this power does not establish, by any means, a superiority of the judicial to the legislative power.

If the executive branch of the government of any federal state were empowered to check the constitutionality of the laws, the usual result would probably be that this power would be exercised so as to ensure the promotion of interests of the governing party. On the other hand, the frequent tendency of national courts which are empowered to review the acts of the state and federal legislatures, is to more or less arbitrarily declare laws they don't like to be unconstitutional and void; such a decision can always be explained in legal terms. Often, this is the situation in the United States.

Some recent constitutions of other nations provide for special institutions and procedures to check the constitutionality of the laws. West Germany's Constitutional Court, established by its Basic Law of 1949, is functioning. The opposite is true in Italy, where a similar court to be established by virtue of the Constitution of 1947 was never called into being.

Judicial review is sometimes advocated in countries which do not recognize it, but it is also criticized in those where it is firmly established in principle. Even in the United States where the modern idea of judicial review originated, voices are being raised, from time to time, that the duty of the courts in every case is to apply the laws as enacted by the legislature.

One of the strongest and best-reasoned arguments to that effect, in the early days of the Union, was presented by the outstanding magistrate Gibson, a Justice of the Supreme Court of Pennsylvania. He argued that "it rests with the people, in whom full and absolute sovereign power resides, to correct abuses in legislation, by instructing their representatives to repeal the obnoxious act." It is significant, however, in light of the current integration controversy, that even Gibson limited his argument to review of state laws on the ground of repugnancy to the constitutions.
state constitution; he felt strongly the necessity of judicial review as far as the conformity of state enactments to the federal legal order was concerned. Any other understanding of the United States Constitution would, he stated, amount to a denial to give effect to the supremacy clause.18

In the United States the federal system affords valuable protection to the rights of the individual against capricious, arbitrary, and oppressive state governmental action. However undesirable we may deem some of the early decisions of the Supreme Court invalidating federal legislation, it is submitted that the Court has, in general, satisfactorily performed its function of checking the validity of state action so as to preserve the supremacy of the federal system.

It is therefore surprising that the greatest amount of criticism against the exercise of its power of judicial review was directed at the Court for one of its best opinions, delivered unanimously, banning racial segregation in public schools: Brown v. Board of Education.19 It can hardly be seen how the decision could go otherwise. The furor over the Brown case is even more peculiar in light of the fact that the decision was merely a logical culmination of other segregation cases decided with reference to higher education.

The problem of racial segregation in education first reached the Supreme Court in the 1938 case of Missouri ex rel. Gaines v. Canada.20 The Court there held that a state denied equal protection of the laws to a Negro student in refusing to admit him to its all-white law school, and that "the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, . . . petitioner was entitled to be admitted to the law school of the State University in the absence of other and proper provision for his legal training within the State."21

In 1948, on authority of the Gaines case, the Supreme Court issued a mandate that the State of Oklahoma furnish a Negro applicant with a legal education afforded by a state institution, "as soon as it does for any other group."22 There, as in the Gaines case, the state had only one law school.

The 1950 decision of Sweatt v. Painter23 held that the State of Texas denied equal protection to a Negro student in refusing to admit him to the state law school, even though the state furnished a separate law school for Negros. The Negro institution offered there was patently inferior to the regular state school, so the Court refused to formally re-examine the "separate but equal" doctrine of Plessy v. Ferguson.24 How-

18Id. at 356.
19347 U.S. 483 (1954). In that opinion racial segregation in the public schools ordered by the state was held unconstitutional. On the same day in Bolling v. Sharpe, 347 U.S. 497 (1954), similar action on the part of federal authorities in the District of Columbia was held bad.
21Id. at 351, 352.
22Id. at 351, 352.
23Id. at 351, 352.
24Id. at 351, 352.
ever the *Sweatt* case presaged the key determination of the later *Brown* decision, that separate educational facilities for the races are inherently unequal, with the following language: "The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned."

*McLaurin v. Oklahoma State Regents,* decided the same day as the *Sweatt* case, held that under the fourteenth amendment a state, having admitted a Negro student to a graduate school, could not segregate him from the rest of the students in regard to classroom seating, study areas, or cafeteria tables.

It should hardly have been surprising to the nation when the doctrine of inherent inequality of segregated schools, suggested in these earlier cases, was made the basis of decision and applied to public schools at the elementary and high school level. The sudden reaction to the *Brown v. Board of Education* decision is probably explainable rather on the basis that it was the first educational segregation decision to affect any substantial portion of the population.

Unfortunately, the *Brown* opinion resulted not only in a wave of dissatisfaction in the South, still sticking to its medieval ways of thinking by bias and discrimination, but also in outrageous attacks upon the Court.

The campaign against the Court culminated in a "manifesto" signed by 19 senators and 77 House members from the South, and read in Congress on March 12, 1956. According to the statement, "all lawful means" would be exercised to bring about a reversal of the Court’s decision. The opinion of the Court was branded as a "clear abuse of judicial power," and its Justices were condemned for substituting "their personal political and social ideas for the established law of the land."

The most amazing passage of the "manifesto" was the following:

This unwarranted exercise of power by the court, contrary to the Constitution, is creating chaos and confusion in the states principally affected. It is destroying the amicable relations between the white and negro races that have been created through 90 years of patient effort by the good people of both races. It has planted hatred and suspicion where there has been heretofore friendship and understanding.

Without regard to the consent of the governed, outside agitators are threatening immediate and revolutionary changes in our public school system. If done, this is certain to destroy the system of public education in some of the states.

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189 *339 U.S. at 634.
180 *339 U.S. 637 (1950).*
In a free country, everyone is free to criticize its authorities, including the courts. Without criticism, no progress could be achieved. The Supreme Court may be and is often wrong. However, only reasonable criticism, expressed in good faith, is constructive. The vicious attack upon the Court, carried out by the Southern legislators, is shocking as an example of uncontrollable bias, utter lack of logic, distortion of facts, and perversion. After all, there must be, in every country, an institution empowered to say, in the final instance, what the Constitution means, and what the law of the country is. Rightfully or wrongfully, this institution, in the United States, is the Supreme Court. Interpreting the Supreme Law of the country, it says that no discrimination based solely on racial bias can be permitted in public schools. It is hardly understandable how any citizen could, in good faith, state that this rather obvious conclusion of the Court plants hatred where there was friendship or destroys the amicable relations between the two races. It is much worse if such nonsense is stated by a group of leading citizens whose main duty is to enact laws and give a good example how to abide by the country’s legal system. The open non-abidance by the Court’s decision by some governors and legislatures of Southern states, teaching the young generation how to disregard the law, is a sad example of the mentality of a segment of Southern population in the United States. Another deplorable event was that a former Justice of the Court joined in the campaign against the decision.140

Such criticism does not merit much attention.

Fundamental to any understanding of the integration cases is recognition of the fact that in them the Court merely exercised the same functions of judicial review which are basic to our legal system and which it has successfully exercised for well over a century. It is the system as such, not merely the present members of the Court, which is in question.

The system is certainly not beyond question. In fact, objective contemporary foreign observers, analyzing the American system sine ira, have concluded that while it has some merits it has possibly more demerits, and that it is hardly acceptable for other countries.141 Probably, the observation is right that until 1937, as long as the Supreme Court did not know how to exercise the necessary self-restraint, judicial review, particularly in its application to congressional legislation, caused more wrong than good; but in the last twenty years, being much more reluctantly and reasonably exercised, judicial review has been a useful feature of the constitutional system.142

On the other hand there are plenty of defenders of the existing system. Mr. Justice Jackson said, “[W]hatever its defects, [the Supreme Court] is still the most detached, dispassionate, and trustworthy custodian” of the

140Byrnes, *The Supreme Court Must Be Curbed*, U.S. News & World Report, May 18, 1956. The author asserted that by its desegregation decision, the Court did not interpret, but changed the Constitution.


142Tunc & Tunc, id. at 276.
It is not that judicial review of governmental actions is perfect, but that to permit either the executive or the legislature to control final determination of legality is open even more to abuse.

18JACKSON, op. cit. supra note 125, at 23. Before he was appointed to the Supreme Court, Justice Jackson took a somehow more critical view of the work of the Supreme Court than he did at the end of his judicial career, suddenly ended by an untimely death. See JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 24 (1949 ed.).
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