Everything Free in America

Evan Gahr

It has become axiomatic in Israel that public criticism of the Supreme Court is a dangerous thing. While within academic circles it is considered legitimate to question the court's bounds, it seems that the moment a politician, rabbi or other public figure gets involved, the talking elites (the press and those they interview) circle their wagons around the court, equating an attack upon it with an attack upon democracy itself. This was most apparent in the days leading up to the massive Haredi demonstration in Jerusalem in February. Public figures from the President and Prime Minister on down made every effort to prevent the rally, fearing violence and damage to the "rule of law."

In the end, nothing happened. Two hundred fifty thousand Haredim gathered peacefully, made their statement, and dispersed. The nation was relieved, yet no one dared to ask the most glaring question: What happened to democracy's demise? What happened to undermining the rule of law? Could it be that criticizing of the court isn't so bad after all?

This is Israel's first flirt with widespread protest against the Supreme Court, and it is instructive to take a lesson from the experience of other democracies which have been there before. The United States, in particular, has a long tradition of judicial activism, and thus an equally long history of virulent attacks on the Supreme Court. Yet unlike in Israel, these demonstrations are taken in stride, and the rule of law is unscathed. Americans see no inherent danger in criticizing the court, in fact view it as a normal part of a healthy public debate. From the standpoint of American history, the Israeli reaction to criticism of the court appears irrational—even hysterical.

The United States Supreme Court has been the focus of vicious attacks since the Dred Scott decision in 1857, and these attacks have been a fixture since the New Deal in the 1930s. At times, the rhetoric has been no prettier than that of the Haredi leadership in Israel, and the critics' actions were far more ominous than the peaceful demonstration of a quarter million Orthodox Jews. Yet the attacks against the American court have not led to violence, nor does the rule of law seem to have suffered any serious damage from them. An examination of several major controversies surrounding the U.S. Supreme Court during the past six decades also demonstrates that the country's political leadership has come to accept the attacks on the court as a natural part of the democratic process, even more unremarkable than the judicial activism that has prompted them.

The twentieth-century tradition of lambasting the U.S. Supreme Court owes more to President Franklin Delano Roosevelt than to anyone else. In the 1930s, the court struck down as unconstitutional much of the New Deal legislation promulgated by Roosevelt, which had proved immensely popular with Depression-weary Americans. Between 1934 and 1936, the court invalidated six pieces of legislation that had increased federal power in an effort to protect Americans from economic hardship and the vagaries of the marketplace. Roosevelt voiced his frustrations with the court on the campaign trail during the 1936 election, en route to winning the greatest electoral landslide in American political history.

In the Court's 1936-1937 term, key parts of the New Deal were up for review; his program threatened, Roosevelt unveiled what became known as his "court-packing plan." In February 1937, shortly after being inaugurated for his second term, Roosevelt proposed legislation that would allow him to appoint as many as six new judges—a different one each time a Supreme Court justice turned seventy but did not retire. Although Roosevelt initially claimed the legislation was needed because the court's elderly justices were overworked, he quickly abandoned the ruse and launched a frontal assault on the court. Roosevelt decried the Supreme Court rulings on New Deal

legislation as illegitimate, with the Court majority animated by its "personal economic predilections" rather than the Constitution.

Declaring that "the balance of power between the three great branches of the federal government has been tipped out of balance," Roosevelt asserted that the Supreme Court "improperly set itself up as a third House of the Congress … reading into the Constitution words and implications which are not there, and which were never intended to be there." Roosevelt proclaimed that his proposed legislation would "save the Constitution from the court and the court from itself" by restoring "a government of laws and not of men." Although the court-packing scheme was permanently buried in a Senate committee, Roosevelt's criticism of the court was considered legitimate—sufficiently so that when deaths and retirements opened the door for new appointments to the court, Congress had no qualms about approving Roosevelt's New Deal-friendly nominees, resulting in a marked shift in the court's views on interventionist economic legislation. The storm passed, Americans' respect for the Supreme Court remained intact, and Roosevelt went down in history not only as a great president, but as one of the greatest defenders of democracy in the nation's history.

As political currents in the country changed, so too did the Supreme Court's most vocal opponents. In 1954, the court issued its landmark *Brown v. Board of Education* ruling, which obligated states to end racial segregation of public schools. Widely viewed in the South as an illegitimate incursion against states' rights, the decision provoked immediate and bitter opposition throughout the South. "Impeach Earl" signs popped up across the region, calling for the ouster of Chief Justice Earl Warren. In 1954, 101 senators and congressmen from the South signed the Southern Manifesto, denouncing the court's "unwarranted decision" in *Brown* as a "clear abuse of judicial power" that "substituted the Justices' personal political and social ideas for the established law of the land." The manifesto vowed to use "all lawful means to bring about a reversal of this decision which is contrary to the Constitution." Only three Southern senators refused to support the manifesto; even President Clinton's mentor, Sen. William Fulbright of

Arkansas, was a signatory. Warren was not impeached, his court continued its activist policies on a wide range of issues, but most importantly, the rule of law was preserved, and the political controversy did not degenerate into a campaign of violence against the Supreme Court justices.

However vituperative the criticism of the Warren Court may have been, it has been matched, if not exceeded, by the accusations leveled against the Supreme Court ever since it declared a constitutional right to abortion in the 1973 *Roe v. Wade* ruling, thereby invalidating anti-abortion laws then extant in more than thirty states. Reaction to *Roe* was fast and furious. Justice Harry Blackmun, who wrote the majority opinion, was vilified by religious leaders across the country, as were his fellow Supreme Court members. The president of the National Conference of Catholic Bishops declared: "It is hard to think of any decision in the two hundred years of our history which had more disastrous implications for our stability as a civilized society."

Every January, tens of thousands of people mark the anniversary of *Roe v. Wade* with a March for Life protest past the Supreme Court. Their spirited demonstrations are considered legitimate, and earn the approval of even the highest-ranking holders of public office. Every year since 1974, members of Congress have joined the throng of anti-abortion protesters. While President, Ronald Reagan met with March for Life leaders in the Oval Office and regularly spoke to protesters via telephone hookup, using the opportunity to call for a constitutional amendment to outlaw abortion, in order to circumvent the court's ruling. In 1988, for example, Reagan praised the March for Life, noting that "the first of your noble marches came just one year after the Supreme Court issued its decision in *Roe v. Wade*. And for a decade and one-half, you've worked to end the tragedy that—since that day when the court, in the stroke of a pen, legalized abortion throughout the nation—has claimed the lives of more than twenty million infants." The following year, the newly inaugurated President Bush

echoed Reagan's sentiments, telling marchers that "the Supreme Court's decision in *Roe v. Wade* was wrong and should be overturned."

Not to be outdone, advocates of abortion rights have also marked the anniversary of *Roe* at different venues throughout the country, showing their support for the court's decision. Their approach to the court has changed, however, since a June 1989 decision giving states more leeway to restrict abortion rights. In the case in question, the court upheld regulations imposed by the State of Missouri that required, among other things, that doctors determine before performing an abortion whether a fetus might survive outside the womb. In response, 150,000 protesters marched on Washington. "We say to the political leadership of this country and to the Supreme Court … we will not go back," challenged Molly Yard, president of America's largest feminist organization, the National Organization for Women (NOW). The protesters were joined by New York Mayor-elect David Dinkins and Senate Majority Leader Alan Cranston. Cranston denounced the court, declaring that "the majority of Americans don't want the government dictating the most personal decision a woman can make."

Indeed, so popular did this approach become among abortion-rights activists that assailing the Supreme Court became the major focus of NOW, which as a result nearly doubled its membership and recruited record numbers of women to run for public office. In a June 1990 column criticizing the Supreme Court for upholding parental-notification requirements in the case of abortions by minors, Yard declared the court to be "cynical, callous and monumentally insensitive," noting that the "court's ruling will cost teens' lives."

In recent years, criticism of the Supreme Court by left-wing organizations like NOW has been no less intense than that of the Right, which has led the charge for the past thirty years. The appointment of conservative justices by Presidents Reagan and Bush, coupled with a shift among public-policy experts against some of the liberal prescriptions of the 1970s and 1980s, has led the court to slay a number of sacred cows of the Left, especially racial preferences and sweeping protections for the rights of criminal suspects.

In 1989, the court issued several decisions that increased the burden of proof on plaintiffs in racial discrimination cases, making it more difficult for blacks and other minority groups to demonstrate that they had been wronged. These decisions sparked protests by civil-rights activists. Addressing a rally of 10,000 protesters held at the Supreme Court itself, Benjamin Hooks, then Executive Director of the National Association for the Advancement of Colored People (NAACP), declared that the court's rulings on civil-rights legislation were the "legal lynching of black America's hope ... to become full partners in the American dream." At the NAACP convention that year, Hooks called for "civil disobedience on a mass scale that has never been seen before," in response to a "Supreme Court … hell-bent on destroying the few gains minorities and women have made in this century. We've got a bunch of plunderers who subvert the Constitution." (*St. Louis Post Dispatch,* July 10, 1989)

Similar eruptions took place in 1995 and 1996, when the Supreme Court invalidated a number of predominately black voting districts that had been created under the Voting Rights Act to ensure that representatives of minority groups would reach high elected office. Rejecting specially constructed majority black and Hispanic districts in Texas and North Carolina, the court ruled that gerrymandering for partisan political purposes was acceptable, but that race could not be the predominant factor in shaping congressional districts. Expect "a return to the days of all-white government," warned Laughlin McDonald, the top civil-rights litigator for the ACLU. "The noose is tightening," said Elaine Jones, director-counsel of the NAACP Legal Defense and Education Fund. Jesse Jackson suggested that the 1996 decision would bring about "ethnic cleansing." (*The American Lawyer*, December 2, 1996)

Again, there were no judicial assassination attempts, no collapse of the rule of law. No one tried to prevent the demonstrations, to seek police investigations for incitement. The debate was allowed to rage, and a fundamental respect for the institutions of government was maintained. If anything, that respect was strengthened: When citizens are allowed to voice their anger,

frustration or concern over the process of government, when their positions are fundamentally legitimized by the right to protest—even in the crudest of terms—they feel respected by the law, and in turn maintain a higher respect for the rule of law.

Israelis are terrified by the thought of what might happen if hundreds of thousands of Haredim are allowed to march on the Supreme Court, and if religious leaders are permitted to calumny court rulings. The American experience shows that *nothing* need happen, so long as the outer bounds of legitimate protest are clearly delineated (a healthy police presence to buttress those bounds can't hurt). We may not appreciate the tone these dissenters employ, or the arguments they put forward. In a democracy, however, the benefit of the doubt should be given to free speech, and only when there is overwhelming evidence that it poses a clear and present danger should it be restrained.

Out of fear, defenders of Israel's Supreme Court have sought every means at their disposal to prevent the Haredim from voicing their opinions. Perhaps if critics of the courts were granted the public legitimacy enjoyed by their counterparts in America, they would not have as much to protest.

Evan Gahr is a contributing writer for The American Enterprise *magazine.*