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# THE SUPREME COURT AS A PROTECTOR OF LIBERTY UNDER THE RULE OF LAW

TOM C. CLARK\*

At the outset, let me extend my congratulations to Marquette on the golden anniversary of its law school. Like Pere Marquette, of whom your school is the namesake, the law school has traveled far, until now it stands in the front rank of our educational institutions.

It is fitting that you are commemorating your first half-century with a program entitled "The Rule of Law—Bulwark of Ordered Liberty." To pinpoint the free world's concept of ordered liberty you have inaugurated during this fiftieth year a trilogy—not of dramas—but of meetings dedicated to the holding of high converse concerning what we are and what we ought to be in this respect. In the triumvirate of your speakers I am the last. At least that is one thing for which you can be thankful.

The President of the American Bar Association, The Honorable Ross Malone, introduced the series with an eloquent and instructive address on "The American Lawyer's Role in Promoting the Rule of Law." As he so ably pointed out, "it was American lawyers who conceived the rule of law as it is embodied in our Constitution and Bill of Rights." I join with him in the belief that this and future generations may not only perpetuate but enlarge and extend it. The next meeting was devoted to the subject "The Rule of Law in the World." You were honored by the presence of Sir Leslie Munro, who brought to you a brilliant address on the rights and responsibilities of nations in the extension of the rule of law throughout the world. Sir Leslie left with you the admonition that the challenge of our age is the extension of the rule of law throughout the world—the stakes, he rightfully said, are survival itself. The usurpation of a state by violence or subversion—which we read about most every day—weakens the rule of law throughout the world. He concluded that we of the free world cannot afford such a diminution. The lesson that his address teaches so well is that only through the rule of law can we hope to have lasting peace amongst all peoples.

My task tonight is to elaborate upon the subject assigned to me, "The Role of the Supreme Court as a Protector of Liberty under the Rule of Law." I would be less than frank if I did not admit that the scope of this assignment rather staggered me, for I would have to be more than human to be able to compress the Court's span of 170 years of decision-making in that field into less than a quarter of that many

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minutes. Those familiar will agree with Rufus Choate that "One cannot drop the Greek alphabet to the ground and pick up the Iliad." It requires much study—"midnight oil" we used to call it. So let us get to the task.

Before a watchmaker's apprentice is introduced to the individual movements of a watch, he is required to become familiar with that instrument as a completely integrated piece of machinery. By the same token, one cannot launch into a detailed study of the role our High Court plays in a specified area, without an appreciation of the over-all function of the Court in our system of government.

Unlike the highest court of most other lands, ours came into being along with the general government itself and was created by the same hand. "We the people of the United States" created the three equal and independent branches of our government and declared each to be essential to the establishment of justice and to the enjoyment of the blessings of liberty. In the Supreme Court and the "inferior courts" created by the Congress, they vested the judicial power of the United States, giving the judges thereof life tenure and undiminished compensation.<sup>1</sup>

At first, it was not entirely clear from these simple words just what the "judicial power of the United States" encompassed. Any doubt on this score was soon dispelled, however, by the Court itself. Under the vigorous and foresighted leadership of the great John Marshall, who was Chief Justice from 1801 to 1835, the Court issued a number of opinions which clarified and solidified its position, as well as that of the federal government generally,<sup>2</sup> in our complex system of federalism. Without doubt, the most important of these decisions was the famous case of *Marbury v. Madison*,<sup>3</sup> issued in 1803. Chief Justice Marshall's opinion in that case made clear that an important element of the "judicial power" was the Court's power to act as a final interpreter of the Constitution and, just as importantly, to declare invalid and unenforceable any Act of Congress inconsistent therewith. In his own words, "No legislative act . . . contrary to the Constitution can be valid."

In establishing this most powerful weapon, and extending it to include the power of judicial review over the actions of the President and decisions of the highest state courts,<sup>4</sup> Marshall's Court but gave effect to the declaration of Alexander Hamilton in *The Federalist* No. 78, almost a score of years before, that every act of a "delegated au-

<sup>1</sup> U.S. CONST., art. III.

<sup>2</sup> See, e.g., *M'Culloch v. Maryland*, 4 Wheat. 316 (1819); *Gibbons v. Ogden*, 9 Wheat. 1 (1824).

<sup>3</sup> 1 Cranch 137 (1803).

<sup>4</sup> *Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816) (opinion by Mr. Justice Story).

thority" which is contrary to the Constitution is void. Likewise, it but followed the course of state courts which had long exercised what Luther Martin called "a negative on the laws."<sup>5</sup> As Martin reported to the Maryland legislature: "Whether therefore, any *laws or regulations* of the *congress*, or any *acts of its president or other officers* are *contrary to*, or not *warranted by*, the constitution, rests *only* with the judges . . . to *determine*; by whose determinations *every state* must be bound."<sup>6</sup>

The role of the Court as the Supreme arbiter of the government, as thus set forth in the Constitution and clarified under Marshall, is of fundamental importance, and has remained substantially unchanged down to the present day. Still the Founders, in establishing a government of checks and balances, made the Court dependent on the other branches of government. The President nominates the Justices; the Senate possesses the power of confirmation. The Supreme Court has but one irrevocable source of jurisdiction—original—and that has to do only with controversies where a State is a party and those cases affecting ambassadors, public ministers and consuls. In all other cases its jurisdiction depends entirely upon "such Regulations as the Congress shall make."<sup>7</sup> Moreover, the Court has no army to enforce its decrees. All of us have heard of the apocryphal comment attributed to President Jackson following the decision of the Court in *Worcester v. Georgia*,<sup>8</sup> in 1832: "Well, John Marshall has made his decision, now let him enforce it."<sup>9</sup> Furthermore, the Court has no treasury from which to draw financial support. The Congress provides, at the moment less than two million dollars per year.

Nevertheless, any combination of five of its members—so long as Congress leaves its composition at nine—wields sufficient power to overturn the action of either or both of the coordinate branches, if that action is presented in a case of controversy. You will note the *if*, for the Court is not a "Council of Revision" exercising a veto power,<sup>10</sup> but is largely a passive instrument of judicial interpretation. It translates, as my late brother Jackson often said, "into current commands and contemporary application" the provisions of our Constitution and the laws enacted thereunder.

Its function in our system can be analogized to that of the umpire that you provide on the baseball field. This being the home town of the Braves you will understand. And, having many sandlotters, you will

<sup>5</sup> Speech at Constitutional Convention, July 21, 1787, *Documents —Formation of the Union*, Government Printing Office (1927).

<sup>6</sup> "The Genuine Information," *Secret Proceedings of the Federal Convention* 53, Government Printing Office (1909) (italics in original).

<sup>7</sup> U.S. CONST. art. III.

<sup>8</sup> 6 Pet. 515 (1832).

<sup>9</sup> 1 Warren, *The Supreme Court in United States History* 759.

<sup>10</sup> U.S. CONST. art. III, § 2; *Muskrat v. United States*, 219 U.S. 346 (1911).

appreciate this story. Not long ago some visiting youngsters came to the Court as sightseers. One asked, "Just why a Supreme Court?" My brother Burton, whom they were interviewing, asked if they played ball, and, receiving an affirmative answer, replied, "Do you have an umpire?" "Well," the leader responded, "we do if we want to play nine innings. Otherwise we end up in a fight." And Brother Burton said "that's why we have a Supreme Court." The umpire keeps law and order in the ball park. He translates the pitched ball into a strike, a ball or an out. He dodges pop bottles, too, as well as other missiles, verbal and solid. He has rules in the playing of the game which guide him in his decisions.

The Court, too, operates by rule. In addition to the restrictions laid down in the Constitution and by the Congress, heretofore mentioned, the Court has other, self-imposed limitations upon the exercise of its power. The case or controversy presented must be a genuine dispute<sup>11</sup> raising a substantial question.<sup>12</sup> The Court does not deal in advisory opinions, moot questions, nor political issues.<sup>13</sup> Traditionally it shies away from deciding constitutional questions; not rendering such a decision unless it is absolutely necessary to the disposition of the case.<sup>14</sup> And even though a substantial constitutional issue is presented it will not be passed upon if the case can be disposed of on a non-constitutional ground.<sup>15</sup> An appeal from the highest state court is dismissed if that court's judgment can be sustained on an independent state ground.<sup>16</sup> A statute is not construed unless the complaining party shows that he is substantially injured by its enforcement.<sup>17</sup> An attack on an Act of Congress on constitutional grounds is by-passed in the event a construction of the statute is fairly possible by which the constitutional question may be avoided.<sup>18</sup> And, finally, the certiorari system, authorized by Congress thirty years ago, requires the affirmative vote of four justices before a petition is granted.<sup>19</sup>

Current statistics show an increasing volume of business coming to the Court—now nearly two thousand cases each Term. Only a small percentage of these cases are disposed of on the merits. Last Term it was less than 15%. Despite this volume, the Court has during its

<sup>11</sup> See *supra* note 10.

<sup>12</sup> See, e.g., *Revised Rules of the Supreme Court*, Rule 19.

<sup>13</sup> *Luther v. Borden*, 7 How. 1 (1849); *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912); *Coleman v. Miller*, 307 U.S. 433 (1939).

<sup>14</sup> See *Siler v. Louisville & N. R. Co.*, 213 U.S. 175, 191 (1909); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (concurring opinion).

<sup>15</sup> *United States v. Rumely*, 345 U.S. 41 (1953).

<sup>16</sup> *Klinger v. Missouri*, 13 Wall. 257, 263 (1872); *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157 (1917).

<sup>17</sup> *Frothingham v. Mellon*, 262 U.S. 447 (1923).

<sup>18</sup> See *supra* notes 14 and 15. See also *United States v. Auto Workers*, 352 U.S. 567, 589-592 (1957).

<sup>19</sup> This is by custom, rather than by rule. See the discussion in Stern and Gressman, *Supreme Court Practice* 145-146 (2d ed.).

entire existence of 170 years decided just over 4,000 cases involving questions of constitutional interpretation. The overwhelming percentage of these involved federal statutes or action rather than those of a State. For the most part, they stemmed from a handful of constitutional provisions, including the commerce, the contract, and the necessary and proper clauses, and the First, Fourth, Fifth, Sixth and Fourteenth Amendments to our Constitution.

Now that we have the picture of the Court as an operating piece of machinery, we may turn more specifically to an examination of its role as a "Protector of Liberty under the Rule of Law."

"Protector of Liberty under the Rule of Law!" These are magnificent words to describe a magnificent function. But what is "liberty?" As is true of such words as "freedom," "democracy," and "justice," the word liberty is a mighty word, charged with emotion. However, it is also an abstract one—having such meaning as one injects into it. Thus, its significance tends to change from person to person and from time to time. Perhaps this is what Mark Twain had in mind when he said, "Solomon's justice depends on how Solomon was raised."

But liberty is a dynamic, not a static, concept. As an Anglo-American product, it has been developing, growing and expanding for nearly seven-and-a-half centuries—since the year 1215, when the English nobles first won a measure of liberty and equality by forcing King John to sign the Magna Carta. At that time, of course, what liberty there was existed solely for the nobles and titled gentry. But the process did not stop there. It continued to develop from the struggles of the Parliament with the Crown; and of the courts against both, until it reached full bloom under the leadership of such great judges as Lord Coke.

By July 4, 1776, the idea of liberty, and of those entitled to it, had developed sufficiently that the thirteen United States of America could issue a document which proudly declared that:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness—that to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. . . .

Even then, the development did not cease. Our concept of liberty has continued to grow, to expand, to reach out and gather in more and more people within its protective shield. Thus, it was only after one of the most terrible and bloody wars in the history of mankind that slavery in our country was abolished, and men were able to vote, to live, and otherwise to partake of "liberty" "without regard to race, color, or previous condition of servitude."<sup>20</sup> It was only after another

<sup>20</sup> U.S. CONST. amend. XIII.

long and difficult struggle—this time in the courts, in the legislature, and in the public meeting place—that a constitutional amendment was passed in 1920 which for the first time gave women the right—the liberty, if you will—to vote.<sup>21</sup>

Throughout this long history, which extends to the present day and, God willing, will continue far into the future, there has been a thread of consistency which has continually woven its way through the warp and woof of life to fashion the fabric we call liberty. That thread has been the two-fold principle that whenever the rights or liberties of one man are threatened, so are the rights and liberties of all men and the obverse of this—that whenever one man or group of men is at “liberty” to wield power indiscriminately, it destroys *pro tanto* the liberty of all those not possessing that power. It is the bipartite nature of this principle which gives rise to the necessity of striking a delicate balance between the rights of the individual and those of the public. To establish such a balance means liberty—equal justice under law.

This balancing process takes place all along the broad front of our concepts of liberty. The freedoms of speech and press must be balanced against the interests of all persons as expressed in the defamation<sup>22</sup> and obscenity laws.<sup>23</sup> The freedom of religion is not, in our society, permitted to include the practices of polygamy<sup>24</sup> or human sacrifice. In the field of economics, it is an American tradition that one has a right to accumulate all the wealth that his initiative and enterprise can earn. But over the years, the power abuses made possible by such wealth have been tempered more and more by laws protecting those who, individually, lack that power: laws to protect the working people, in the form of laws regulating working hours and minimum wages, as well as laws protecting the right to bargain collectively; laws to protect the buying public in food, drugs and other necessities; laws to protect free enterprise itself, in the form of anti-trust and unfair competition statutes.

But it is the field of the criminal law that the balancing process is most strikingly presented. One of the most important functions of government is to afford the citizen protection against those who would murder, maim or rob him. Without this protection, *no* person can truly be said to possess liberty. In the formation of our Government, however, the Founding Fathers—having been made fully aware of the possibility that those in possession of governmental power might misuse it—insisted upon a counterbalance; a Bill of Rights to ensure that no person accused of crime would be deprived of his individual liberty

<sup>21</sup> U.S. CONST. amend. XIX.

<sup>22</sup> *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

<sup>23</sup> *Roth v. United States*, 354 U.S. 476 (1957).

<sup>24</sup> *Reynolds v. United States*, 98 U.S. 145 (1878).

without extensive procedural and substantive safeguards against power abuse. As Mr. Justice Cardozo so well said:

The law . . . is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.<sup>25</sup>

Both sides of each of the equations in all these fields represent interests included within our modern-day concepts of liberty. This bundle of rights has not been acquired over-night, and no one stick in the bundle has been earned without a struggle. But I submit to you, my friends, that the result has been well worth the price.

What, then, of the role of the Supreme Court in this endless weighing and balancing process—its role as “a protector of liberty.” The answer is provided largely by a reference back to the function the Court performs generally in our federal system. Essentially, the Court’s role is carried out by the interposition of judicial authority between political or economic force and those whose liberty it might destroy. On one side of the equation, this means simply that the Court, together with the lower courts, provides a ready forum for the remedy of a private or public wrong. On the other side, it means that procedural safeguards are imposed and scrupulously observed to ensure that the forum—be it civil or criminal—is not misused.

Let me say, however, that while the Court has the power so to interpose this judicial authority—a power conspicuously absent from courts under dictatorships—the exercise of that power is nevertheless limited by jurisdictional, procedural and political handicaps. Some of these obstacles I have already indicated. Another is delay in adjudication. The Court must wait until some litigant presents a case. It has no built-in self-starter. Often it takes a half-decade before a suit completes its tortuous course to us. The damage is often done long before the judicial remedy for the breach is effective. Then, too, many of the actions of government involve the exercise of executive or legislative powers the supervision over which the Court has renounced, such as governmental action raising political questions or those involving foreign affairs. Likewise the war power, necessarily exercised with a firm and independent hand, steps on the toes of many. The provocation for action in the name of the necessities of war has been brought home to my generation twice, and still has not entirely abated.

<sup>25</sup> *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

In this area especially, the Court often has to defer judgment in favor of the conclusions of the other branches of the government, even though some persons might be hurt as a result.<sup>26</sup>

In this regard, you will note that we have spoken only of the Court's role as "a" protector of liberty, not as "the" protector. As Mr. Justice Holmes once said, "It must be remembered that legislators are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."<sup>27</sup> The same is of course true of the executive, for as Chief Justice Stone also pointed out, "Courts are not the only agency of government that must be assumed to have capacity to govern."<sup>28</sup> Indeed, the three branches of our government—though occasionally at odds—work together with remarkable unanimity.

The existence of this shared burden illustrates the final and most fundamental limitation on the Court's power to interpose judicial authority between the assertion of conflicting rights. The Court invariably works from general rules which have already been established in the documents of government. The supreme repository is of course the Constitution itself; others are found in statutes and executive orders. The Court's powers are thus called into play only after a trial balance has already been struck. It would be a gross and indeed inaccurate understatement, however, to say that judges do not make law, but only apply it. As Mr. Justice Frankfurter has said, "The question is not whether judges *may* legislate, but rather when and how much." The proscription that "No State shall . . . deprive any person of life, liberty, or property, without due process of law,"<sup>29</sup> sets out the general rules of fair play. Along with many other provisions in the Constitution as well as in innumerable statutes, it only goes so far into the balancing process as to provide the scales and mark off the divisions in hundredweights. It is the Court which is called upon to make the finer and more delicate adjustments in pounds, ounces and grams. As Holmes put it, "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."<sup>30</sup>

These limits on the creative aspect of the Court's role do not make of it a static body. Quite to the contrary, it not only can but it also must—as part of a government "of the people, by the people, and for the people"—approach its task in the spirit of the times and be truly reflective of that spirit. As a "protector of liberty," it must be as dynamic as the concept it is protecting; and, as protective as the ever growing and expanding ideal of liberty requires, as it extends to more and

<sup>26</sup> See, *e.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>27</sup> *Missouri, Kansas & Texas R. Co. v. May*, 194 U.S. 267, 270 (1903).

<sup>28</sup> *United States v. Butler*, 297 U.S. 1, 87 (1936) (dissenting opinion).

<sup>29</sup> U.S. CONST. amend. XIV.

<sup>30</sup> *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (dissenting opinion).

more people in ever-increasing fields; it must be as ready and willing to accept and protect that concept as any branch of government.

Particularly is this true in the field of constitutional law. At the very beginning of the Court's history, the great Chief Justice Marshall issued two famous dicta which have ever since served to guide the Court in its duties. He admonished that "[W]e must never forget that it is a *constitution* we are expounding."<sup>31</sup> and, furthermore, that the Constitution was "intended to endure for ages to come, and, consequently, to be adapted to the various *crisis* of human affairs."<sup>32</sup>

It has not always been easy for the Court to carry out its assigned function. Its task by definition is performed amidst strife. Its powers are called into play only when there are opposing litigants, each of which invariably believes firmly in the righteousness of his cause. This task is not made any the easier by the knowledge that the opposing sides of every litigation represent conflicting doctrines. In every such battle there must by the very nature of things be a winner and a loser—and this applies to the opposing doctrines as well as the opposing litigants.

Whether the Court has lived up to its job is a matter for history. That it has diligently worked at it there is no denying. Certainly it is true that, for better or for worse, it cannot falter as it performs its umpire-like role. The stakes—liberty for all men—are too high for that to happen. It was Attorney General Wickersham who, on the occasion of the death of Chief Justice Fuller, remarked: "Much of the work of all courts is of but transitory importance except in so far as it keeps ever burning the sacred lamp of justice to lighten the footsteps of men."

So long as the Court sits, let us hope this sacred lamp continues to burn brightly so that every man may not only read the words inscribed over the Court's facade but truly have and enjoy "Equal Justice under Law."

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<sup>31</sup> *M'Culloch v. Maryland*, 4 Wheat. 316, 407 (1819) (emphasis in the original).

<sup>32</sup> *Id.*, at 415 (emphasis in original).