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# Introduction: History and Development of the Court in National Society The United States Supreme Court

*by Professor Laurence H. Tribe\**

**I** AM HONORED to participate in this gathering of the Canada-United States Law Institute. I am also pleased to have the opportunity to share with you some thoughts on the role of the United States Supreme Court in our constitutional scheme. I will not be speaking this morning of the Supreme Court's very important functions with respect to federal statutory law or federal common law, but only of its function with respect to the United States Constitution, the supreme body of law to which all government—federal, state, and local—is bound. The United States Supreme Court's role in the constitutional arena is its most distinctive, and thus provides the most useful ground for comparative study.

In talking about the Supreme Court's role in constitutional controversy, I will address broad issues. My main concern is not with the mechanics of constitutional adjudication in the Supreme Court, but with fundamental and pervasive problems that are posed by such adjudication. While such problems—for instance, how to maintain legitimacy in relation to the other branches, or how to reconcile conflicting notions of rights—might seem to render the Court extremely vulnerable to political control or at least to effective public resistance, the Court has in fact played an independent pivotal role in American politics by assuming a paramount role in constitutional adjudication. The problems with which the Court in this role has had to grapple have potentially great significance for a nation like Canada, whose Supreme Court is likely to be moving gradually toward a larger and more influential role in resolving basic constitutional disputes.

I would like to begin with a cartoon I saw a number of years ago in the *New Yorker Magazine*. It shows two pilgrims leaning over the edge of what appears to be the *Mayflower*. Scanning the distant horizon, one says to the other, "Religious freedom is my immediate goal . . . but my long-range plan is to go into real estate." One moral of this rich tale is plain enough: that seemingly mundane matters of geographical and institutional structure have provided a constitutional matrix within which America's values and ideals have somehow survived—even if, from time to time, they have seemed to be submerged. A second moral is that the nation's constitutional history has largely been a history of tensions between abstract rights and concrete, tangible realities—if you will, between form and substance.

The United States Supreme Court's complex place in our national

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experience has reflected and has been shaped by each of these binary themes. As guardian of the institutional and geographical boundaries of the country's federal system, the Court has significantly structured the processes through which our aspirations and our concepts of human rights have been articulated. Sometimes the Court has enforced those concepts directly, but most often it has simply nourished arrangements of countervailing power and rules of decision calculated to protect human rights indirectly, principally by resisting excessive concentration of political authority while avoiding balkanization and fragmentation of the nation's economy. In mediating human rights through what appear to be sometimes inhuman institutions, the Supreme Court has had to contend constantly with the duality of form and substance.

The political philosophers from whom the Framers drew much of their inspiration for the role they assigned to the federal judiciary in general, and to the United States Supreme Court in particular, could hardly have predicted the catalytic role that the Court would often play. Montesquieu said in his *Spirit of the Laws* that, "of the three powers, the judiciary is in some measure next to nothing," since the nation's judges are "no more than the mouth that pronounces the words of the law, mere passive beings incapable of moderating either its force or its rigor." Alexander Hamilton might have purposely understated the Court's role when he wrote in *Federalist No. 78* that the federal judiciary would always be the "least dangerous" branch of government, having "no influence over either the sword or the purse," and having "neither force nor will but merely judgment." In fact, "mere" judgment has indeed proved to be a powerful force in the United States.

It was natural for the framers to think of the proposed Supreme Court as a relatively unthreatening voice of reason, enforcing the fundamental social compact against less trustworthy but more potent lawmakers and executives. The idea of judicial review was born in an attempt to oppose the willfulness of the British Crown in the 1600's, an era when both the Parliament and England's courts were seen as voices of reason and discoverers of true principle. By the 1780's, legislatures in the American colonies had fallen quite rudely from the state of grace that they initially shared with Parliament, appearing to contemporary observers hardly different from the willful executive. By the late 1820's, the courts too had joined legislatures and executives in the subjective pit of will and power, at least in the reigning consciousness of the time. The breathing space between these two great slides—the brief period from around 1785 to around 1820—provided a uniquely auspicious time in which to think of the federal judiciary, and especially of the Supreme Court, as the most logical guardians of our basic political and legal commitments.

The great struggle since the post-1820 loss of faith in judicial objectivity has been to provide both legal content and political legitimacy to the exercise of the independent judiciary's countermajoritarian power. Viewing the Court as the "least dangerous branch" has helped only marginally. The Supreme Court's inability to wield either the sword or the

purse, to command armies or appropriations, is plain enough; but the very question is whether and why the Supreme Court's exercise of judicial review deserves obedience even when the reasons that it gives do not completely convince. The fact that the Court ultimately lacks the means either to compel or to procure obedience may comfort some people, but that fact in itself hardly proves the case for a habit of voluntary submission, or even for the Supreme Court's own assertion of a paramount role as constitutional expositor.

In any nation, the arguments both for and against the habit of voluntary compliance with judicial supremacy necessarily rest in large part on an assessment of whether more is likely to be gained than lost, in the long run, by separating the constitution's enforcement from the discipline of electoral accountability, and from the process and personnel of policy formation and policy execution. That is not an easy question to answer even after nearly two centuries of experience. I think that few would today accept Learned Hand's rather sad assessment that a nation which cares little enough for liberty to need a judicially-enforced constitution is a nation so far gone that a judicially-enforced constitution cannot save it. But our relatively salutary experience with judicial review should not lead us to ignore the limits of judicial power, or the dangers of relying on it too heavily, or the tensions that have proven inherent in its exercise.

There is, first of all, the almost hackneyed but nonetheless genuine risk that symbolic victories in the courtroom will sap the will to obtain deeper and more enduring solutions in the legislative arena. There is also the risk that politics itself will be impoverished by the assumption that the Supreme Court will step in and cure any and all constitutional defects.

Both of these risks have materialized often enough in our history to be of real concern. And, beyond these risks, I think it would be naive to overlook the possibility that a constitutional rescue by the Supreme Court is sometimes part of a deliberate design. The Supreme Court has been a tempting "fall-guy" for politicians who are eager to tell their constituents that they voted for a measure but who secretly count on the Supreme Court to strike the measure down. They may thus denounce the Court as imperial while gaining political credit at home.

Some of the New Deal legislation adopted despite nearly certain prospect of doom in the Supreme Court in 1935 and 1936 may well have been of this variety: measures for which the Administration could take credit—while avoiding the embarrassment of actually seeing it tested in practice. Simultaneously, the Administration gained a whipping boy, the "Nine Old Men," in the bargain. One has to recognize that the Supreme Court is a susceptible target for strategies of precisely this kind.

Recent proposals in Congress for federal tax assistance to parents of children in private religious schools may represent another such example. The measures I have seen do not appear likely to survive a constitutional challenge under settled doctrines of church-state separation. The propo-

nents of such legislation might well be seeking political credit simply for trying, while they would not mind discrediting the Supreme Court for its anticipated "obstruction."

This strategy has at times backfired. In 1965, the United States Congress responded to a particularly active form of protest against the Viet Nam War by making draft card burning a federal crime. Some sponsors of the measure supported it with speeches on the floor of Congress so hostile to political dissent that one has to wonder whether they were not trying to have it both ways: sending the voters back home a signal of their unyielding patriotism while all but inviting the Supreme Court to strike the law down as thinly disguised political censorship. When the Court in *United States v. O'Brien* instead upheld the law against draft-card burning on the ground that it served purely administrative, ideologically neutral purposes, more than a few Congressmen may have been surprised, and even distressed.

But the Supreme Court serves as a shock absorber, even as a scapegoat, for reasons deeper and more basic than political expedience. It is the Supreme Court, burdened by a perceived duty to harmonize and reconcile conflicting ideals, that is most often charged with inexcusably betraying fundamental principles, regardless of what the Court does or fails to do. Choices which would be tolerated as acceptable accommodations in other branches of the government are regularly denounced, both by Court dissenters and by outsiders, as unacceptable departures when made by the Supreme Court. But it is these very accommodations that the "political branches" are least likely to make.

The most controversial of these accommodations express the most basic tension in our law and politics between, on the one hand, norms of formal equality and abstract rights subject to no "trade-off," and, on the other hand, the realities of social and economic inequality and of abundant rights competing for scarce resources. We are committed in the United States at the same time to substantive justice—"neutral" rules be damned—and to the ideal of formal equality. But as Anatole France knew when he wrote that the majestic "equality" of French law forbade the rich and the poor alike to beg in the streets and to sleep under the bridges of Paris, formal ideals do not always yield substantive justice. Form and substance may be irreconcilable. The Supreme Court is subject to attack both when it recognizes substance and when it honors form.

When the substantive "reality" principle prevails in the Supreme Court, it may be attacked from both ends of the political spectrum. It may be attacked from the right, as when the Court mandates far-reaching remedies like metropolitan busing to desegregate schools, or permits the private use of employment preferences for minorities to redress historic inequity. It may be attacked from the left too, as when the Court refuses to readjust a state's welfare distribution formulas and procedures in the name of decency, equality and fairness, recognizing that the end result may be that finite resources are withheld from the needy.

When the procedural "formalism" principle triumphs in the Supreme Court, it is again attacked, and also both from the right and from the left.

The right has attacked the Court for insisting that the costs of according subjects of state power full and fair hearings, or of excluding illegally obtained evidence from use in trials are immaterial. The left too has attacked holdings in favor of abstract rights at the alleged expense of substantive justice. Leftist critics attacked the Court's insistence in the early 1900's that minimum wage laws intruded impermissibly on the "liberty" of employer and employee to bargain as free and equal agents. The left has likewise attacked the Court's more recent holdings that ceilings on political spending or bans on corporate advocacy violate the right to speak or the right to hear, even if such measures in fact *reduce* the skewing role of economic power in the "free marketplace" of ideas.

It is as though the nation confronted the Court and said, "Heads we win, tails you lose." Whatever ways it chooses in the unending conflict between substance and form, the Supreme Court will be said to have betrayed its principled mission.

Much the same is true of the more specific choices the Court must make in case after case. For upholding a woman's right to end an unwanted pregnancy, the Court was accused of denying the unborn's right to live. For permitting the government to withhold public funds from elective abortion while extending such funds to cover childbirth, the Court was accused of burdening and therefore betraying the impoverished woman's right to choose. Thus in individual cases as well as in broad choices of legislative policy, the Court often faces only a void—a fate likely to confront any similar constitutional tribunal in a nation which, like our own, has fundamentally irreconcilable values of constitutional dimension, each relevant in every case.

This description does not offer a terribly happy picture. Yet, remarkably, our Supreme Court remains the most esteemed—and, by many criteria, the most successful—branch of the United States Government. Its opinions continue to provide the primary language through which we habitually envision and describe the exercise of power in American society, as well as the primary language through which we subject the exercise of power to criticism and hold it to account. A phrase like "the police power," which some have said had little more to commend it than alliteration, persists in our discourse and shapes our public debate long after the "night watchman state" for which the phrase was perfectly suited became obsolete.

Despite the many inherent sources of its profound vulnerability, instances of real defiance of the Supreme Court's judgments remain extremely rare. One colorful episode may help to suggest why. Shortly after the Supreme Court in *Chisholm v. Georgia*, awarded damages in 1793, against the treasury of the state of Georgia in a suit brought by South Carolina citizens, an outraged Georgia state legislature passed a law stating that any federal marshal or other person seeking to execute the Supreme Court's mandate in that case would "suffer death, without the benefit of clergy, by hanging." Nothing quite so dramatic proved necessary. Within five years, in 1798, the Constitution had been amended to reverse

the Supreme Court's assumption that the federal judicial power automatically subjected unconsenting states to citizen suits for damages in federal court.

On only three other occasions has a Supreme Court interpretation of the Constitution been nullified by constitutional amendment, a step requiring two-thirds approval in both the House and the Senate followed by ratification in three-fourths of the states. The first occasion involved the Supreme Court's ill-fated ruling in 1857 that slaves were not persons but mere property, a ruling "reversed" in fact by the Civil War and rejected in law by the Thirteenth and Fourteenth Amendments. The second involved the Supreme Court's holding in 1895 that income taxes must be apportioned according to population among the states, a ruling undone by the Sixteenth Amendment. The third such occasion involved the Supreme Court's decision in 1968 that Congress cannot lower the voting age to eighteen in state elections, a decision repudiated by the Twenty-Sixth Amendment.

The power to correct by amendment, however rarely exercised and however deliberately difficult to employ, creates in the nation's elected bodies a checking device whose very availability both restrains the Court and helps to legitimate its conclusions. Nonetheless, I have no doubt that factors less tangible and more elusive deserve most of the credit for the United States Supreme Court's ability to transcend the nearly crippling limitations of its role. Among the most crucial sources of the Supreme Court's success is its paradoxical character—at once both a remote oracle dispensing "miracle, mystery and authority," and a common courthouse adjudicating ordinary cases and controversies in a forum accessible to all, dispensing equal justice to everyone. These two images coalesce to make the Court a unique source of credibility and strength in American society.

Given this paradox, it seems fitting that the decision setting our Supreme Court on its enduring course was *Marbury v. Madison*, which at once declared the Court's authority to act as supreme constitutional interpreter and denied the Court's authority to dispense relief in the particular case before it. William Marbury had claimed a right to fill the post to which outgoing President John Adams had appointed him. The Court opened its doors to Marbury, only to shut them again upon concluding that it lacked authority to grant him the relief he sought against the new President, Thomas Jefferson, and his Secretary of State, James Madison. That the Court could order the Executive to obey the Constitution was clear, Chief Justice John Marshall said, but only in a case properly within the Court's jurisdiction. Writing for the Court, Marshall held that Congress' attempt to confer jurisdiction upon the Court in cases such as *Marbury's* was void because it violated Article III of the Constitution—as construed by the Court itself.

The Court in 1803 thus assumed for itself the power to decide whether Congress had violated the Constitution. It also assumed the power to order the Executive to respect rights found by the Court to be

vested—pursuant to Acts of Congress or otherwise. The Court assumed both of these extraordinary powers, however, in the process of denying itself the power to award *Marbury* any relief against Madison.

Nearly 175 years later, in the Pentagon Papers case, the Supreme Court with equal deftness would deny itself and all federal courts the authority to perform the “executive” function of maintaining state secrets. The result of this self-denial, however, was to dissolve the restraint against publication sought by a President, and so to prevent a President from engaging in prior censorship.

The Court in *Marbury v. Madison* had renounced and assumed power in the same breath. It had asserted authority to protect private rights against even the Chief Executive, while apparently ruling in favor of the Executive branch. It had opened the courthouse even to the most mundane of claims and yet had proclaimed the Court’s jurisdiction to be unavailable. And the Court performed each of these feats without doing violence to constitutional text, history, or logic. It is on such paradoxes that the Supreme Court has, at its best, built its fortress. It is a fortress without ramparts, just as the Pope has no divisions. But it is a fortress that has ably guarded the Constitution.