Margaret H. Marshall

Threats to the rule of law: state courts, public expectations & political attitudes

"The law makes a promise: neutrality.[1] If the promise gets broken, the law as we know it ceases to exist." These are the words of Supreme Court Justice Anthony Kennedy.[2] They remind us of the potential vulnerability of our system of justice. It is a system erected by our federal and state constitutions and made manifest in thousands of concrete ways through laws and the enforcement of laws. But, ultimately, it is a web of relationships grounded in a moral compact, a promise of fair and unbiased justice. "If the promise gets broken, the law as we know it ceases to exist."

Those of you who grew up in the United States – the birthplace and stronghold of constitutional democracy – may take for granted the concept of a just government.

But as one who has had personal experience of the arbitrary, often brutal abuse of official power, I never can. Yes, in the South Africa of my youth there were duly enacted statutes, and a sophisticated network of executive agencies and courts to implement and enforce those statutes. But apartheid South Africa's laws had one primary aim: to protect and consolidate the power of the powerful. Here it is different. The United States has given the world much. But unquestionably this country's most enduring contribution to human progress is the structure of government in which a foundational, written charter apportions public power, guarantees fundamental rights, and entrusts the ultimate protection of those rights to an impartial judiciary. Constitutional democracy so defined has been the foundation of our security and prosperity.

For two centuries America stood in splendid isolation in its chosen form of

Margaret H. Marshall, a Fellow of the American Academy since 2001, is Chief Justice of the Massachusetts Supreme Judicial Court. She joined the Court in November 1996 as the second woman Associate Justice in the Court's history, and in October 1999 became the first woman to serve as Chief Justice of the Court.

1 This paper is taken from a talk given at the 225th Annual Meeting and 1902nd Stated Meeting of the American Academy of Arts and Sciences held on May 10, 2006.

2 Quoted in Shirley S. Abrahamson, "Judicial Independence as a Campaign Platform," reprinted by the Washington State Bar Association, available at www.wsba.org/media/publications/barnews/2005/mar-05-abrahamson (on file).

government. Today our form of constitutional democracy has become the world's gold standard of government.[3] Countries as diverse as India, Lithuania, South Africa, and Canada have staked their future on the promise of constitutional democracy. While we embrace these extraordinary developments, are we in the United States turning away from our foundation? I ask that question because a convergence of potent developments is exerting significant pressure on our form of government: attacks by politicians and others on the constitutional role of our courts to be free from political interference, the massive influx of special-interest money into judicial selection and retention procedures, and the loosening of ethical constraints on what judicial candidates may and may not say about cases likely to come before them. Combined and unchecked, these developments will have a wide-ranging, permanent, and damaging impact on our freedom, our security, and our prosperity.

In thinking about our structure of government today, we would do well to recall how – and why – our government came to be. We can pinpoint its creation. The year? 1780. The place? The Commonwealth of Massachusetts. The document? The Massachusetts Constitution, in which the principle of constitutional democracy first gained institutional and practical form. It begins with a ringing promise:

> All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness.[4]

Grand words, but was it possible to design a scheme of government to realize those aims?

John Adams invented the answer. In the Massachusetts Constitution he created for the first time in history a representative democracy that guaranteed certain rights – guaranteed them in writing – and that limited, divided, and balanced public power. To be sure, he borrowed from Britain (and other examples) the idea of a supreme executive and a bicameral parliament. But, in Britain, the word of Parliament was the supreme law of the land, no matter what Parliament enacted. And judges were required to enforce the will of Parliament, no matter what Parliament enacted.

Adams crafted a different solution. To the executive and legislative departments, he added a third, equal-standing department: the judiciary. Judges, long regarded as subordinate to the will of the powerful, would now be "subservient to none," except the rule of law.[5] Would the Adams "invention" work?

3 Richard H. Pildes, "The Supreme Court Term 2003 – Foreword: The Constitutionalization of Democratic Politics," *Harvard Law Review* 118 (2004): 29: "In the last generation, more new democracies, all constitutional, have been forged than in any comparable period. In regions ranging from South Africa to the former Soviet Union, Latin America, and parts of the Middle East, the renewed rise of democratic institutions has been a defining political development of the era." We remain the world's "oldest continuous constitutional democracy"; Samuel Issacharoff and Richard H. Pildes, "Emergency Contexts Without Emergency Powers: The United States' Constitutional Approach to Rights During Wartime," *International Journal of Constitutional Law* 2 (2004): 296.

4 Massachusetts Constitution, Part the First, article 1.

5 David McCullough, *John Adams* (New York: Simon and Schuster, 2001), 103.

Margaret H. Marshall on judicial independence

In 1783, just three years after its adoption, the Massachusetts Constitution was put to the test. On the docket of the Supreme Judicial Court was a series of cases concerning the savage beating of a man named Quock Walker, a black man, by or at the behest of Nathaniel Jennison, a white man. Jennison claimed that Walker was a slave, his property, and had run away; Walker claimed that he had been promised his freedom. Walker sued Jennison for assault and battery. The outcome of the case – this when slavery was widely endorsed in all thirteen colonies and elsewhere – was far from certain.

We do not have a decision of the Court because none is published. But we do have Chief Justice William Cushing's notes, which give some of the texture of this extraordinary event in American history:

> As to the doctrine of slavery and the right . . . to hold Africans in perpetual servitude and sell and treat them as we do our horses and cattle, . . . whatever sentiments have formerly prevailed . . . a different idea has taken place with the people of America, more favorable to the natural rights of mankind, and to that natural innate desire of Liberty, with which Heaven . . . has inspired all the human race. And upon this ground our Constitution of Government, by which the people of this Commonwealth have solemnly bound themselves, sets out with declaring that all men are born free and equal.

This being the case, the chief justice wrote, "the idea of slavery is inconsistent with our conduct and Constitution."[6]

In the Quock Walker case the Supreme Judicial Court treated the new constitution not as a mere statement of ideals but as binding law. Quock Walker's case was the first in the United States, or anywhere, to abolish slavery by judicial decision.[7] It demonstrated that the words of the Massachusetts Constitution were not mere platitudes; they were the supreme law of the land. Twenty-six years before *Marbury v. Madison*,[8] Adams's "mighty invention"[9] had met the real world – and made it a better world.

Fully 95 percent of all of our nation's litigation takes place in state courts. It is litigation that touches on every aspect of our lives: commercial contracts, property disputes, grandparental visitation rights, environmental law, consumer fraud, the right to assisted death, academic tenure disputes, just to name a

6 *Proceedings of Massachusetts Historical Society* 1873 – 1875 (1875): 294: "Chief Justice Gray submitted for the inspection of the members of the Massachusetts Historical Society Chief Justice Cushing's original note-book of the trials before the Supreme Judicial Court of Massachusetts at the terms held in the County of Worcester in 1783, (which had been intrusted to him for the purpose by Mr. William Cushing Paine, the namesake and great grandnephew of Chief Justice Cushing), and read therefrom the minutes of the trial at the April Term 1783 of the case of the *Commonwealth v. Nathaniel Jennison*, in which it was established that slavery was wholly abolished in this Commonwealth by the Declaration of Rights prefixed to the Constitution of 1780"; ibid., 292 – 293.

7 See Joseph Ellis, *Founding Brothers: The Revolutionary Generation* (New York: Vantage Books, 2002), 89 – 90.

8 5 U.S. (1 Cranch) 137 (1803).

9 The phrase is taken from an address by Justice Benjamin Kaplan on the occasion of the 300th anniversary of the Supreme Judicial Court. Benjamin Kaplan, "Introduction: An Address," in *The History of the Law in Massachusetts: The Supreme Judicial Court, 1692 – 1992*, ed. Russell K. Osgood (Boston: Supreme Judicial Court Historical Society, 1992), 4.

few. How many cases are we talking about? In 2005, the latest date for which we have reliable figures, well over 93 million cases were filed in state courts.[10] Contrast that figure with approximately 323,000 cases filed in all of the federal courts nationwide in 2005.[11] You see my point: state courts and state-court decisions matter; they have an enormous impact on our daily lives and on the development of the law. Even in the U.S. Supreme Court, of the cases decided in the 2005 term, 28 percent originated in state courts.[12]

The impact of state courts has sometimes sparked controversy. State-court rulings have piqued the wrath of governors and presidents. One example: The former governor of Massachusetts, Mitt Romney, has loudly and publicly voiced his disagreement with the Supreme Judicial Court's holding in *Goodridge v. Department of Public Health*,[13] which held that the Massachusetts Constitution forbade limiting marriage to opposite-sex couples.[14] Legislators also have taken umbrage at the decisions of state courts. When the Supreme Judicial Court held that the Massachusetts Constitution required the legislature either to fund or repeal a "clean elections" law passed by the voters,[15] some members of the legislature were angry enough to talk of pushing for a constitutional amendment requiring the election of judges.

And state courts have sometimes issued decisions that have incensed whole communities, just as they have elated others – not only in Massachusetts. In 1948, the California Supreme Court declared the state's antimiscegenation statute to violate the constitutional rights of individuals who wish to marry those of another race.[16] This was at a time when Jim Crow reigned supreme, and when public sentiment nationwide was overwhelmingly opposed to interracial marriage. (Ten years later, in a 1958 Gallup poll, 96 percent of those responding said they opposed interracial marriage.[17])

Given that some decisions of our courts are highly controversial, and sometimes unpopular, it is a wonder that some court orders are obeyed at all. But that is a remarkable feature of our constitutional democracy, one that newer democracies struggle to emulate. Americans obey court decisions for a variety of reasons, of course. But surely one of them, a significant one, is that, whatever we might think about individual courts or individual decisions, we continue to trust that the judiciary, as an institution, on balance, continues faithfully to carry out its constitutional duty to do justice, to "say what the law is,"[18] and to keep the promise of neutrality.

10 National Center for State Courts, Court Statistics Project (updated April 10, 2008), at http://www.ncsconline.org/D_Research/csp/CSP_Main_Page.html.

11 See www.uscourts.gov/judicialfactsfigures/Table601.pdf.

12 Chart for 2005 term on file with author; includes habeas cases from state courts.

13 *Goodridge v. Department of Public Health*, 440 Mass. 309 (2003).

14 See, for example, Mitt Romney, "One Man, One Woman: A citizen's guide to protecting marriage," *The Wall Street Journal*, February 5, 2004, stating, among other things, that *Goodridge v. Department of Public Health* was "wrongly decided and deeply mistaken."

15 *Bates v. Director of the Office of Campaign & Political Finance*, 436 Mass. 144 (2002).

16 *Perez v. Sharp*, 32 Cal.2d 711, S.C. sub. nom. *Perez v. Lippold*, 320 Cal. 2d 711 (1948).

17 Randall Kennedy, *Interracial Intimacies* (New York: Pantheon, 2003), 88.

18 *Marbury v. Madison*, 177.

Margaret H. Marshall on judicial independence

To the extent that the American public understands the judiciary to proceed thoughtfully, impartially, fairly, it is willing to obey even those judgments that most rankle. When a group in the United States strongly disagrees with a court decision, what is the response? Not blood in the streets. The losing side returns to the drawing board to develop new evidence, refine its arguments, and file the next case. Or so it has been until lately.

I referred earlier to three forces that are converging and whose confluence causes me great concern: attacks on the constitutional requirement of political impartiality in the judicial branch, the torrent of special-interest money pouring into state judicial selection campaigns, and the loosening of judicial canons of ethics. Here, I can only give some sense of the scope of these troublesome developments, but they should cause all of us the greatest concern.

First, we have all heard the denunciations. Some politicians urge citizens to "save America from the judges."[19] Others tell us that judges "are trying to take the hearts and souls of our culture."[20] Hardly a day goes by, it seems, without some charge of "judicial activism" or "judicial legislating." Prominent politicians trumpet their intention to punish – and that is the word they use, *punish* – judges for issuing opinions with which they disagree.[21] Supreme Court Justice Ruth Bader Ginsburg revealed that both she and Justice O'Connor have been the targets of death threats.[22]

Make no mistake: I believe, deeply, that our courts should be placed under the closest scrutiny. The public should be free to criticize the language and reasoning of our decisions. But the criticism has lately taken an ominous turn. It targets the very heart of our judiciary: its function as a separate branch of government. It calls for the judiciary to be subordinate to legislative oversight, or for judges to work in fear of "punishment."

The second disturbing development is the recent and escalating influx of vast amounts of special-interest money into state judicial selection and retention campaigns. Since the 1990s, as special interests – political, business, religious, and others – have come to recognize the impact of state courts' decisions on daily life and commerce, judicial campaigns

19 Bert Brandenburg, "Judge Dread: The judiciary may end up the big losers in the Schiavo mess," *Slate Magazine*, March 29, 2005 (on file): "Majority Leader [Tom] DeLay, Phyllis Schlafly, and Alan Keyes will gather in Washington to lambaste 'the Judicial War on Faith.' Conference organizers call it 'the beginning of a broad-based effort to save America from the judges.'"

20 Quoted in "DeLay Takes on High Court at Tenn. Rally," August 15, 2005, at www.nytimes.com/aponline/national/APJustice-Sunday.html.

21 See David D. Kirkpatrick, "Republicans Suggest a Judicial Inspector General," *The New York Times*, May 10, 2005, at http://www.nytimes.com/2005/05/10/politics/10watchdog.html?scp=1&sq=Judicial+Inspector+General&st=nyt: "To preserve the independence of the judiciary, [Congressman James] Sensenbrenner said, Congress should not seek 'to regulate judicial decision-making through such extreme measures as retroactively removing lifetime appointees through impeachment.' But he continued, '[t]his does not mean that judges should not be punished in some capacity for behavior that does not rise to the level of impeachable conduct. The appropriate questions,' he added, 'are how do we punish and who does the punishing.'"

22 Ruth Bader Ginsburg, "'A Decent Respect to the Opinions of [Human]kind': The Value of a Comparative Perspective in Constitutional Adjudication," Constitutional Court of South Africa, February 7, 2006 (on file).

have become far more competitive, harsher, and more expensive – a lot more expensive. In 2004, two Illinois Supreme Court candidates combined to raise more than $9.3 million to secure their positions on that court, and three of four winners of a seat on the Ohio Supreme Court raised over $1 million.[23] In that same period, 81 percent of high-court races (thirty-five of forty-three) were won by the top fund-raisers.[24]

All too often the money comes from single-interest advocacy groups. All too often the money goes to advertising that is overwhelmingly negative. Indeed many judicial campaigns now attack the very institution of the judiciary itself. Just as national politicians see advantage in running against Washington, judicial candidates now find benefit in running against the bench. In Alabama, for example, Justice Tom Parker centered his 2004 judicial campaign on attacks against "liberal judges," whom he characterized as "trying to take God out of public life."[25] Justice Parker won the election.

The pressure to politicize the judiciary is not confined to those states in which judges are elected; it is present in any state in which judges must be either reappointed or reelected to the bench. Whenever sitting judges face some form of reconfirmation or reaffirmation they must be evaluated on their "record." Every judicial decision becomes a message of allegiance, or not, to partisan constituents, much like a legislator's voting record. Judges who have rendered decisions that run counter to an interest group's agenda are tarred as "antifamily," "soft on crime," "unaccountable." The aims are obvious: to pressure fair and neutral judges to look over their shoulders, to test the prevailing political winds, to abandon the principles of judicial neutrality when deciding a case.

The strategy appears to be working; judges who have been through a contested retention process tell us so. The late Justice Otto Kraus of the Oregon Supreme Court once remarked that to ignore the political implications of a decision near the time of a judicial election "would be like ignoring a crocodile in your bathtub."[26]

Third, those who seek to lock judges into a particular partisan agenda were emboldened by an opinion of the U.S. Supreme Court. In 2002, the case of *Republican Party of Minnesota v. White*[27] threatened to leave state codes of judicial conduct throughout the nation in tatters. The case began when a complaint was lodged with Minnesota's judicial conduct commission against a candidate for a seat on the Minnesota Supreme Court who distributed campaign literature criticizing the judicial decisions of his opponent – on crime, welfare, abortion, and other issues. Minnesota's Code of Judicial Conduct at the time prohibited a "candidate for a judicial office, including an incumbent judge," from "announc[ing] his or her views on disputed legal or political is-

23 James Sample, "The Campaign Trail: The true cost of expensive court seats," *Slate Magazine*, March 6, 2006, at www.slate.com/toolbar.aspx?action=print&id=2137529.

24 Ibid.

25 The storyboard of the campaign advertisement of Judge Parker's from which these quotations are taken may be found on the website of the Brennan Center, at www.brennancenter.org/programs/buyingtime_2004.

26 Quoted in Paul Reidinger, "The Politics of Judging," *ABA Journal* 73 (1987): 58.

27 536 U.S. 765 (2002).

Margaret H. Marshall on judicial independence

sues."[28] The candidate claimed that the rule prohibiting a judicial candidate from "announcing" views on politically controversial issues violated the First Amendment. By a bare majority of five, the U.S. Supreme Court agreed.

The dissenting opinions were scathing. By blurring the distinction between the election of a judge and the election of a senator, Justice John Paul Stevens wrote, "the Court defies any sensible notion of the judicial office and the importance of impartiality in that context."[29] Justice Ruth Bader Ginsburg accused the majority of disingenuously permitting judicial candidates to promise to rule a certain way on important issues.[30]

Political attacks on courts as protectors of individual rights, special-interest money flowing to judicial campaigns, and the loosening of ethical restrictions on judicial candidates have blurred the line between judicial accountability and political accountability in alarming ways. The two forms of accountability are different – very different. Judicial accountability is faithfulness to the principles of neutrality, fairness, and equal treatment under law. It is accountability to civil society's most laudable pursuit: the work of justice. Judicial accountability knows no partisanship. It brokers no compromises and trades no favors. That is the American model now so widely embraced around the world.

Constitutional democracy, although surely imperfect, is the best mechanism we have to ensure that debates about deeply divisive national issues will take place according to the rule of law and not the law of the ideologue or the law of the mob. In a speech at Georgetown University in 2006 that was widely reported in this country and abroad, Justice Sandra Day O'Connor voiced concern about "the efforts of those who would strong-arm the judiciary into adopting their preferred policies. It takes a lot of degeneration before a country falls into dictatorship," she said, "but we should avoid these ends by avoiding these beginnings."[31] Justice O'Connor is not known for hyperbole.

The warning signs are there for all to see. The question is: have we the will to protect the structure of government that for so long has protected us?

28 Minnesota Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2000).

29 *Republican Party of Minnesota v. White*, 797.

30 Ibid., 804.

31 Nina Totenberg, *Morning Edition*, March 10, 2006 (on file). See Julian Borger, "Former top judge says US risks edging near to dictatorship," *Guardian*, March 13, 2006.