

FOREWORD

Politics and Law

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The Cato Institute's Center for Constitutional Studies is pleased to publish this fourth volume of the *Cato Supreme Court Review*, an annual critique of the Court's most important decisions from the term just ended, plus a look at the cases ahead—all from a classical Madisonian perspective, grounded in the nation's first principles, liberty and limited government.

We release this volume each year at Cato's annual Constitution Day conference—held on September 14th this year since Constitution Day falls on a Saturday. That is far from the only thing that is out of the ordinary this year, however. At this writing we are less than a fortnight away from the start of Senate confirmation hearings concerning the nomination of Judge John G. Roberts Jr. for a seat on the Supreme Court. More than a decade has passed since the nation last witnessed such hearings, and it was almost fifteen years ago that we saw hearings as politically charged as those upcoming may be.

Quite apart from the salvos Democrats have been hurling at Judge Roberts, even in the president's own party the gauntlet has been thrown down. Two weeks ago and again today, for example, Senator Arlen Specter, who will be chairing the Senate Judiciary Committee hearings, has written to Roberts to give him "advance notice" that he will be pressing the nominee for his views on the Rehnquist Court's "judicial activism" of recent years—in particular, its decisions finding that there are limits on Congress' regulatory power, which Specter sees as the Court's "usurping Congressional authority."

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The hearings may yet go smoothly, of course, as did those for then-Judges Ruth Bader Ginsburg in 1993 and Stephen Breyer in 1994, both of whom declined to answer a wide range of questions posed by members of the committee. The question remains, however: Why have confirmation hearings—not only for Supreme Court but for appellate court nominees as well—become so political of late? The answers are several, but in this brief foreword I will focus on only two, drawing on the Court's recent term to illustrate the second.

The first answer begins innocently enough: Confirmation hearings for Supreme Court nominees are “political” because, under our Constitution, those are occasions on which politics and law come naturally together. Although the Constitution belongs to all of us, and judges are expected to adjudicate impartially under it, not legislate, the president's selection of a nominee for the Court is a political, not a legal act, as is the Senate's decision whether or not to confirm the nominee. That means that the president and members of the Senate are free to decide on any ground they wish—including “politics,” in its many senses—not simply on such neutral criteria as the nominee's competence and integrity, as Alexander Hamilton recommended.

The problem with going down that political road, however, is its potential for undermining the rule of law, for turning everything into politics. At the extreme, for example, both the president and the Senate might demand that a nominee pass a so-called ideological litmus test as a condition for being nominated or confirmed—the idea being to try to bind him to deciding future cases in accordance with his answers on the test. Were that approach to prevail—and we are already part way there—the independence of the judiciary would be seriously compromised as judging would no longer be a function of dispassionate and apolitical reason but of nomination and confirmation politics. That political process would determine the legal process, in effect, rendering the latter a sham.

To more fully explore those issues, let me begin by outlining the connection between politics and law that the Constitution contemplates. (This is drawn from my Cato study of a few years ago on the emergence of ideological litmus tests.) In a limited constitutional republic like ours, the relation between politics and law is set, for the most part, by law—by the law of the Constitution. Drawing upon reason and interest, the Framers drafted a constitution that

became law through ratification, a political act that reflected, in large measure, the will of the founding generation. As amended by subsequent acts of political will, the Constitution authorizes the political branches to act pursuant only to their enumerated powers or to enumerated ends. It further limits the exercise of those powers and the powers of the states either explicitly or by recognizing, with varying degrees of specificity, rights retained by the people. And, by fairly clear implication, made explicit in the *Federalist* and shortly thereafter in *Marbury v. Madison*, the Constitution authorizes the judiciary to declare and enforce that law of authorizations and restraints consistent with the document itself.

Thus, the scope for “politics”—understood as will or the pursuit of individual or group interests through public or political institutions—is limited. Consistent with constitutional rules and limits, the people may act politically to fill elective offices. And those officers may in turn act politically to fill nonelective offices. But once elected or appointed, those officials may act politically only within the scope and limits set by the Constitution. In particular, not everything in life was meant to be subject to political or governmental determination. In fact, the founding generation wanted most of life to be beyond the reach of politics, yet under the rule of law. In a word, our Constitution does not say, “After periodic elections, those elected may do what they wish or pursue any end they wish or any end the people want.” On the contrary, it strictly limits, by law, the scope of politics. And it falls to the judiciary, the nonpolitical branch, to declare what the Constitution says that law and those limits are, thereby securing the rule of law.

The aim in all of this, then, is to constrain the rule of man—and politics—by the rule of law. The Framers understood that legitimacy begins with politics, with the people. Thus, “We the people . . . do ordain and establish this Constitution.” But once ratification—the initial political act—establishes the rule of law, that law constrains politics thereafter, at least in principle. And it is the nonpolitical judiciary that declares and enforces that law. It is essential, therefore, that the judiciary act nonpolitically—not from will or interest but from reason, according to law, consistent with the first principles of the system. If it does not, then to that extent the rule of law is undermined and politics trumps law.

Competence and integrity in a nominee go together, therefore. A competent and principled nominee will understand the subtle

relationships between law and politics in our system and, if confirmed, will let politics reign where it is authorized to do so while enforcing law where the Constitution calls for that. Unfortunately, especially over the twentieth century, we have strayed very far from the ideal Hamilton and the other Framers envisioned. Today, so much is politics, so little is law, that even the judiciary is involved, ineluctably, in making “political” decisions. Thus the second and far more searching reason why judicial confirmation hearings have become so political: Given that judges are so often called upon today to “make” law, we want to know not simply whether the nominee is competent and principled but what his “politics” are as well.

I will develop that point more fully in a moment, but let me note first that I alluded to the problem in this space a year ago when I addressed the question, can law this uncertain be called law? Citing a number of cases the Court had recently decided—concerning campaign finance, affirmative action, property rights, and more—I argued that the Court’s opinions too often reflected politics more than law, all of which has led to a sorry state of law. I am hardly alone in reaching that assessment, of course. In fact, a related, if sometimes wandering, thesis was recently set forth in some detail by one of the nation’s most prominent students of constitutional law, Harvard’s Laurence Tribe.

Writing in the spring 2005 issue of the eclectic legal periodical, *The Green Bag*, Tribe explains, first in a letter to Justice Breyer, then in a much longer “Open Letter to Interested Readers of *American Constitutional Law*,” why he has decided not to complete and publish the projected second volume of the third edition of his treatise by that name. Published originally in 1978, with a second edition in 1988 and a third, at least in one volume, in 2000, the treatise was envisioned from the outset to be more than a hornbook. It was to bring together a large body of judicial decisions, thereby to call attention to the organizing themes that become apparent—all by way of attempting “a synthesis of some enduring value.” But Tribe has come to have profound doubts, he says, “whether any new synthesis having such enduring value is possible at present.” Thus, he has set the project aside.

The reasons underlying Tribe’s doubts are several. In essence, in area after area, he writes, we find ourselves at a fork in the road: things could go in several directions “because conflict over basic

constitutional premises is today at a fever pitch . . . with little common ground from which to build agreement." Thus, no treatise of the kind he has been writing can be true to this moment in our constitutional history, he says, for "profound fault lines have become apparent at the very foundations of the enterprise." And he does not have, he claims, nor has he seen "a vision capacious and convincing enough to propound as an organizing principle for the next phase in the law of our nation."

When Tribe began his enterprise, however, things were different. Unlike in the late 1940s, when "conflict and irresolution organized the elaboration of constitutional law" following the New Deal constitutional revolution of the late 1930s, the mid-1970s amounted to a time when the Burger Court was in important respects simply extending the groundbreaking work of the Warren Court. Thus, it was a period, Tribe writes, when a considerable body of judicial work had accumulated that needed to be pictured as a whole "in order to be properly appreciated, extended, or reconsidered." A treatise was possible at that time since even critics of controversial decisions like *Roe v. Wade* were "in an important sense reading from the same page as the majority." Then-Justice William Rehnquist, for example, one of two dissents in that case, did not disagree "that the Constitution imposes *some* substantive constraints on government in such matters."

Today, however, Tribe sees fissures looming large, reflecting fundamental and seemingly irreconcilable divisions. Fastening on the Court's work "over the past decade or so," he writes that "a period of reassessment in several doctrinal contexts" appears to be largely over, "but plainly we see no new constitutional law emergent and ready for synthesis." In all of this, he continues, "justices write as though self-consciously in the midst of unresolved, ongoing struggle, sometimes choosing to present their views in exaggerated, polemical forms, and sometimes too conspicuously trying to restrict the reach of their ideas as though in this way to give them space to survive."

What are we to say? Tribe is largely right. For too long, as many of us have long said, the Court has been without a compass. At the same time, Tribe's main concern—to explain why "ours is a particularly bad time to be going out on a limb to propound a Grand Unifying Theory"—seems to disable him from articulating—

perhaps even from seeing—the deeper implications of his thesis. For it is not simply the Court’s decisions of the past decade that have brought the current state of uncertainty upon us; that state and those decisions, however much they may help to explain the judicial confirmation battles that go back even further, are but the latest manifestations of a much deeper problem.

In his wide-ranging canvass of the elements that constitute our “constitutional culture,” as he calls it, Tribe touches on several important sources of today’s conflicting worldviews. All of that is instructive and illuminating. But the world has been beset with conflicting worldviews for a long time. In fact, it was to enable people with conflicting worldviews to coexist, peacefully, that the Constitution was written in the first place. That peaceful coexistence could be achieved, however, only if the constitutional regime allowed each of us to go his separate way—in fact, protected us in our right to do so. And that, I submit, is the main source of our problem today. For as long as we are forced, by law, to abide by and live under one worldview—today, that of the public planner, in all of its manifestations—we will continue to see “profound fault lines” that go, as Tribe puts it, to issues “as fundamental as whose truths are to count and, sadly, whose truths must be denied.”

The source of this deeper problem is well known, of course, even if today it is largely ignored. It is the Progressive mindset, institutionalized by the New Deal’s constitutional revolution, before which time Tribe’s essay barely goes. It was then that we were all thrown into the common pot, so to speak. Modern Progressives talk often about freedom, of course, and to their credit they have often served that end far better than conservatives, modern or ancient. But to take license with Justice Hugo Black’s memorable expression: What is there about the word “free” that they don’t understand? Where is the freedom in taxing us to establish a failing retirement system and then forcing us into it? Where is the freedom in taxing us to establish a mediocre public education system and then forcing us to place our children in it—unless we want to pay yet again to get them out of that system? Where is the freedom in the government’s telling us how to run our businesses in a thousand and more ways? I could go on *ad infinitum*, of course, but the point should be clear. In those and so many other ways today, we live under “law” that arises not from principle but from politics. And we do because the

New Deal Court opened the constitutional barriers to ubiquitous government—in a word, the Court replaced law, the law of liberty, with politics.

Although the seeds of the New Deal revolution were sown somewhat earlier, as Richard Epstein's B. Kenneth Simon Lecture below brings out, the 1937 Court, following on the heels of President Roosevelt's infamous Court-packing scheme, eviscerated the centerpiece of the Constitution, the doctrine of enumerated powers, thus opening the floodgates for the modern regulatory and redistributive state. Then a year later the Court bifurcated the Bill of Rights and invented a bifurcated theory of judicial review, effectively instituting political adjudication, the practical result of which was to unleash state legislative juggernauts. Often mistaken for restraint, the activism of the New Deal Court—ignoring constitutional limits that had largely stood for 150 years—would soon rise again in the form of interstitial lawmaking once the surfeit of legislation worked its way back to the Court, as inevitably happened. But yet a third wave of activism set in once the planners, unable to win every legislative battle, realized that the courts might sanction their plans. Not all of that last form of activism was unwarranted, of course. Some, in fact, was long overdue, like that which abolished Jim Crow, not a moment too soon. But enough was written from whole cloth to have led to a conservative backlash.

Regrettably, that backlash, when it came, made its peace, for the most part, with the political premises of the New Deal's constitutional revolution, attacking mainly that third form of "judicial activism"—and calling into question in the process the Court's good work, such as there was, in recognizing the unenumerated rights the Ninth and Fourteenth Amendments were written to secure. In its own way, therefore, the conservative backlash misconceived the constitutional design as fully as the Progressive juggernaut that gave rise to it. Both camps, that is, conceived of the Constitution as essentially democratic, not libertarian. Both saw scope for public and hence political power in wide areas of life. They differed simply over the ends to be served by that power, grounded as they were in their different worldviews.

Over the past decade that Tribe demarcates, however, the Rehnquist Court has begun to rediscover a few pre-New Deal principles. Thus, in 1995 the Court resurrected the doctrine of enumerated

powers, which had lain dormant for nearly sixty years. And over a series of decisions it began to put teeth in the Fifth Amendment's Takings Clause, thus better protecting property rights, which the 1938 Court had reduced to "poor relations" in the Bill of Rights, as James Ely documents below. After the term just ended, however, it is hard to know where that "Rehnquist revolution" stands. The *Raich* decision, upholding Congress' power under the Commerce Clause to regulate medicinal marijuana that never enters even intrastate commerce, makes a mockery of the doctrine of enumerated powers, as Douglas Kmiec illustrates below. And the Court's three property rights decisions, as Professor Ely shows, reflect little but abject judicial deference to political power.

Yet even at its best, when it has grasped for first principles, the Rehnquist Court's reach has fallen far short, barely scratching the surface of the problem. That problem was well stated by our board member, Gary Lawson, in the 1994 *Harvard Law Review*: "The post-New Deal administrative state is unconstitutional," he wrote, "and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution." The problem, then, goes far deeper than our inability at the moment to discern the Court's organizing principle. The Court has no such principle because it has abandoned its roots in the law of the Constitution. That mistake is simply playing itself out, for what is left when law withers is mere politics. And that is why the judicial confirmation battles today are about politics, and only seemingly about law.