Foreword

The Battle for the Court: Politics vs. Principles

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The Cato Institute's Robert A. Levy Center for Constitutional Studies is pleased to publish this 17th 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 term ahead, all from a classical liberal, Madisonian perspective, grounded in the nation's first principles, liberty through constitutionally limited government. We release this volume each year at Cato's annual Constitution Day symposium. And each year in this space I discuss briefly a theme that seemed to emerge from the Court's term or from the larger setting in which the term unfolded.

The October 2017 term was noteworthy for a number of decisions, discussed further on by our authors, but barely had it ended when it was overshadowed by Justice Anthony Kennedy's announcement that he would be stepping down from the seat he had held for three decades. The foreboding on the left was immediate. Despite his failure this term to join the Court's four liberals on any of the contentious 5-4 decisions, Kennedy had long been the Court's "swing" vote—a term he disliked—often rescuing the liberals' agenda from the Court's conservatives, and at times advancing it himself. But the left's anger grew only more intense when President Trump nominated the apparently more predictably conservative Judge Brett Kavanaugh for the seat.

In fact, so distraught were Senate Democrats that many, knowing little about Kavanaugh except his billing as a conservative, announced

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immediately that they would vote against his confirmation. Editorials and op-eds quickly appeared demanding reams of records bearing little if at all on his qualifications. The aim, plainly, was to stall the hearings until after the mid-term elections—or better still, until after a new Congress had been seated, possibly with a Democratic Senate. Those efforts have come up short: At this writing, Senate Judiciary Committee Chairman Chuck Grassley has just scheduled hearings to begin on September 4, prompting calls for Democrats to boycott them.

Committee Democrats will doubtless ignore those calls, which means that by the time this volume appears we are likely to have endured a repeat of the bitter politicized hearings we witnessed a year ago for then-Judge Neil Gorsuch, about which I wrote at length in this space. But these hearings may be even more politicized because the stakes for the left are higher. Last year a conservative was replacing another conservative, the late Justice Antonin Scalia (although Gorsuch is proving to be as much a classical liberal as a conservative). This time it is that swing-vote seat that is at stake—and liberals fear, not without reason, that Kavanaugh's vote will swing less often their way. At stake, they say, is nothing less than the Court's "balance."

The Politicization of the Law

The anger on the left is due partly, of course, to the perfectly legitimate political gamble Senate Republicans made when they decided to sit on President Obama's nomination of Judge Merrick Garland as the 2016 presidential primaries were already under way. Part of the tit-for-tat behavior that began with the brutal confirmation battle that followed President Reagan's 1987 nomination of Judge Robert Bork, the Republican refusal to act reflected simply how politicized our courts have become—to say nothing of our law. The idea that the Court should be ideologically "balanced," for example, a plea seemingly for "fairness," bespeaks at bottom a conception of law more politics than law, more will than reason—a conception better suited for the legislature than the courtroom. Indeed, it says that there is no objective standard for law, that law *is* politics by another name. No less than Justice Elena Kagan, reflecting on the current battle to confirm Kavanaugh, said it makes the Court look like we are "junior varsity politicians."

To be sure, there are domains of law where "politics"—defined as the assertion of will informed, usually, by reason—properly belongs,

where reasonable people can have reasonable differences about where to draw the line in such common-law areas as nuisance, risk, and remedies. So too with various due process matters such as determining "reasonable" searches and seizures. One wants some balance on the courts or legislatures that draw such lines, to say nothing of legislatures authorized to pursue various public ends where differing value judgments are ordinarily in play.

But it is quite another matter where the law is relatively clear and, especially, where background presumptions limiting discretion are manifest, for there is no balancing to be done in such cases. State police power, for example, is meant mainly to secure our rights. Thus, to take a few cases that have made their way to the Court, laws criminalizing interracial marriage, the sale and use of contraceptives, or same-sex sodomy among adults will not withstand rational scrutiny. Whose rights do such laws secure? Those decisions should all have been 9-0 since the states had no justification for the restrictions—as a matter not of policy or politics but of *law*. Where is "balance" appropriate in such cases?

The Blurring of Law and Politics

The failure to distinguish the respective domains of law and politics is at the core of many of our disputes today and the growing battle for the courts. Foreshadowed by Justice Oliver Wendell Holmes's infamous 1905 dissent in *Lochner v. New York*, the main roots of that failure are in progressivism, which rejected the limited-government principles of the Constitution as amended after the Civil War. For Progressives, nearly all was and still is politics—as in their effort in *Lochner* to limit the hours that bakers might work, freedom of contract notwithstanding. They were social engineers pursuing change through *legislation*. Thus, legal relationships defined largely by property and contract principles under the common law came in time to be redefined by statutes overriding those principles in the name of progressive social values. And as Progressives ascended to the courts, animated by those values and the underlying political rationale majoritarian democracy purported to afford, the conflict with judges abiding by the earlier order and its principles was inevitable—as was the tyranny of, at best, the majority, at worst but far more common, special interests more able to work the system to their advantage.

That conflict came to a head during the New Deal, of course, when President Roosevelt, shortly after his landslide reelection in 1936, attempted to pack the Supreme Court with six new justices—a blatant political move that succeeded only because of the famous "switch in time that saved nine." Unlike after the Civil War, when federalism as originally established was changed legitimately by constitutional amendment, the politically cowed New Deal Court began itself, in effect, to rewrite the Constitution, without the legitimacy afforded by an amendment.

In 1937, the Court eviscerated the document's basic substantive principle, the doctrine of enumerated powers, after which the floodgates were opened for Congress to redistribute and regulate at will with the Court looking the other way. But the burgeoning legislation that followed often ran roughshod over our rights, which brought judges back into the picture. To address that problem, the Court in 1938 distinguished "fundamental" from "nonfundamental" rights, plus differing levels of judicial review to match—all written from whole cloth and all enabling judges thereafter to make value and hence political judgments about which rights were and were not "fundamental." Finally, in 1943, the Court declined to check Congress's growing practice of delegating ever more of its lawmaking authority to the executive branch agencies it had created and would continue to create, thus leading to today's gargantuan executive state where most law is written, notwithstanding the Constitution's very first sentence after the Preamble: "*All* legislative Powers herein granted shall be vested *in a Congress*" (emphasis added).

Thus, in brief, were the institutional arrangements for executing the progressive agenda created, however inconsistent with the Constitution, the original understanding of those who wrote and ratified it, and the theory of legitimacy undergirding it. The Court's role in this constitutional inversion was essentially passive and deferential: allowing a vast expansion of congressional power; reducing rights that might impede legislative, executive, and state actions, especially by treating economic liberty as a second-class right; and allowing the growth and scope of the administrative state, thus enabling bureaucratic social and economic planners to order our private affairs better than we, left free to do so ourselves, would ever do—or so both early Progressives and later liberals believed.

But shortly thereafter the Court's passive posture and deference to the political branches and the states were overtaken by the civil rights movement, and not a moment too soon. Coming before the Court was the Civil War's unfinished business, itself a product in part of a passive Court that had eviscerated the Fourteenth Amendment's Privileges or Immunities Clause in the infamous *Slaughter-house Cases* of 1873. It remains today an embarrassment that a Court now dominated by conservative originalists has failed to correct that mistake. In the 1950s, however, it was liberals who dominated the Court, turning to the amendment's Due Process and Equal Protection Clauses to begin correcting, if not the Court's reading of the amendment, at least the result of that earlier misreading, racial segregation.

With that, however, a funny thing happened. As the Warren and Burger Courts became more active in protecting not only civil rights but other rights as well—concerning criminal procedure, for example—political conservatives began to question the legitimacy of this "judicial activism." They did so first because they sometimes disagreed with the results, but second, and more basic, because judges were overturning democratic decisions, thereby raising what Yale Law's Alexander Bickel famously called a "countermajoritarian difficulty," a question about the legitimacy of judicial review itself. Conservatives, in short, were buying into the far-reaching majoritarianism that underpinned Roosevelt's New Deal constitutional revolution.

Thus emerged the constitutional vision of modern conservatives, at least until rather recently. Reacting to what they saw, sometimes rightly, as liberal judicial activism—judges invoking progressive social values to defeat democratic decisions—conservatives urged judicial restraint and deference to majoritarian rule. The contrast between the two constitutional visions was never more sharply drawn than during the confirmation battle over Bork's 1987 nomination, and the theoretical confusions surrounding that battle have clouded our constitutional debate ever since.

Two Mistaken Constitutional Visions

Truth to tell, both sides had it wrong. Liberals read the Constitution, when they did, as authorizing far-reaching rule by democratic majorities—except when majorities trampled on rights they thought

"fundamental," whether constitutionally recognized or not. Conservatives, believing the restoration of the enumerated powers doctrine to be a lost cause, stood also for far-reaching majoritarian rule, especially at the state level; but from fear of judicial activism—liberal judges inventing rights from whole cloth—they urged judges to secure only those rights enumerated *expressly* in the Constitution.

Neither of those readings was consistent with the Framers' vision, especially after the ratification of the Civil War Amendments. Drawing from moral and political theory, history, and their recent experience in the states under the Articles of Confederation, they distrusted majorities almost as much as the king, which is why they wrote a constitution designed to preserve liberty and limit power. Not by accident, therefore, did it conclude with the Tenth Amendment, which makes it clear that Congress's powers are enumerated and therefore limited. And the Ninth Amendment—which together with the Tenth recapitulates the libertarian vision of the Declaration of Independence—makes it equally clear that we "retained" countless unenumerated rights, distinguishing none as "fundamental" or "nonfundamental." Consider finally that the Framers of the Civil War Amendments repaired repeatedly to that vision, made clear by the debates in the 39th Congress and the state ratification conventions, and you end with a vision of a polity animated by individual liberty under limited constitutional government.

It was, again, the Progressives and their progeny who rejected that vision, joined later by modern conservatives: Progressives because they rejected the Constitution itself, especially its plan for limited government (read Woodrow Wilson, among many others); conservatives of the Bork era because they chose to resist what they often saw as judicial activism basically on *political* grounds—more precisely, on an erroneous constitutional vision of wide majoritarianism and limited rights.

Nowhere did Bork more clearly state that vision than in his justly famous 1990 book, *The Tempting of America*. Madison, he wrote, held "that in *wide* areas of life majorities are entitled to rule, if they wish, simply because they are majorities; . . . there are nonetheless *some* things majorities must not do to minorities, *some* areas of life in which the individual must be free of majority rule" (emphasis added). That gets Madison exactly backwards. Madison held that in "wide areas" individuals are entitled to be free simply because they are born so

entitled, while in "some" areas majorities are entitled to rule, not because they are inherently so entitled, but because we have authorized them to. That gets the order right: individual liberty first, self-government second, as a means toward securing that liberty.

A Return to Madisonian Constitutionalism

But much has changed on the conservative side since Bork wrote those words. In particular, we have seen a slow revival of true constitutionalism: led by classical liberals and libertarians like those of us here at Cato's Center for Constitutional Studies, together with many in the legal academy; aired and tested at events through organizations like the Federalist Society and the Heritage Foundation; and litigated by the Institute for Justice, the Pacific Legal Foundation, and other free-market public-interest legal groups. Edwin Meese, attorney general under President Reagan, can be credited with bringing a more principled constitutionalism to the fore with his July 1985 ABA speech on originalism, prompting a response by Justice William Brennan a few months later. The debate thus joined, it was dominated early on by conservatives like Bork, but in the years since, libertarians, drawing on philosophical and historical work begun years earlier, have slowly shifted it back to First Principles, especially with an appeal to the natural rights foundations of the Declaration, the Constitution, and the Civil War Amendments.

As is often the case with ideological shifts, this evolution in constitutional thought on the right, whether in debates or in the courts, has been glacial, with fits and starts. Yet a substantial body of writings shows by now that the shift is real—so much so that it is now liberals, looking especially to the courts, who call conservatives "judicial activists." A more accurate term would be "judicial restorationists." Thus, early on, in 1995, in *United States v. Lopez*, the Court revived the doctrine of enumerated powers, which had lain dormant for 58 years. Finding that Congress's power to regulate interstate commerce was not a power to regulate any and everything, Chief Justice William Rehnquist wrote, "We start with first principles. The Constitution creates a Federal Government of enumerated powers." Long forgotten, those words appeared again in 2000 in *United States v. Morrison*, but then escaped the Court's grasp five years later in *Gonzales v. Raich*, the California medical marijuana decision, only to be revived in 2012 in *NFIB v. Sebelius*, the Obamacare decision. We are only at

the beginning of that restoration, however, and it has occurred thus far only at the edges, but at least the principle is back in play.

On the rights side, things have been uneven, and truer, unfortunately, to the earlier divide between conservatives and liberals. It is perilous to generalize here, but in general, in recent years, the Court's conservatives have protected enumerated rights rather better than the liberals have in areas like free speech (especially campaign finance), religious liberty, freedom of association (limits on affirmative action, for example), gun rights, property rights, and, unevenly, Fourth Amendment privacy rights. But on "social-issue" rights, which are mostly unenumerated, it is liberals who have generally done better, again if unevenly, as in *Lawrence v. Texas*, the 2003 same-sex sodomy decision, and *Obergefell v. Hodges*, the 2015 same-sex marriage decision that should have been decided easily on equal-protection grounds, from which the rights would have followed by implication. But except for Justice Clarence Thomas, the Court's conservatives treated *Obergefell* as a due-process case. That immersed them in a deeply mistaken discussion of "substantive due process" that included an unbridled attack on *Lochner* by Chief Justice John Roberts.

Fortunately, a number of judges coming along on the lower courts have had less difficulty incorporating in their decisions a truer understanding of the classical theory of rights that underpins and informs the Constitution, especially concerning unenumerated rights to both economic and personal liberty. They understand that one can be a textualist and an originalist and, *as a result*, be compelled to do the work needed to find retained unenumerated rights—a very different undertaking from that of earlier liberal judges who appealed simply to "evolving social values," thus conflating rights and values, two very different moral concepts. Those developments below constitute an important reason for hope, including hope for the confirmation of Judge Kavanaugh. For the generational shift that he and Justice Gorsuch reflect marks also the coming of judges and justices who, from an early age, have been immersed in the right's constitutional ferment.

And why is this important? It is because the Progressives who have dominated our constitutional world for more than a century now have unleashed the modern welfare state and the appetites for public goods and services that today are crushing us—and will crush coming generations even more. Put simply, we are demanding

more such goods than we are willing to pay for, so we borrow. The federal debt now exceeds $21 trillion and is growing, having more than doubled over the past decade, and unfunded liabilities vastly exceed that. In fewer than 20 years, our debt-to-GDP ratio has more than doubled, from 33 percent in 2000 to 78 percent today; it is projected to reach 100 percent in 10 years and continue rising thereafter. As history makes clear, this cannot go on.

The Federalist teaches that constitutions are written to discipline not only rulers but the ruled, we the people, but the limits they establish must be respected. Over the past century we took a number of wrong constitutional turns and today are reaping the results. The Court made those wrong turns, but we, ultimately, are responsible for them, because it is we who elect the people who nominate, confirm, and, at times, prevail upon the justices to make such turns. This far down the road, the Court alone cannot reverse the destructive course we have been on, but it can begin. And one place to begin is with the last of the three main steps the Court took that opened the door for the modern executive state. It is time to put teeth into the Constitution's first word: "*All* legislative Powers herein granted shall be vested *in a Congress*."

Fortunately, the records of both Justice Gorsuch and Judge Kavanaugh show them keen to rein in the excesses of the administrative state, to challenge the deference doctrines that have enabled that state to grow, and to return law-making power to Congress, where it should always have been kept. If this new generation can thus require Congress to take responsibility for the massive redistributive and regulatory state it has created and to start reining it in, we may be on the road to addressing the entitlements crisis looming ahead before it overwhelms us. It is time for the least dangerous branch to discipline the most dangerous branch and the executioner it empowered, for which the Constitution, properly understood, is the proper guide.

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Speaking of generational shifts, after publishing 17 volumes of the *Cato Supreme Court Review*, conceiving and creating Cato's Center for Constitutional Studies, which I've directed now for 30 years, and reaching the three-quarters mark on life's big clock, it's time for me to step down and hand the reins over to the next generation, which I'm delighted to do. When I discovered Ilya Shapiro some 11 years

ago and invited him to become a senior fellow with the Center and the editor-in-chief of the *Review*, it was with an eye to his becoming my successor. He has exceeded my hopes beyond anything I could have imagined. A prolific author and speaker, Ilya has, among much else, vastly expanded the quantity and quality of the Center's well-regarded amicus brief program and brought great credit to the Center. He will soon be named director of the Center and will be the publisher of next year's *Review*.

Stepping into Ilya's shoes as editor-in-chief of the *Review* will be current managing editor and research fellow, Trevor Burrus. He too is a prolific author and speaker when he is not co-hosting Cato's "Free Thoughts" podcast. Trevor came to us in 2010, first as an intern, then as a one-year legal associate, where we found him a polymath and so could not let him go.

My indebtedness over these years extends to many, but three individuals stand out. The *Review*'s first editor-in-chief, who played a major role in selecting everything from the authors to the Constitution Day speakers to the *Review*'s federalist color scheme, was the Lincoln scholar James Swanson, who left after two years to find the time to write his masterful *New York Times* best seller, *Manhunt*. James got the *Review* off the ground. I was fortunate to find a worthy successor, Mark Moller, who at Cambridge had studied the common law, on which so much of our work rests; alas, four year later we lost Mark to his dream job in the legal academy. It may be no accident that James did his B.A., Mark and Ilya their J.D.s, and I my Ph.D. at the University of Chicago, where "the life of the mind" is understood by all.

Finally, the Center, the Review, and the Constitution Day symposium would likely not have come into being were it not for Cato's co-founder and president emeritus, Ed Crane, who needed no encouragement to see the potential of the proposal for the Center that I put before him exactly 30 years ago, in September 1988. At the time, as I discussed above, two approaches to constitutional interpretation and the role of the courts pursuant to each dominated our jurisprudence, one liberal, the other conservative. A very few of us, like the late Professor Bernard Siegan, had long urged a more Madisonian approach, grounded in the nation's natural rights foundations, but our voices were then only beginning to be heard. We needed an institutional base, which Ed provided at the still young Cato Institute—and the rest, as they say, is history, and a good history it has been.