

FOREWORD: THE LAW OF POLITICS

CHRISTOPHER H. SCHROEDER*

Figuring out an acceptable relationship between law and politics has been one of the perennial preoccupations of both politicians and lawyers, and of political scientists and legal scholars as well. In a country in which it has long been the case that “scarcely any political question arises . . . that is not resolved, sooner or later, into a judicial question,” the way this question is answered has ramifications for many issues vital to the health of our society.¹

Viewed through a conventional lens, the relational issues of greatest concern about these two activities, politics and law, involve politics’ influence on law: how much is politics influencing law, whether that is a good thing, whether that influence can be avoided and whether the political preferences of the judges rather than some quasi-autonomous methodology of legal reasoning determine legal outcomes.

One recurring worry is that politics will have too much influence on legal outcomes. A central ambition of the rule of law has been to insulate legal decisions from political pressures. Creating the social expectations that courts of law ought to make decisions without regard to the social status or political power of the litigants was one of the great developments in the history of Anglo-Saxon jurisprudence.² Law “ought to ignore the social status of individuals and also to ignore their political role, unless their ability to perform that role itself requires some legal exemption.”³

This is a commitment that is never quite fulfilled, however. In the past thirty years, we have witnessed a number of high-profile battles over Supreme Court nominees, in which traditional political battle lines were drawn up over the nomination, leaving plenty of room for the inference that the leaders in our political parties thought there was something political at stake in the decisions about whom to place on the highest court in the land. The high water mark in the politicization of Supreme Court nominations, if that is the appropriate image, was the 1986 nomination of Robert Bork.⁴ Soon thereafter, Clarence Thomas’s nomination put the politically volatile issues of race and gender poli-

Copyright © 2002 by Christopher H. Schroeder

This article is also available at <http://www.law.duke.edu/journals/65LCPForeword>.

* Professor of Law and Public Policy Studies, Duke University.

1. ALEXIS DE TOCQUEVILLE, *I DEMOCRACY IN AMERICA* 280 (Vintage Edition 1945, reprinted 1990).

2. For a selective rendition of the story of this accomplishment, see DON HERZOG, *HAPPY SLAVES* 110-47 (1989).

3. *Id.* at 132.

4. See MARK GITENSTEIN, *MATTERS OF PRINCIPLE* (1992) (recounting the political battles of the Bork nomination, while also showing that issues of legal principle were also central to the fight over that nomination).

tics at center stage in another confirmation battle. Subsequent to Justice Thomas's confirmation on a nearly straight party line vote of 52-48,⁵ the political rhetoric surrounding Supreme Court nominations has been somewhat toned down, but few doubt that the political parties consistently favor candidates with distinctly different outlooks on hotly disputed social issues, including affirmative action, a woman's right to choose, school vouchers, the separation of church and state, and the scope of federal power.

A major reason that political parties—and all people who care about public policy—are intensely interested in who sits on the Supreme Court is, of course, that legal decisions can have great influence on the effectuation or frustration of political objectives. Many an important political question does not just become “resolved, sooner or later, into a judicial question;” the judicial answer can go a long way to resolving the political question, either by taking some previously available policy option off the table, or by altering the ease with which options can be achieved or even by altering the political status quo itself.

The importance of law in our society, combined with the commitment to strive for a legal system that is at least to a degree insulated from politics, clearly makes the influence of politics on law worthy of continual scrutiny. Noticing the capacity of law to influence politics and policymaking also suggests that scrutinizing the relationship between the two activities from the opposite perspective also merits some of our time. On October 11 and 12, 2001, the Program in Public Law at Duke Law School convened its third annual public law conference on the topic of the Law of Politics. Its central idea was to reverse the lens through which politics and law are commonly viewed, and to try to extend our understanding of some of the dimensions of law's influence on politics.

The conference was held in the looming shadow of the events of September 11, 2001, but it was also held in the longer, even if less dark, shadow cast by the decision in *Bush v. Gore*.⁶ Nowhere could anyone find a better example of how law can directly affect politics. By effectively halting the recount in Florida, the Court's decision cast Florida's twenty-five electoral votes for George W. Bush, giving him a majority of the electors—and the presidency. Historians and scholars will long debate whether that result accorded with the “actual” totals of votes cast, or with the “actual” intentions of the voters of Florida, but no reconstruction of ballots or voters intentions can ever change the fact that, at the time the Court rendered its decision, no one knew what the outcome of the recount procedures would have been, no one knew what Congress would have decided had there been a ballot challenge during the special session convened to count the votes, and all knew that the judicial decision in that case raised the probability of George W. Bush becoming president from something less than one hundred percent to a certainty.

5. R.W. Apple, *The Thomas Confirmation*, NEW YORK TIMES, October 16, 1991, at A1 (41 of 43 Republicans voted to confirm; 46 of 57 Democrats voted to reject the nomination).

6. 531 U.S. 98 (2000).

Sanford Levinson undertakes an analysis of the decision in a paper that was also delivered as Duke Law School's Currie Lecture.⁷ Convinced that the "opinions offered to justify the decision to halt the Florida recount are grievously mistaken as standard-form exercises in legal analysis,"⁸ Levinson sets out to understand the conditions that produced the result as well as some of its consequences. Using the term "law" to refer to the results of quasi-autonomous legal reasoning, Levinson concludes that one lesson from the decision is that "law" is much less important in controlling politics than we might think. Here the crucial distinction is between "law" in the sense in which Levinson employs it, and "law" in the sense of the output of legal institutions such as the Supreme Court. For Levinson, the lesson that the first kind of law cannot explain *Bush v. Gore* counts as a reason to try to diminish the influence of law in the latter sense. With our constitutional culture the institution of the Court has become too central to constitutionalism, Levinson claims, and we ought to reclaim for other, non-judicial institutions more important roles in generating constitutional meaning. Others have begun to urge this course of action as well.⁹

Levinson understands *Bush v. Gore* as something more than justices just voting to elect their preferred candidate, however. From an institutional perspective, Levinson argues, the majority could anticipate that, at worst, the public would be as divided in its opinion on the outcome as it was at the polls in November, when Bush and Gore finished in the functional equivalent of a dead heat. What is more, the decision would generate many institutional friends: the president himself, of course, and the House and Senate Republicans as well, both for the result and for relieving the Congress of having to make the decisive choices when counting the ballots in January, had the Court not intervened.¹⁰ "[C]onsiderations of judicial power," he concludes, "strongly counseled doing exactly what the Court did."¹¹

By focusing some of his attention on the institutional context within which the Court acted, Levinson anticipates a topic probed directly by John Ferejohn. Ferejohn first documents the manner in which legal institutions are deciding more and more legislative-type questions in many governments throughout the world. Ferejohn wants to understand better what conditions have produced this "profound power shift," whereby "courts have been increasingly able and willing to limit and regulate the exercise of parliamentary authority by imposing substantive limits on the power of legislative institutions . . . have increasingly

7. Sanford Levinson, *Bush v. Gore and the French Revolution: A Tentative List of Some Early Lessons*, 65 *Law & Contemp. Probs.* 7 (2002).

8. *Id.* at 104.

9. E.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Mark Tushnet, *Non-Judicial Constitutional Review* (manuscript on file with the author).

10. Levinson, *supra* note 7, at 121-24.

11. *Id.* at 129.

become places where substantive policy is made [and] . . . have been increasingly willing to regulate the conduct of political activity itself.”¹²

Ferejohn argues that institutional factors have an importance that has been overlooked in explaining the power shift. Quite independently of the political ideologies being pursued, courts tend to increase in their power to constrain legislatures, shape policy outcomes, and regulate the political process itself to the degree that the opposing institutions are fragmented and lack the ability to mount a coordinated opposition. A second reason, related to the first, comes from the courts’ willingness to protect a “wide range of values from political abuse,” in other words, their ability to protect people’s rights. Fragmentation contributes to the inability of the other branches of government to act constructively, creating the opening for court initiatives. The success of those initiatives then contributes to public receptivity to court leadership on rights, helping to solidify the power shift.¹³

This last point is largely implicit in Ferejohn’s analysis, which is focused on the conditions under which the judiciary will be in a position to produce or supply the kinds of “judicialization” of politics which he examines. Cornell Clayton’s article examines where the demand for such judicialization originates.¹⁴ Clayton does not see the power shift which Ferejohn identifies as necessarily antithetical to democratic values, because, in his view, the Court is largely giving the American people what they want. Opinions by the Rehnquist Court that are hotly contested in the legal academy are, in Clayton’s view, “squarely within the mainstream of contemporary political values and electoral preferences.”¹⁵ In area after area, such as federalism, welfare rights, and abortion, the Court’s results “track the general direction of the elected branches or democratic opinion more generally.”¹⁶ *Bush v. Gore* itself may have been dramatic, but the result can scarcely be thought radical—in an election in which the two candidates fought to a statistical dead heat, both candidates had some claim to victory.

Given Clayton’s view that much of the Court’s work is within the political mainstream, it is less clear that the judicialization process presents a threat to democracy. “Whether the shifting of policymaking into courts . . . is democratically desirable or undesirable may have less to do with the decision-making processes of different institutions than with the substantive policy outcomes involved.”¹⁷ To the extent it is a threat to democracy, both Ferejohn and Clayton

12. John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 Law & Contemp. Probs. 41, 41 (2002).

13. *Id.* at 55-60.

14. Cornell Clayton, *The Supply and Demand Sides of Judicial Policy-Making (Or, Why Be So Positive About the Judicialization of Politics?)*, 65 Law & Contemp. Probs. 69 (2002).

15. *Id.* at 83. Clayton’s article focuses on the American system, while Ferejohn draws on examples from other nations as well.

16. *Id.* at 84.

17. *Id.* at 81.

make recommendations as to what the political side of our governance structures might do to reclaim some of the policy-making role.

My own contribution to this volume sees a different problem law may be posing for politics.¹⁸ Deliberative democracy is one of the most discussed contemporary political theories. I argue that its central claim can be understood as the claim that politics needs to become more like law. Three central elements of the rule of law are the aspiration that justice be blind to political or status influence, that decisions be based on reasoned argument, and that only facts and arguments relevant to the decision being made be allowed to play a role in that argument. In this vein, John Rawls has argued that the Supreme Court ought to be the exemplar of the kind of decision processes that should be used to reach political decisions, and other deliberativists like Amy Gutmann and Dennis Thompson share that conception. That conception presents an aspirational model of legislative deliberation that is markedly different from the pluralist models that played a large role in political theory just forty to fifty years ago. The question of whether this is a sound model has relevance well beyond the academy, because the obvious inability of elected officials to meet a standard of principled deliberation seems to be a contributing factor in public cynicism toward politics.

Reacting to the presence of special interest influence in the political arena, deliberative theory argues that politics should adopt these law-like characteristics. I nonetheless argue that deliberative theory serves poorly as a theory of politics. While specific recommendations to make specific decision processes more deliberative are fair, the attempt to efface the distinctively non-lawlike attributes of politics entirely cannot withstand scrutiny. While this means that politics will remain at least partially non-deliberative in its decisional procedures, that result is more justified than equating the two modes of decision-making.

Arthur Lupia's contribution both follows and diverges from my own.¹⁹ Lupia agrees that the suggestions of deliberativists to incorporate more and more law-like precepts into politics will not achieve the ultimate ambition of deliberative theory, which is to have the resolution of disputes turn on nothing but "the force of the better argument."²⁰ There are, however, means to improve the civic competence of citizens, to develop "competence-generating mechanisms [that] advantage the force of the better argument."²¹ Drawing on economics and the cognitive sciences, Lupia undertakes to show "why, when, and how one person can persuade another to change his or her ideas."²² Understanding this then permits one to turn to building mechanisms that improve civic competence, by

18. Christopher Schroeder, *Deliberative Democracy's Attempt to Turn Politics Into Law*, 65 *Law & Contemp. Probs.* 95 (2002).

19. Arthur Lupia, *Deliberation Disconnected: What It Takes to Improve Civic Competence*, 65 *Law & Contemp. Probs.* 133 (2002).

20. *Id.* at 136.

21. *Id.* at 145.

22. *Id.*

creating conditions in which the better argument has an improved chance of winning three battles: the battle for attention, the battle for memory, and the battle at the precipice of choice.²³ Lupia's analysis thus strikes out in a constructive direction, and one that deliberative theory may wish to endorse—not because it vindicates their description of politics as law, but because it may show the way to accomplishing what they ultimately wish, improving the quality of public decisions.

The essays in this volume scarcely exhaust the ways in which one might explore the influence that law is having on politics. They open up many avenues for further exploration, while making their own contributions to those efforts.

23. *Id.* at 145-46.