

## ENNOBLING POLITICS



*Robin West*

*As Robin West tells us in this essay, a great deal of constitutional scholarship in the past half century has proceeded on a set of related assumptions: that the processes of democracy are unruly, irrational, inherently subject to corruption, and just plain inelegant; and that the processes of law, especially constitutional law, can, in the right hands at least, be orderly, rational, incorruptible, and highly elegant. We scholars and judges, if we are of the proper persuasion, are priests in this civic religion, the center of which is what West calls an “adjudicated constitution,” a constitution, that is, which lives through lawsuits and judicial opinions.*

*In this essay, West challenges these assumptions.*

*Even in its own terms the traditional view addresses only the active wrongs of the government, not its inaction, and the abandonment of responsibility by the government is as serious an issue today as its violations of established rights. Moreover, the adjudicated constitution cannot effectively regulate the processes of politics; what is needed is not a removal from politics but an engagement in politics—and an engagement that uses the Constitution not just as a set of rules limiting what the government can do but as a set of principles and values that can guide the government when it is acting, or refusing to act, beyond the zone of any possible adjudication. How such a politics might be imagined is West’s subject here.*

Over the last half century, we American lawyers have been congenitally worried, sometimes alarmed, and occasionally frightened out of our very skins by the specter of democratic politics, both our own and others: the faux democracies that might spawn global fascism, communism, and terrorism to be sure, but also our homegrown and at least somewhat genuinely majoritarian deliberations. That lawyerly concern has not been without good reason. Democratic deliberations in the past century have notoriously reflected as well as entrenched a vicious race hatred that poisoned do-

mestic life for generations of Americans, the beginnings of a cure for which came not through democratic process but through Supreme Court action.<sup>1</sup> In just the first decade of this new century, democratic deliberations have yielded the Patriot Act,<sup>2</sup> a military commissions act,<sup>3</sup> and amendments to various surveillance acts<sup>4</sup> that collectively strip us all of individual rights; have paved the way for calamitous and ill-considered foreign policies;<sup>5</sup> have prompted sanctimonious exercises that gratuitously offend religious minorities or nonbelievers;<sup>6</sup> have cruelly extended the life of a severely disabled and long-unconscious individual for no earthly reason;<sup>7</sup> and have expended precious resources on foolish projects to nowhere that do nothing to promote anyone's conception of the public good.<sup>8</sup> Even democratically pristine political will, we lawyers fear, can be rooted in fanaticism, greed, fury, or calculated self-interest; can inspire clannish loyalties that prove genocidal; can sow familial fellow feelings of community and shared identity that prove to be the stuff of fascism; can give voice to a purported generosity that masks authoritarianism; can take the shape of a concern for well-being that is in fact contempt for the individual's self-sovereignty. The problem with ordinary do-it-by-voting democracy is not, American lawyers of the past half century might be read as collectively proclaiming, that of which John S. Mill and other sympathetic liberal critics of majoritarianism warned: the mediocrity of the minds of the undistinguished mass.<sup>9</sup> The problem, as increasingly assumed as gospel by the constitutional dogma we are carrying from the last century into this one, is that politics itself is a debased, ignoble endeavor that elicits our worst instincts. The political animal within must be stopped.

So, stop it we do, or try to. The framers of our Constitution famously worried as well over the political animal and designed a familiar political structure they thought might tame it.<sup>10</sup> Equal state representation in the Senate would put that institution at odds with rank majoritarianism; separation of the powers of enforcement and legislation would counter ambition with ambition; power shared, dispersed, limited, and divided between state and national governors would create political competitions that would ultimately further the common good. Not content, however, with those quaintly hardwired political safeguards, constitutional lawyers have done Madison and company one better: we stop the political animal dead in his tracks with the full force and rhetoric of constitutional law. That is a very different thing. The Constitution, as employed and deployed by American lawyers and courts from Justice Marshall's time to our own, is

not simply a blueprint of good governance for a nation cautious about political ambition. Rather, the Constitution is a source of law, the very point of which is to counter the political impulse with a legal one and at times negate the fruit of politics with the power of a legal pronouncement.

Stopping malignant politics with benign law—curbing the excesses of the dangerous branches with the words, the collaborative thought, the collective wisdom, and the judicial good reason of the least dangerous—has long seemed, to American lawyers, to be the most felicitous way to honor the spirit of Simone Weil’s<sup>11</sup> and now Jim White’s<sup>12</sup> pressing moral demand: that if we wish to live lovingly and justly, we must find a way to disrespect the destructive instincts and disastrous policies of the world’s empires of force, including the one in which we all live and work. Lawyers collectively answer Weil and White that here in America, we counter our “empire of force” with judicially created constitutional law. We do not just counter ambition with ambition—rather, we counter the whole mess with reasoned law. When lawyers voice a worry over the adequacy of our legal response to the empire of force, it is likely to be the worry that—for various reasons—our constitutional response is not sufficiently robust to meet the dangers posed by an overreaching, dangerous, voracious political state. Perhaps the Supreme Court has been politically co-opted and has lost its claim to neutrality. Or perhaps the legal commands of the Constitution themselves are not sufficiently clear. Perhaps conditions have changed such that amendments are in order; maybe the legal apparatus with which we counter the political has grown creaky or dysfunctional. For any of these reasons and plenty of others, the legal, constitutional, reasoned response to the state’s overreaching, intrusive, destructive political inclinations might not be adequate. If so, then we will have reached a dangerous imbalance in the relation of force to reason, of politics to law, and of the political to the judicious animal, both in our governing constitution and in our human souls. If any of this is true, then we lawyers need to turn our attention pronto to the dangerously overreaching political state. The best way to do that—maybe the only way, or at any rate, the way American lawyers instinctively explore—is through revitalizing our constitutional culture. The papers prepared for the conference that produced this book sought in large part to do just that.

I do not wish to disagree with White and Weil that we are right to fear what they call the empire of force or that it is imperative that we learn how not to respect it, if we are to live lovingly and justly. I also do not disagree