Debate on Thomas ignores natural law

by Edward Spannaus

The nomination of Clarence Thomas to the U.S. Supreme Court has provoked a brawling and sometimes interesting debate over what kind of judge Thomas will be. But it has avoided the real issue: whether the William Rehnquist-dominated Court has left us any Constitution to interpret.

Liberals, exemplified by Prof. Lawrence Tribe of Harvard, are climbing the walls. In a July 15 commentary in the *New York Times* entitled " 'Natural Law' and the Nominee," Tribe warns that Thomas's "adherence to 'natural law' as a judicial philosophy could take the court in an even more troubling direction than it's going right now." Tribe then notes, correctly, that Thomas is the first Supreme Court nominee in 50 years "who believes that natural law should be readily consulted as a guide to constitutional interpretation."

In reaction, so-called conservatives are praising Thomas in the hope that he will bolster the Rehnquist majority on the Court. Both sides of the "liberal-conservative" debate are characterized by an appalling ignorance of the natural law foundations of the Constitution.

Rehnquist's police state

In the name of Rehnquist's phony "conservatism," the Supreme Court has been tearing the Constitution to shreds. A "conservative" is allegedly someone who has some respect for our nation's traditions. But Rehnquist's judicial philosophy is explicitly hostile to the outlook which gave rise to the Declaration of Independence and the Constitution. He is an avowed Hobbesian, who believes that the government can do no wrong, and that the citizen has no rights that the government is bound to respect. Hobbes's—and Rehnquist's—outlook was adamantly rejected by the Founding Fathers and the framers of the Constitution.

From this standpoint, it is clear why Rehnquist has led the charge in virtually writing the Fourth, Fifth, Sixth, and Eighth Amendments, and *habeas corpus*, out of the Constitution. Those amendments were enacted by the generation of the American Revolution because they realized how a tyrannical government could use criminal laws and procedures to suppress the liberties of the people. That generation believed that there is a higher law above all written law, and that the Constitution reflected the natural and inalienable rights of man which the state was morally and legally bound to respect.

Rehnquist has explicitly and repeatedly denied the existence of natural law and natural rights, expressing the view that law has nothing to do with morality, and that moral notions only have force by virtue of their having been enacted as positive law by the majority. Rehnquist ridicules any notion that the Supreme Court should be the "conscience" of the nation, or that the Court should defend the rights of citizens against the majority as expressed by actions of the Executive or Legislative Branch.

Thomas versus Rehnquist

Thomas has expressed a fundamentally different philosophical view. Whether this would have any practical effect on Thomas's rulings as a judge, particularly on police-state issues, remains to be seen.

In articles published in 1987 and 1989, Thomas argued that natural law and natural rights arguments are the best defense of liberty, and that reason, not the passions of the majority, ought to control the actions of the government. In respect to the Fourteenth Amendment, Thomas argued that the rights protected therein—life, liberty, and property—are inalienable rights, given to man by his Creator. (This already puts Thomas on the other side of the fence from Rehnquist.)

Thomas's arguments on the 1954 *Brown v. Board of Education* desegregation decision have been widely and deliberately distorted. What Thomas contends is not that the decision was wrong, but that the grounds on which it was decided were wrong. The ruling was based on Dr. Kenneth Clark's notions of the "sense of inferiority" created by segregation. This, argues Thomas, overlooked the real problem of segregation: that it originated with slavery, and that it is at fundamental odds with our nation's founding principles. "Justice and conformity to the Constitution, not 'sensitivity,' should be the object in race relations," wrote Thomas. He continued:

"Brown was a missed opportunity. . . . Our task is to turn policy toward reason rather than sentiment, toward justice rather than sensitivity, toward freedom rather than dependence . . . in other words, toward the spirit of the founding. These steps would validate the Warren [Court] opinion with one resting on reason and moral and political principles, as established in the Constitution and the Declaration of Independence, rather than feelings."

To approach the matter this way, says Thomas, "poses a major alternative to the cynical rejection of 'the laws of nature and nature's God' from jurisprudence."

No one, except maybe Hugo Black, has been more cynical in his rejection of natural law than Rehnquist. But whether Thomas will reject Rehnquist's outlook and his police-state jurisprudence is an open question. Thomas's rulings to date on the Court of Appeals show little indication of independent thinking or willingness to buck the majority.