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CONSTITUTING POLITICS AND THE POLITICAL CONSTITUTION

Leslie Friedman Goldstein*

MARK TUSHNET, *WHY THE CONSTITUTION MATTERS* (Yale Univ. Press 2010). Pp. 208. Cloth. \$25.00. Paperback. \$16.00.

JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (Harvard Univ. Press 2011). Pp. 304. Hardcover. \$35.00.

In the last couple of decades, the legal academy produced a spate of books arguing that the U.S. Supreme Court should not have a monopoly on determining the meaning of the U.S. Constitution.¹ I presume that what stimulated these populist-constitutionalist works was a growing awareness on the part of liberal academics that not much in the way of progressive, or even admirable, decision-making was likely to come soon. This is due to a U.S. Supreme Court dominated by a combination of nominees of Republican presidents and those who, even if nominated by a Democratic President, had to pass through Senates laden with filibuster-happy and ideologically homogeneous Republicans.²

These two recent books, from the pens of professors at Harvard and Yale Law Schools, take a somewhat different tack. Instead, both emphasize and build upon the indisputable fact that popular political and social movements have shaped the interpretation of the U.S. Constitution, over time altering its meaning (as a matter of its legal force, or what Balkin calls “the Constitution-in-practice”).³ To offer just one extended example: From almost the minute that the Fourteenth Amendment was ratified (1868) and continuing long after the Fifteenth was ratified (1870), the white South rose up in arms to keep both white Republican allies of blacks and black voters themselves from the polls by terroristic intimidation. Black voters were permitted to vote for new state constitutions under the Congressionally-imposed rules of military Reconstruction, then by these constitutions, and later the Fifteenth Amendment). Yet for almost a

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1. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 130-31 (2004); RICHARD D. PARKER, “HERE, THE PEOPLE RULE”: A CONSTITUTIONAL POPULIST MANIFESTO 71-72 (1994); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 6 (1999); JEREMY WALDRON, *LAW AND DISAGREEMENT* 289-91 (1999). *See also*, Michael J. Klarman, *What’s So Great About Constitutionalism?*, 93 *Nw. U. L. REV.* 145, 146-48 (1998). I have seen no such books or articles since Barack Obama won the Presidency.

2. *See* MARK TUSHNET, *WHY THE CONSTITUTION MATTERS* 13-16 (2010). The Tushnet book reviewed here insightfully suggests a causal link between ideological cohesion and propensity to filibuster.

3. JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 2 (2011).

century after the Civil War ended, as to Southern blacks, neither “equal protection of the laws” nor “free and fair elections” reigned outside of the immediate vicinity of where federal troops might be stationed.⁴ Instead, Southern blacks were subjected to the rule of largely unconstrained lynch law, and by the 1890s, almost total electoral exclusion and de jure segregation of public life.⁵ Not until the Second Reconstruction, pushed by the civil rights movement of the nineteen fifties and nineteen sixties, were black voting rights secured in the American South and white assaults against blacks fairly prosecuted. Both of these were accomplished only by dint of federal enforcement efforts. *Brown v. Board of Education*⁶ (1954) came about in large part because of a decades-long campaign of litigation lobbying by the NAACP. This, in turn, stimulated by its encouraging message a continuing civil rights movement that took place via lobbying, by groups like the NAACP and Urban League, of the President and Congress; further litigation campaigns; street protests and marches by groups like CORE, the SCLC, and SNCC; and electoral efforts, which could be influential because after the Great Migration blacks formed concentrated voting blocs in major Northern cities. Congress, led by President Lyndon Johnson, enacted the Civil Rights Act of 1964,⁷ the Voting Rights Act of 1965,⁸ and the Open Housing Act of 1968.⁹ Eventually, Americans witnessed from the U.S. Supreme Court all of the following: the upholding of court-ordered positive measures to integrate formerly de jure segregated schools (1968);¹⁰ the striking down, as a barrier to the required desegregation, of a state law that mandated racially neutral school assignments in the formerly segregated South (1971);¹¹ the upholding, (and implicitly the requiring, where appropriate) of court-ordered busing for desegregation

4. Referring to the Fourteenth Amendment phrase of “equal protection of the laws” and the modern catchphrase for representative government of “free and fair elections.” U.S. CONST. amend. XIV, § 1.

5. The degree of black disenfranchisement became far more severe when the white South was able to move from the technique of sporadic violent intimidation of the 1860s-1880s to systematically racially-biased enforcement of exclusionary suffrage laws from the 1890s on. J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910* (1974).

6. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

7. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. This act prohibited racial, religious, ethnic, or sex-based discrimination in hiring in any enterprise operating in interstate commerce; or among the customers in public accommodations (hotels, restaurants, gas stations) doing the same; and it cut off federal funds for any program that practiced racial, religious or ethnic discrimination, the latter which effectively pushed school desegregation, because the Elementary and Secondary School Advancement Act (ESSAA) of the same year provided federal financial assistance to public schools for the first time. In 1971 (pushed by the Women’s Movement) Congress extended the funding cut-off to school and college programs (including, most prominently athletics) that discriminated on the basis of sex (but excluding traditionally single-sex schools).

8. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1(2006)). This act outlawed the use of literacy tests to exclude from voting anyone who had finished sixth grade in an American school, sent federal officials all over the South to eliminate the prior, blatant racial discrimination in enforcement of voting laws, and banned southern restructuring of voting laws without pre-approval of the federal government to assure non-discriminatory impact. The number of black voters in the former Confederacy doubled from 1964 to 1968 (1.5 million to 3 million).

9. Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3631 (2006)). This law prohibited racial discrimination in the rental or sale of housing except for owner-occupied buildings with four or fewer rental units (the “Mrs. Murphy’s boarding house exclusion” in Congressional parlance of the day).

10. *Green v. County. Sch. Bd.*, 391 U.S. 430 (1968).

11. *N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971).

(1971);¹² and a ruling upholding the federal government's affirmative racial quota system to undo traditional patterns of segregation in contracting in the construction industry (1980).¹³ These were then followed by counter-moves: rulings that governmental affirmative action programs must meet the strict scrutiny test (i.e. disapproving of them, in 1989 and 1995),¹⁴ and a holding of unconstitutionality for voluntary efforts on the part of regularly elected school boards to maintain racially integrated schools via school assignments that take into account the race of pupils (2007).¹⁵ Throughout this time, after the Fifteenth Amendment (1870), the Constitution underwent no relevant formal amendment other than a ban on poll taxes in federal elections,¹⁶ yet the U.S. Supreme Court claimed to be applying in this period its un-amended meaning. Obviously, something changed.

Constitutional law professors, as Balkin and Tushnet are, can string out similar twisty-turny examples of doctrinal development in numerous subject matter areas, ranging from federalism to economic regulation, to women's equal protection rights to sexual privacy. While these books do not contain all of the specific details just enumerated, they could both be described as extended meditations on the Political Constitution, i.e. the Constitution that politics makes and that in turn shapes politics. How then can an informed person possibly believe that the Constitutional text and/or a politically independent federal judiciary restrains abuses of governmental power after observing these plainly political alterations of the Constitution-in-practice? The answer from these two professors is that one cannot. One must acknowledge that, at any given moment, the Constitution is a product of politics, but must also be aware that the Constitution itself shapes politics.

The Tushnet volume focuses upon the latter claim, insisting that the Constitution matters most in the ways that it creates and sustains a representative democracy that institutionalizes policy-making powers for elected officials. They in turn check and are checked by the power of other officials, all elected either directly (Congressmembers and state government officials) or indirectly (originally Senators, and to this day, the President and federal judges). In other words, the]

Constitution matters most by creating a representative democracy modified by the traditional system of checks and balances, separation of powers, and federalism.¹⁷ The reason the creation of this system matters most, according to Tushnet, is that most of the important public policies in the U.S. come from elected legislative and executive branches (and in modern times, increasingly from the federal government), not from courts.

12. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

13. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

14. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (dealing with a local government program under the Fourteenth Amendment); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (dealing with a federal government program under the Fifth Amendment).

15. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

16. U.S. CONST. amend. XXIV, § 1.

17. The latter divides powers between state and national government; moreover, in some judicial eras, federal power works to check state power, and in others the two mutually check each other ("dual federalism").

His thesis covers not only those policies typically thought of as legislative — tax policy, education policy, health policy, defense policy, etc. — but also what might be called “rights policies.” Americans have strong views about what they consider their fundamental rights, such that a Supreme Court decision professing to “determine” the contours of these rights (e.g., speech, press, gun possession, abortion) will not be the final word. Instead it is merely a part of an ongoing dialogue with the “political” branches, who in the end decide who gets to serve on the Court to produce the latest instantiation of the “last word” on the subject.¹⁸ In addition, in the final analysis, voters both determine who will fill those political branches and themselves join and fund the myriad of interest groups that influence those governmental officials. Since in the long run it is politics that shapes constitutional outcome,¹⁹ what the Supreme Court does to shape or constitute the structures or processes of politics matters more than what it says about rights directly (according to Tushnet, chapters one and two).

Mark Tushnet is a fine and prodigious scholar. The books he has authored or edited since 2005 (to pick a random date) number thirteen. This one is a small book and, for me, not his most enlightening. By contrast, I have found illuminating and informative his ventures into the field of comparative constitutionalism.²⁰ Roughly the length of a sizable law review article and printed in nicely large-ish, well-spaced font on thick paper in a hardback priced at \$25 and with no footnotes, this book appears to aim for the educated adult general audience. Political science professors who teach undergraduate courses in constitutional law typically also are assigned to teach (at least for many years) courses that introduce students to American Government. For us, the first third or so of this book is a (not-news) recap of things we have been saying for years.²¹ Perhaps the volume can function, however, as a useful corrective for law students and attorneys who did not major in political science (i.e., the vast majority of them) and whose nourishment in constitutional law comes only from the clips of judicial opinions, law review articles, and historic documents that they are fed in casebooks. This book provides a look at the political context of major public policies in the U.S. The context, Tushnet’s book points out, is shaped in important ways, although far from exclusively, by the Constitution. His compressed analysis, as an amateur political scientist, of the structure and processes of American Government is not bad. Like Keith Whittington, he builds on the work of Stephen Skowronek, which in turn builds on V.O. Key’s classic article, “A Theory of Critical Elections.”²² The book’s small flaws tend to be those of omission. For instance,

18. This dialogue idea originated, so far as I know, with the late Alexander Bickel, who termed judicial review a “colloquy with other institutions of government.” ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 70-71 (Yale Univ. Press, 2nd ed. 1986).

19. Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957) (famously advancing this argument).

20. E.g., MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008).

21. Perhaps this is intentional; Tushnet may hope that this book will be assigned as a supplemental text in Intro to American Government classes, whose enrollments nationally number in tens of thousands at least. Its appeal would be limited to the most challenging colleges; at most colleges, professors are hard-pressed to lure students into reading even the whole textbook or the assigned portions of it.

22. All three are political scientists. STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH* (1993); KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL*

whereas he notes the unifying effect of gubernatorial elections to create state-wide rather than merely local political parties, he neglects the more important but similar point: We have two relatively unified national political parties (rather than a group of state-based ones) because the Constitution specifies that there will be a jointly elected national office, the Presidency & Vice-Presidency.²³ The Presidency-with-Vice-Presidency is the only nationally elected office, the only one that answers to a national constituency.

In terms of Tushnet's fundamental claim, viz., that the Constitution and Supreme Court matter more for the way they structure politics than for the rights they secure, one wants to ask "Compared to what?" Sure, the Constitution gives us a system better than a military dictatorship, hereditary monarch, or hereditary oligarchy; and yes, this matters. But it also gives us a system where the government is forbidden to silence its critics, impose general searches, or forbid the right to trial by jury. American political culture makes it unthinkable that Congress would attempt a blanket system of any of these; This culture is nurtured and refreshed by the stream of Supreme Court decisions that uphold rights. While most Americans do not read court opinions, they read or hear about them from opinion molders who do. Thusly, rights consciousness is nourished in America.²⁴

Jack Balkin's book, too, offers a meditation on the depth of division of opinion over fundamental rights in the U.S. His is longer, richer, and more thought-provoking than Tushnet's short piece. As "Constituting Politics" would be a fitting subtitle to Tushnet's volume, "The Political Constitution" aptly describes Balkin's. Balkin does go into somewhat more detail (of the two) over the ways that various political movements have succeeded in shaping the Constitution in one or another policy direction, only to encounter eventual pushback from a counter movement (as with the civil rights description above). But his book is more concerned with both promoting and trying to understand aspirational thinking about the Constitution.

He depicts the Declaration of Independence as having set forth promises or pledges of a society where all are equally secured in their rights to life, liberty, and the pursuit of happiness. America's three Constitutions (The Articles of Confederation, the 1787-89 Constitution, and the post-bellum Constitution), as well as the reforms of the New Deal, have all, he suggests, been steps toward redeeming those promises. Constitutional redemption for Balkin requires not vicarious atonement through a noble sacrifice of a third party (as in the story of Jesus) but rather faith — in the form of sustained belief that

SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2007); V. O. Key, Jr., *A Theory of Critical Elections*, 17 J. POL. 3 (1955). Tushnet does not mention Key.

23. The Framers, as he notes, imagined no parties but simply meetings at the state level of the voter-selected electors, who would then cast their votes for President, choosing from among national notables with whom they would have some level of acquaintance. TUSHNET, *supra* note 2, at 28-29. This never happened. As soon as organized opposition from the Jeffersonians developed against George Washington's supporters (Federalists), the choosing of electors became structured by the two national political parties in what has ever since been, for all practical purposes, a national election.

24. See MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994); Justin Driver, *Why Law Should Lead*, THE NEW REPUBLIC (April 2, 2010, 12:00 AM), <http://www.tnr.com/article/books-and-arts/why-law-should-lead>. But for a contrasting argument see GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (presenting a forerunner of Tushnet's argument: political movements do more to create and enforce rights than federal court decisions can do).

the constitutional system is capable of continuing progress toward fulfilling the promises of the Declaration — and good works — in the form of political and social movement activity.

Both books stress that political movements create the Constitution, in the directly political ways on which Tushnet focuses, but social movements do so as well by changing people's thinking about which constitutional arguments fit within the range of the legally plausible. Thus, a constitutional argument called "facetious" in a majority opinion in 1986 (in *Bowers v. Hardwick*²⁵) is incorporated into the thinking of the Supreme Court majority opinion in 2003 (*Lawrence v. Texas*²⁶) after seventeen more years of the gay rights movement.²⁷

The fact that Americans divide intensely over what they consider their fundamental rights is, Balkin explains, the reason that the U.S. Constitution is, and always will be, in need of "redemption." It is always some version of a compromise between contending political forces. Thus, some group is always disappointed in its hopes. From their point of view, the Constitution always needs further redemption or, as Balkin puts it, "is fallen."²⁸ On the other hand, the Constitutional project needs to retain their faith that it CAN ultimately be redeemed, taking Americans into a better future. It retains this faith, paradoxically, by remaining a project in need of redemption. The Constitution cannot give TOTAL satisfaction to one or another contending side, because if it did it would lose the loyalty of the other side, causing secession or societal breakdown. Each side must win enough to want to stay in the game, to retain hope for a better future. This maintaining of constitutional faith in the minds of the contending sides is what creates and sustains constitutional legitimacy.

Both of these books pay tribute to some of Sandy Levinson's enduring and important contributions to constitutional scholarship. Tushnet's book focused explicitly on Levinson in analyzing the troubling aspect of the hard-wired Constitution and its potential reforms (chapter three).²⁹ In general, Tushnet is less than optimistic about Levinson's proposed constitutional convention, but he does like the idea of a multi-state legislative project to work around the Electoral College's anti-majoritarian potential. Balkin's book particularly heralds Levinson's concept of "constitutional Protestantism," which he says "has struck a sympathetic chord with constitutional thinkers who are critical of judicial supremacy, and who seek to discover alternative constitutional values in the work of legislatures, executive officials, social movements, and ordinary citizens."³⁰

Constitutional Redemption is a richly thought-provoking book, particularly rich in

25. *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

26. *Lawrence v. Texas*, 539 U.S. 558 (2003).

27. TUSHNET, *supra* note 2, at 139-142, 144-146; BALKIN, *supra* note 3, at 69, 135, 182, 206, 272 n.33.

28. BALKIN, *supra* note 3, at 123.

29. CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (William N. Eskridge, Jr. & Sanford Levinson eds., 1998); SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006).

30. BALKIN, *supra* note 3, at 95-96. Balkin is discussing SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988).

its contemplation of parallels discoverable between concepts of religion and aspects of constitutional theory. It also has interesting reflections on ways in which judicial interpretive opinion can be thought of as similar to performances of a score by a musician or of a script by an actor.³¹ And Balkin is to be credited for his efforts to sort through the difficult analysis of what distinguishes exactly an “off-the-wall” from a legally plausible line of argument.³² I am not yet fully satisfied, for he has not yet attempted to specify how one decides whether a particular judicial opinion was “unduly motivated by political agendas” or “duly” motivated by a redemptive constitutional aspiration.³³ But perhaps this will come in the next book.

Another particular strength of this book is its encouragement to aspirational thinking, offering trenchant doctrinal analysis of some recent Supreme Court decisions that turned away from the more appropriately redemptive arguments that were legally available. He offers several illustrations, and I found his discussion of those related to racial profiling to be particularly persuasive.³⁴ As a political institution, a court’s greatest strength probably lies in its potential to check overreaching and/or bias by administrative officials (such as cops). On the other hand, Balkin could occasionally benefit by taking to heart Tushnet’s message that politics is sometimes the straightest and most effective path to a policy goal. This corrective would seem to apply well to Balkin’s aspiration to have the Supreme Court declare unconstitutional the legislative sentencing differences between smoked and powder cocaine. Traditional lobbying of Congress would seem to offer the better potential on this subject.

31. BALKIN, *supra* note 3, at 91-94. Political scientist Lief H. Carter made similar arguments in LIEF H. CARTER, *CONTEMPORARY CONSTITUTIONAL LAWMAKING: THE SUPREME COURT AND THE ART OF POLITICS* 150-55 (1985). I have elsewhere commented on them. LESLIE FRIEDMAN GOLDSTEIN, *IN DEFENSE OF THE TEXT: DEMOCRACY AND CONSTITUTIONAL THEORY* 176-81 (1991).

32. BALKIN, *supra* note 3, at 179-82.

33. *Id.* at 181.

34. *Id.* at 167-71.

