
Mark Tushnet: *Taking Back the Constitution: Activist Judges and the Next Age of American Law*. (New Haven, CT: Yale University Press, 2020. Pp. x, 308.)

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Mark Tushnet's latest book is informed by two of his earlier works. In *Taking the Constitution Away from the Courts* (Princeton University Press, 1999) he presented an argument against the concept of judicial supremacy in interpreting the US Constitution and in favor of popular constitutionalism. The people, through social movements, parties, interest groups, and control of Congress, have decided over time, and *should* decide, what the Constitution means. His 2013 book, *In the Balance: Law and Politics on the Roberts Court* (Norton), examined the ways in which Chief Justice John Roberts straddled the divide on the Court between a liberal wing tied to New Deal/Great Society notions of the law, and a conservative wing motivated by Reagan-era values of free enterprise and small government.

In his new book, Tushnet argues that the election of Donald Trump in 2016, and his ability to appoint Justices Gorsuch and Kavanaugh to the Court, heralds a new era of constitutional law. He sees two possible scenarios going forward, depending on the outcome of the election. In the first scenario, where Trump wins, a new conservative regime will take hold and be supported by the Court, and in the second, the Court will stymie the Democratic majority's policy efforts unless they are prepared to change some rules.

Tushnet begins where he thinks we find ourselves in 2019, poised on the brink of a new constitutional order that could reflect either the economic and social nationalism of Trump's policy preferences or a progressive alternative centered on democratic participation and a stronger social safety net. The chapters in this section of the book focus on his critique of modern Republican approaches to constitutional interpretation. He rejects the idea of judges as neutral "umpires." He thinks originalism in all of its forms is a cover for conservative political values rather than a neutral method of interpretation. Several chapters in this section focus on particular areas of the law—election rules, race, religion—and explain how the new conservative majority is shaping the law to the advantage of the interests and social groups represented by the Republican party.

Next, Tushnet explores what we might expect from the new Republican majority on the Court going forward. This is a highly speculative enterprise, which Tushnet seems to recognize by the use of the word "might" throughout the argument. He discusses the most likely areas for the Court to pursue a conservative agenda, including election rules that advantage the Republican Party, and wins for Republican-leaning organized interests (the NRA, the right-to-life movement, and businesses). He devotes several chapters to the likelihood that a probusiness Court will pursue the effort begun during the Reagan administration to dismantle the modern administrative state.

The last two sections of the book focus on what Democrats might do should they prevail in 2020 and have the opportunity to shape the new constitutional order. He argues that Democrats should pay attention to making policy, particularly at the state and local level, and rely on state courts and state constitutions more when attempting to advance a progressive agenda. They might also use conservative approaches to constitutional interpretation (e.g., defending “sanctuary city” policies with the anticommandeering doctrine developed by the Rehnquist Court). He sees little opportunity to advance progressive issues at the national level as long as the Supreme Court has its Republican majority and the Senate has the filibuster. He ends by suggesting that if Democrats win control of Congress, as well as the White House, they should learn to play “constitutional hardball” as well as Republicans have, and seriously consider court packing and elimination of the filibuster.

Tushnet ends with speculation on how progressives might dominate the new constitutional order. The first step is to give up on the belief in judicial supremacy, and instead turn to popular constitutionalism, challenging the Court’s decisions when they conflict with progressive ideals and mobilizing interests to resist. This is what the Republicans did well in challenging the New Deal order. Now that they have their Court, Republicans are likely to become believers in judicial supremacy, and Democrats will be motivated to abandon their long-held faith in the Court as an agent of change. He does not appear to believe there is a way to accomplish change through the Article V amendment process. But, he reminds us, the Framers of the 1787 Constitution did not follow the process required under the Articles of Confederation and nonetheless ushered in a new constitutional order.

This book is an engaging read, but reading it in early 2021, when we know the outcome of the election and its aftermath, we can more easily see its limitations than its strengths. Speculative argument can be an interesting intellectual exercise, but that speculation can be put to the test quite rapidly. Several examples come to mind. Tushnet argues that Republican judges will help Republicans with election rules that favor them. And yet, in the sixty some cases filed in federal and state courts, including the US Supreme Court, by Donald Trump and his allies challenging the 2020 election, not a single one succeeded. Perhaps more startling to read in 2021 is Tushnet’s too sanguine dismissal of concerns about the dangers of playing “constitutional hardball” and the breakdown of democratic norms. Trump’s critics’ “nightmare” scenario is “that he will use all the force at his disposal when push comes to shove—call his supporters on to the streets to use their Second Amendment remedies” (238). Tushnet does not seem to think this is likely, but, he says, instead of a nightmare, we might have a “refreshing dream. . . that there’s nothing wrong with hardball as such” (238). Disruption of existing political arrangements can lead to their collapse and that can be a good thing.

The political science work on the emergence, consolidation, and demise of constitutional orders that Tushnet says is framing his argument is nonspeculative historical work that looks back at evidence that exists. The historical

lens allows us to recognize the often gradual, but sometimes sudden, developments in politics, the economy, and society that break down old coalitions and build new ones. It also provides a much more nuanced approach to understanding the Supreme Court and its role in either consolidating or challenging the emergence of a new order. Yes, members of the Court are human with political perspectives that shape their approach to the law, and at any given time, depending on the opportunities for appointment, they can be generally reflective of the political majority or quite out of touch with it. But from the perspective of political development and institutionalism, from which the regime/political-order literature originates, judges are also constrained by rules and institutional concerns that make their decisions less predictable than judicial behaviorists would have us believe. Tushnet seems to acknowledge this implicitly by the frequency with which he says things might, may, or could happen. But in the end, his analysis and predictions are driven much more by the assumption that judges are political animals than by any belief that they are constrained.

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Michael S. Kochin and Michael Taylor: *An Independent Empire: Diplomacy and War in the Making of the United States*. (Ann Arbor: University of Michigan Press, 2020. Pp. x, 309.)

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The term “empire” is not fashionable among American academics. Being synonymous with colonialism, it has come to represent, as the popular journalist Robert D. Kaplan has proposed, a symbol for racism writ large, the legacy of Western imperialism. Yet as Kaplan observes, in the wake of the emerging great power struggles of today, the concept of empire still lurks in the background, offering us perhaps the best analytical framework to understand modern geopolitics.

It also offers us the best analytical tool for understanding the development of the first fifty years of American foreign policy and national security. So Michael Kochin and Michael Taylor propose in their compelling and provocative book *An Independent Empire: Diplomacy and War in the Making of the United States*. Covering a host of episodes and key, frequently obscure, personalities from the American Revolutionary period through the country’s early constitutional development, the authors declare that the transition