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Mark Tushnet: The Right Questions

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I

It is the most grotesque of ironies that much of twentieth-century jurisprudence has been an effort to make law into a science. This effort amounts to a reversal of a far earlier appropriation. It was the observation of regularities in gravity and the movement of the planets that reformed science and gave credence to the locution, 'the laws of nature.' Nature was "lawful" because it appeared to follow undeviatingly a certain regimen, which is to say that any deviations observed were held to be clues as to the true content of the laws that were being followed. Mathematics was the language in which the laws of nature were encoded. This view of science has persisted, most especially among scientists. But the view of law from which it took its description has undergone a dramatic change.

Law is generally held to be the most contingent of human disciplines, especially by lawyers. It was the birth of the modern state, at about the same time and place as Galileo's observations, that severed law from theology and married it instead to that most fickle of contingencies, politics. This severance meant that law would thereafter be understood as the very opposite of the unchanging symmetries of nature. Therein lies the irony: The twentieth century attempted to seize the mantle of science for law when science itself had so long ago appropriated the idea of "laws" that that idea is virtually unrecognizable to most persons dealing with law today.

During the twentieth century, reductionist programs attempted to found jurisprudence on the twentieth-century version of "natural law" (that is, the social sciences). Some, like the law-and-economics movement, still flourish; others, like the empirical programs of legal realism, have languished. All sought, however, to replace the necessary rites of judgment with the alleged facts of social science, the certitudes of ideology, and the search for the one true standard. And this too was ironic; for while the way to make science a search for laws was to focus on the unique elements of science (its relationship to mathematics, its systematic testing by prediction and experiment, or its non-teleological modality of explanation, etc.), the way in which it was sought to make law into a scientific search was to transform law into something else (economics, the class struggle, the hermeneutics of interpretation, etc.).

In one important respect, however, science had something to give to law. In scientific research there is nothing quite so important as choosing the right questions to pursue. The universe of possible questions is infinite; the resources for experimentation frustratingly constrained. Whether a question is ripe for

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research depends on many factors including, of course, the fashion and habits of the scientific culture. In the last twenty-five years the action has shifted in constitutional law from the development of legal theories that would serve as a basis for litigation (as epitomized by Frank Michelman's famous Harvard *Foreword* urging a constitutional basis for welfare rights),[1] to the search for a broader understanding of the constitutional order (as epitomized by Michelman's influential Harvard *Foreword* calling for civic republicanism).[2] The set of questions taken up by the legal academy has reflected this shift in fashion and habits.[3]

Being so close to these shifts may make them seem much more dramatic than they are. While interesting and worthy of discussion, such shifts in focus are scarcely fundamental changes in the constitutional order; indeed, I am inclined to doubt whether there have been more than two fundamental periods of constitution-making in the United States,[4] and both of these occurred in the aftermath of war. If, as I argue elsewhere,[5] the Long War that began in 1914 actually did not end until 1990 and if, as I argue in the same place, such epochal wars typically precede changes in the constitutional order of states, then we may now, however, be on the verge of a new such period of constitution-making.

A constitutional order is defined by its unique basis for legitimacy. Monarchical orders are legitimated by customary rules of descent, often guided, it is supposed, by the divine will. Republican orders are legitimated by rule-based institutions, democratic orders by representative institutions, and so on. The constitutional order that has governed the twentieth-century American state is a variant of the same order that prevailed in Europe during this century. In essence, its legitimacy is premised on a single promise: Give the state power, and it will improve the material well-being of the people. This order had many ideological variations, chiefly communism, fascism, and parliamentarianism, but all were based on this same, fundamental premise. Hitler, Stalin, and Franklin D. Roosevelt disagreed as to how this might be best done, but each promised that his system would deliver the goods.

If we are witnessing the era of a new constitutional order, this fundamental compact of the American state since Lincoln will be redefined. A new form—the "market state"—offers a different compact: In exchange for power, the state will maximize opportunity. It will gradually shed the responsibilities of the welfare state, and take up new ones in their place. Partisans accustomed to state

1. Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

2. Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

3. Mark Tushnet & Timothy Lynch, *The Project of the Harvard Forewords: A Social and Intellectual Inquiry*, 11 CONST. COMMENT. 463 (1994–95).

4. *But see generally* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

5. PHILIP BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY (forthcoming 2002).

action on behalf of moral objectives, whether affirmative action or antiabortion laws (to take two examples), will feel betrayed by this new form of the state. As in previous such periods, we can expect a vehemence and violence in our political discourse that may shake our confidence and threaten our well-being.

II

The great movements of the last twenty-five years in constitutional jurisprudence—critical legal studies, law and economics, critical race and gender theory—have little to say about such a development in constitution-making. Far from being avant-garde, they are little more than applications of the insights of the great movement, legal realism, and are therefore thoroughly encapsulated in a single modality of American constitutional argument, prudentialism. The emergence of a new constitutional order was a question that legal realism ignored. And yet it was taken up by Mark Tushnet (you may be surprised to learn this about a Movement man), who brilliantly speculated in his own Harvard *Foreword* that we were on the verge of a new constitutional order.[6]

Let me offer two potential consequences of this change in the constitutional order, one benign, the other malignant.

Market states are defined less by their territoriality than nation states, and thus will find other means of organizing themselves appropriate to their constitutional form. One may speculate that the umbrella, rather than the felt-tipped marker that once limned partition lines, will be one such means. The umbrella is a free trade or defense zone that allows for a common legal jurisdiction as to some, but not all, issues. To put it differently, an umbrella is one outcome of a market in sovereignty. Different umbrellas may overlap. Small cultures can shelter within such umbrellas—cultures too small to be viable as separate states—retaining for themselves control over essentially cultural matters. For such umbrellas to work, however, we must weaken the promise of maximum identical human freedoms for all peoples, because the control that a culture wishes to retain (its religious character, for example) will necessarily infringe maximum identical freedom.

Such umbrellas offer a constitutional mechanism for ameliorating one of the most significant shortcomings of the market state: its indifference to community and to culture. Under a multicultural umbrella, many subcultures can dwell, appropriating the economic and defense advantages of a larger territorial scope while retaining the ability to develop different legal regimes within each specific domain. These subcultures will not be states, at least as we currently understand the term. Let us call them "provinces." These may be provinces in which feminists or fundamentalist Christians or ethnic Chinese congregate, all within a larger sheltering area of trade and defense. This development would

6. Mark Tushnet, *The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29 (1999).

represent a profound reversal of the constitutional developments of the last 100 years in which the subcultures of regional political constituencies were homogenized by applying human rights laws uniformly.[7]

A second, more malignant development has recently burst onto the consciousness of the world. The multinational mercenary terror network that Osama bin Laden and others have assembled is a new and mutated form of the market state. Like other emerging market states, it is a reaction to the strategic developments of the Long War (international telecommunications, rapid computation, weapons of mass destruction) that brought forth global cultural penetration, the liberalization of trade and finance, and arms proliferation. Like other states, it has a standing army; it has a treasury and a consistent source of revenue; it has a permanent civil service; it has an intelligence collection and analysis cadre; it even runs a rudimentary welfare program for its fighters, and their relatives and associates. It has a recognizable hierarchy of officials; it makes alliances with other states; it promulgates laws that it enforces ruthlessly; it declares wars. What it lacks is a contiguous territory. This network, of which al Qaeda is only a part, is not a geographical state. It is, however, a state nevertheless—a new kind of virtual state made possible by the strategic and technological developments listed above.[8] The emergence of the virtual market state means that our classical strategies of deterrence based on retaliation will have to be rethought.

Deterrence, assured retaliation, and overwhelming conventional force enabled victory for the coalition of parliamentary nation-states in the Long War. These capabilities cannot provide a similar victory now because what threatens the states of the world is too easy to disguise and too hard to locate in any one place. We cannot deter an attacker whose identity or location is unknown to us, and the very massiveness of our conventional forces makes it unlikely we will be challenged openly. As a consequence, we are just beginning to appreciate the need for a shift from the sole reliance on target, threat-based strategies to defensive, vulnerability-based strategies.

Realizing that we are fighting a state and not just a stateless gang helps clarify our strategy. For one thing, it suggests that controlling and diminishing the revenue stream to bin Laden's network is far more important than capturing or killing any individual.

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7. *Id.*; *see also* Alan Wolfe, *Moral Federalism*, RESPONSIVE COMMUNITY, Summer 2000, at 49, 49 (writing about present harbingers of such a development). Alan Wolfe writes:

> For all the talk of globalization, it matters greatly these days where you happen to live. If you are gay and want recognition of your union with a person of your own sex, it helps if you are a Vermonter. If you are poor and want public assistance to send your child to a private school, you can be thankful if you live in Milwaukee. And if you like having the Ten Commandments posted in your local courthouse, Alabama is the place to be.

Id.

8. *See generally* DANIEL BENJAMIN & STEVEN SIMON, THE FACE OF THE ENEMY (forthcoming 2002).

III

Changes in the constitutional order will bring new questions to the fore: constitutional interpretation, the Constitution outside the courts, comparative constitutional law, and biography (by which I mean an historical description of the choices made by legal decisionmakers, not a memoir of their personal lives).

Legal realism did not have much to offer to constitutional interpretation beyond a challenge to its legitimacy. Its classic formulation is, to paraphrase Chief Justice Hughes, the statement that we are under a Constitution, but "the Constitution is what the judges say it is."[9] Indeed we owe the current set of constitutional explanations—the jurisprudential accounts for the legitimacy of the modalities of constitutional argument—to the reaction of a generation of scholars and judges to the legal realist challenge as well as to the dominating question of the era, the countermajoritarian objection.[10] After such "knowledge" (from the legal realist's perspective) questions of legitimacy achieve leading status.

With respect to constitutional decisionmaking outside the courts, the legal realist formulation was captured by Gerald Ford's remark regarding impeachment: "[A]n impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history," and conviction results from "whatever offense or offenses two-thirds of the [Senate] considers to be sufficiently serious to require removal of the accused from office."[11] In such an environment, most constitutional decisions are left up to the courts; there is simply no other way of achieving coherence. Those decisions that are delegated to other branches, like impeachment, are essentially standardless.

With respect to comparative constitutional law, what was there for the legal realist to compare but that which explicitly reflected the decisions of authoritative deciders? Comparative constitutional law courses, as a result, became paralyzingly boring, typically consisting of arid juxtapositions of the provisions of different written constitutions: which ones protect trial by jury, which ones have a bicameral legislature, and so forth. In this way, comparative constitutionalism came to resemble comparative religion, where lecturers profess to think that the anthropologically collected dogma of a particular sect more or less sums up the bases for religious faith. Such comparative constitutional law courses (and I dare say the comparative religion ones, too) lack the animating aspect of the subject being studied. They lack constitutionalism's link between

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9. CHARLES E. HUGHES, ADDRESSES AND PAPERS OF CHARLES EVAN HUGHES 139–41 (1908) ("The Constitution is what the Supreme Court says it is."); CHARLES E. HUGHES, THE SUPREME COURT OF THE UNITED STATES 120 (1928) ("The law is what the judges say it is.").

10. *See, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962); CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953); Hugo G. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960); Henry Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

11. 116 CONG. REC. H11913 (daily ed. Apr. 15, 1970) (statement of Rep. Ford).

the common methods of legitimation (unique to that era) and the different values that characterize different states. People do not sacrifice their lives to protect the electoral college. Nor do people make the sacrifices asked by religious faiths because they share deep convictions on any but the most basic theological matters. The really interesting comparisons in constitutional law are across time because there we can see the ground of legitimation shifting, sometimes quite suddenly and dramatically. But it was rare to find that sort of comparison in the legal realist accounts.[12]

Finally, legal history[13] and biography became essentially political in the era of legal realism. Lucas A. Powe's recent account of the Warren Court[14] is an excellent example; less winning but in quite the same vein is *The Brethren*, which depends on the idea that law has very little to do with judging, at least at the level of the U.S. Supreme Court.[15] Here, too, there was a counterrevolution. Some biographers attempted to demonstrate that a judge's commitment to a certain sort of jurisprudence arose from a person's character,[16] as of course it does, but were compelled to neglect the other half of this truth, that a life could be shaped by the constraints and requirements of theory-applying.

IV

Why are these four subjects—constitutional interpretation, constitutional decisionmaking by nonjudicial agents, comparative constitutional law, and legal biography—such urgent subjects now? How are they related to each other? And how are they connected to the emergence of a new constitutional order, the market state?

The four questions to which I drew attention above are connected to one another by their relationship to change in the constitutional order. They are urgent now because we are witnessing a rare and momentous change.

A. CONSTITUTIONAL INTERPRETATION AND CONSTITUTIONAL DECISIONMAKING OUTSIDE THE COURTS

Because the constitutional order is defined by its legitimating premises, inquiries into the legitimacy of constitutional decisionmaking (as opposed to its justification) concomitantly implicate the constitutional order. If we want to know how and whether legitimacy is maintained, we must know the background assumptions upon which law's legitimating methods depend. The constitutional ethos upon which ethical argument depends, for example, has important

12. An interesting exception was ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

13. *See* LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW (rev. ed. 1985).

14. LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2000).

15. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN (1979). Also noteworthy is BRUCE ALLEN MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE (1988).

16. *See, e.g.*, GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1994).

elements of continuity between the American state of Washington and Hamilton and that of Lincoln and Wilson, but there are differences as well: The 1789 state assumed that citizens' duties to the state endowed government with maximal security discretion, even in enforcing the Alien and Sedition Acts; the 1865 American state assumed that mass conscription, like mass education and the broadening of the franchise, did not infringe the retained rights of the individual; the 2000 American state will take the protection of the human rights of the individual as the ethical basis for government. All these different orders agreed that the maintenance of a shoreline between rights and powers defined the American constitutional arrangement, but the high-water marks of each were distinct. For example, the American constitutional structure was redefined by the Civil War Amendments, which placed the states under the same system of rights as the national government.

One can expect that structural arguments will again undergo a transformation in this new period of constitution-making, as the structural focus shifts to diversifying the options available to the individual and her development, and shifts away from the uniform federal requirements that, until now, defined states' freedom of action. Textual arguments may change both because there are new texts to be construed (amendments) and because the contemporary sensibility at work reading the constitutional texts will change. Even historical argument will change because the relation between the original ratifiers' understanding and its application to new controversies will appear differently from a radically altered perspective. What seems prudent will change (a recent *New Yorker* cartoon depicts two children, one of whom is saying, "I'd like to share my candy, but I'm afraid of creating a culture of dependence"), and legal doctrine will inevitably follow the constitutional order because serving that order is the purpose of doctrine.

All this is to say that the exploration of constitutional interpretation will take on a new intensity, as partisans of the old order attack the legitimacy of the new, and advocates of the new order attempt to claim continuity with our interpretive traditions. Some classic problems of the 1865 American state—I have in mind especially the countermajoritarian objection, which first appeared in the 1870s—will, mercifully, fade away. New problems, like the vexing issue of constitutional interpretation by nonstate actors, will re-emerge. Finally, the trend toward judicial exclusivity of interpretation, so marked in the 1865 American state, will be reversed with all the complexities that such a reversal will bring.

B. COMPARATIVE CONSTITUTIONAL LAW

Like the nation-state of Bismarck and Lincoln, of Theodore Roosevelt and Theodore Herzl, the new market state will come in several variations. Some market states will adopt a Washington Model. In such states, success comes to those who nimbly exploit the fast-moving, evanescent opportunities brought by high technology and the global marketplace. These states provide an environment for the fullest expression of individual creativity; they reward those who

innovate and those who can deal with, and indeed relish, impermanence. There are no fixed rules or taboos. Competition is the great god that sorts out the quick and the dead.

Other states will look quite different, reflecting societies in which the values and attitudes of the Berlin Model have prevailed. Governments will play a far larger role in defining the common interest and using the political power of government to assert that interest. Minority rights will be more carefully husbanded; international institutions will be more carefully maintained; protection of the environment will be given a priority. In short, there will be in such states a sincere effort to afford respect to the mores of many different groups, accepting that this can be a costly strategy.

Finally, some states will adopt an approach associated with the Tokyo Model. In this model, governments also play a large role, but that role is less a regulatory one and more a supportive role. These governments provide long-range strategic planning based on the good of society taken as a whole—not based on the sum of its interest groups. Unlike the regional groupings fostered by the Berlin Model, the states of the Tokyo Model are likely to become more and more ethnocentric, and more and more protective of their respective cultures.

In one form of the market state, all is profusion, randomness, variety; in another, the constitutional environment is, for the most part, publicly maintained, and highly regulated with different sectors for different uses; in yet another variation, the state is smaller, more inwardly turned—it aims for the sublime, not the efficient nor the just. I need hardly add that, at such a moment of change, comparative constitutional law ought to achieve a heightened interest such as it had in 1789 in the United States and Europe, and again in the 1870s among international lawyers.

C. BIOGRAPHY

Legal biographies will take a more central place in constitutional studies. Biography asserts, implicitly, the decisive role of free will. When human beings are simply the random objects thrown in collision by "historic forces" there are no real choices to be made, there is no real tragedy to be suffered, and there is nothing unique about the story to be told. But when we come to believe that our decisions have otherwise avoidable consequences, and that we will stand presently at one of those rare moments of flux when those decisions will have fateful consequences of historic significance, we will want to study the stories of men and women in similar circumstances in the past. Twenty years ago I called for "essays depicting individuals and societies responding to the theoretical requirements of the legal conceptions with which they must cope."[17] Principal among these is the conception of sovereignty, a conception that is by no

17. PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 248 (1982).

means shared among the great states that are moving toward a new constitutional order.

V

Mark Tushnet, for a decade the secretary to the Conference on Critical Legal Studies, the church militant of legal realism, may seem like an unlikely person to go beyond that movement. Yet Tushnet was among the first to recognize that the roiling political currents of the 1980s and 1990s were evidence of something deeper than a political new wave. In his pathbreaking Harvard *Foreword* of 1999 he explicitly asked whether a new constitutional order was awakening in the United States.[18] And he related the development of this new order both to political programs and judicial decisions of the period. He wrote,

> The chastened aspirations of the new constitutional order derive from a somewhat different view of the prerequisites of liberty and flourishing. . . . [S]mall-scale programs with modest aims characterize the new constitutional order: any deficiencies in the provision of health care or in income security after retirement are to be dealt with by market-based adjustments rather than ambitious redistributive initiatives. Similarly, poverty is to be alleviated by ensuring that the poor obtain education and training to allow them to participate actively in the labor market, rather than by providing generous public assistance payments. . . . The Court's federalism decisions are the most obvious examples of substantive downsizing. . . . The cumulative effects of these doctrines can best be understood in light of the institutional characteristics of the new constitutional order.[19]

Moreover, his work in each of the four subject areas previously discussed is innovative and profound, and his attention to these particular four subjects is, in itself, remarkable. *Red, White, and Blue: A Critical Analysis of Constitutional Law* is an important study of the shortcomings in several of the most influential postmodern schools devoted to rehabilitating the modalities of American constitutional argument.[20] *Taking the Constitution Away from the Courts* is a bold attempt to move our constitutional consciousness out of the sedated state in which it has long been since the introduction of the case method reduced the teaching of constitutional law to the review of appellate cases.[21] Few casebooks treat the constitutionality of Lincoln's decision to issue the Emancipation Proclamation (or, for that matter, his decision that secession was unlawful), or Jefferson's purchase of Louisiana in the absence of statutory authority, or Truman's "police action" in Korea without a declaration of war, or Roosevelt's

18. Tushnet, *supra* note 6.
19. *Id.* at 61–62, 70, 74.
20. *See* MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988).
21. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

Lend-Lease program in the very teeth of the Neutrality Act.[22] Surely, however, these are worthy of at least as much study as that lavished on the doctrinal intricacies of the Establishment Clause.

By contrast to the courses that treat U.S. constitutional law, comparative constitutional law courses are almost unknown in the American curriculum. Here, too, an encouraging development is Mark Tushnet and Vicki Jackson's book, *Comparative Constitutional Law*,[23] a radical departure by Tushnet and one of his most distinguished and wide-ranging law colleagues at Georgetown. Finally, I would add my voice to the chorus of praise for Tushnet's work on the life of Thurgood Marshall,[24] a rich biographical treatment that helps to rid us of the illusion that social or theological mechanics explains our constitutional life.

It isn't just that Tushnet has found the *right* questions in a rapidly changing era, but that he has also perceived them with energy and insight that commend him so much to the rest of us. For a Movement man to have also been a fresh explorer; for a "man of the left" to have charted territories that are not mapped by right, left, or indeed directional symmetries of any kind; for these bold intellectual departures, Tushnet is to be valued and celebrated. He has been willing to continue inquiry, even if this has turned the searchlight—and the artillery—on his own position.

22. I have collected about eighty such "cases" (presented in the business or public-policy school manner, as thick fact descriptions).

23. VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW (1999).

24. MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 (1994); MARK V. TUSHNET, MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961–1991 (1997).