

COPYRIGHT NOTICE:

Mark Tushnet: The New Constitutional Order

is published by Princeton University Press and copyrighted, © 2003, by Princeton University Press. All rights reserved. No part of this book may be reproduced in any form by any electronic or mechanical means (including photocopying, recording, or information storage and retrieval) without permission in writing from the publisher, except for reading and browsing via the World Wide Web. Users are not permitted to mount this file on any network servers.

For COURSE PACK and other PERMISSIONS, refer to entry on previous page. For more information, send e-mail to permissions@pupress.princeton.edu

THE IDEA OF A CONSTITUTIONAL ORDER

PRESIDENT BILL CLINTON announced in his 1996 State of the Union Address that “[t]he age of big government is over.”¹ Many Republicans thought that the president was cynically appropriating Republican themes to preserve his presidency after the apparent public repudiation of Clinton’s approach to government in the 1994 elections, when Republicans attained a majority in both the House of Representatives and the Senate for the first time since 1954. Many traditional Democrats thought that the president was betraying the Democratic Party’s principles as they had been developed in Franklin Roosevelt’s New Deal agenda and Lyndon Johnson’s Great Society programs.

We ought to take President Clinton’s observation quite seriously. His statement demonstrated his understanding that what I call a new constitutional order had been consolidated. By *constitutional order* (or *regime*), I mean a reasonably stable set of institutions through which a nation’s fundamental decisions are made over a sustained period, and the principles that guide those decisions.² These institutions and principles provide the structure within which ordinary political contention occurs, which is why I call them *constitutional* rather than merely political.³

Both institutions and principles constitute a constitutional order. On the institutional level, a constitutional order extends well beyond the Supreme Court and includes the national political parties, Congress, and the presidency. Indeed, as I argue in chapters 1 and 2, the constitutional principles articulated by the Supreme Court cannot be understood except in the context of the institutional arrangements prevailing in the national government’s other branches. For me, a constitutional order is more like the small-c British constitution than it is like the document called the United States Constitution. And, just as scholars of constitutionalism have found it productive to think about the British constitution, so I think it productive to think about constitutional orders in the United States that go beyond judicial doctrine and the written Constitution to encompass relatively stable political arrangements and guiding principles.

Franklin D. Roosevelt’s State of the Union message in 1944 defined the guiding principles of the constitutional order that prevailed from the 1930s to the 1980s, which I call the New Deal–Great Society constitutional order. Roosevelt called for implementing a “Second Bill of Rights”

that included “the right to earn enough to provide adequate food and clothing and recreation” and rights to “adequate medical care,” “a decent home,” and “a good education,” as well as “the right to adequate protection from the economic fears of old age, sickness, accident, and unemployment.”⁴ Clinton’s claim that the age of big government had passed did not mean that the national government had nothing left to do. Rather, the initiatives of the new constitutional order would be small-scale. The aspirations expressed by Roosevelt, and in the New Deal–Great Society constitutional order, have been chastened in the new order.

In the most general terms, the principles that guide the new constitutional order make it one in which the aspiration to achieving justice directly through law has been substantially chastened. Individual responsibility and market processes, not national legislation identifying and seeking to promote justice, have become the means by which that aspiration is to be achieved. Law, including constitutional law, does not disappear, but it plays a less direct role in achieving justice in the new constitutional order than it did in the New Deal–Great Society regime. Statutes and constitutional doctrines establish the conditions within which individuals and corporations seek their own ends, which include, for some, achieving justice. Statutes and constitutional doctrine form the framework within which these efforts take place. The new order’s vision of justice, that is, is one in which government provides the structure for individuals to advance their own visions of justice.

Constitutional orders are gradually constructed and transformed: At any moment we can observe a dominant set of institutions and principles, some residues of a prior regime, and some hints of what might be the institutions and principles that may animate a succeeding one.⁵ As I argue in chapter 1, the present constitutional order began to take shape with Ronald Reagan’s election in 1980, was given greater definition in the 1994 elections, and was consolidated during the final years of the Clinton presidency. The gradual processes of regime construction and transformation make it particularly difficult to describe “a” constitutional order, because one must always be concerned that some feature is a residue of the past or an anticipation of the future rather than a central feature of the existing regime. My descriptions of those central features will be less qualified than perhaps they should be, but recurrently observing that my argument is tentative would be distracting.

Throughout this book I contrast the new constitutional order with the New Deal–Great Society constitutional order. For my purposes it is unnecessary for me to identify other constitutional orders in U.S. constitutional history, but it does seem appropriate at this point to distinguish my approach from two others, to which it is most closely related in constitutional scholarship.⁶ Law professor Bruce Ackerman has described con-

stitutional history as a series of constitutional moments followed by extended periods of what he calls normal politics.⁷ The periods of Ackerman's normal politics correspond roughly to what I call constitutional orders, and his constitutional moments might be the points at which new constitutional orders come into being.

Building on Ackerman's insights, law professors Jack M. Balkin and Sanford Levinson also describe revolutionary transformations in constitutional orders.⁸ They disagree with Ackerman in emphasizing that these transformations can, and ordinarily do, occur gradually. They implicitly criticize Ackerman's metaphor of a *moment*, which suggests—misleadingly, at least with respect to the new constitutional order—that constitutional orders necessarily come into being quickly.⁹ For Balkin and Levinson, constitutional revolutions happen through a process of what they call partisan entrenchment, in which one party with a guiding ideology gains control—sometimes suddenly but more usually gradually—of all three branches of the national government. Balkin and Levinson frame their essay with *Bush v. Gore* in the background, for they take that case, which installed George W. Bush in the presidency, as a step in the direction of partisan entrenchment. As they see the case, the Supreme Court's conservative justices took steps to ensure that the next justices to be appointed would consolidate Republican control of the courts and thereby complete the partisan entrenchment that constitutes a constitutional revolution.¹⁰

I agree with Balkin and Levinson, and thus disagree with Ackerman, that constitutional regimes can come into being over extended periods rather than in convulsive moments. So, for example, some of the Supreme Court's decisions discussed in chapter 2 as exemplary of the demise of the New Deal–Great Society constitutional order pre-date 1980, and some doctrines that flourished in the late 1990s had precursors in the 1970s. The emphasis Balkin and Levinson place on partisan entrenchment, however, means that they cannot consider the possibility, developed in this book, that a constitutional regime can be characterized by persistent divided government, and that divided government produces policies with their own guiding principles. To Balkin and Levinson, *Bush v. Gore* placed us on the verge of a constitutional revolution; I suggest, in contrast, that we have already made the transition to a new constitutional order.

Another difference between my approach and Ackerman's is that Ackerman insists on identifying constitutional moments because he wants to develop a normative constitutional theory that can explain what he calls the intertemporal difficulty with constitutional law,¹¹ the problem of explaining why decisions taken by people generations ago should restrict the choices people today wish to make. Ackerman solves the intertem-

poral difficulty by arguing that decisions made in constitutional moments have greater normative weight than those made during periods of normal politics.¹² The reason is that the political sequences producing constitutional moments elicit from the public a greater degree of attention to constitutional fundamentals than the public gives those fundamentals during normal politics, when quotidian concerns understandably and properly distract many from political deliberation and permit narrowly focused interest groups to influence policy development more than occurs during constitutional moments.

Ackerman's normative concerns lead him to develop a number of formal criteria that, in his view, must be satisfied before we can say that a constitutional moment has occurred: Because duties of fidelity to the Constitution arise from constitutional moments, people deserve to have some clarity about the precise occasions from which those duties arise. I am less concerned than Ackerman with the normative problems associated with the intertemporal difficulty.¹³ For that reason, I do not think it necessary to demonstrate that the new constitutional order came into being by satisfying some specific formal criteria.¹⁴ There was no particular critical election, for example.¹⁵ Ackerman's way of thinking about our constitutional order has influenced my approach, but I believe that Ackerman's formalism, derived from his normative concerns, obscures our ability to see clearly the present constitutional order.

Ackerman's formal criteria do have an important advantage: They allow us to identify when one constitutional order replaces another. My approach, unfortunately, lacks the crispness of Ackerman's. Without formal criteria to rely on, I cannot avoid making judgments, which others can readily contest, about which institutional arrangements and guiding principles are stable enough to be part of a constitutional order. Chapters 1 and 2 present, as forcefully as I can, the arguments supporting my judgments, while chapter 3 addresses some challenges to those judgments, with the inevitable effect of weakening the force of my arguments. In the end, I think my judgments remain good ones, but I hope at least to have acknowledged the most vulnerable points in my analysis.

Ackerman's concern with the intertemporal difficulty produces another difference between his approach and mine. That difficulty is closely tied up with judicial enforcement of the principles that guide a constitutional order: It is a difficulty only to the extent that we worry about being bound by decisions taken decades ago, and only courts issue directives that are formally binding. My approach to regime principles is less Court-focused than Ackerman's or Balkin and Levinson's. Unlike them, I believe that *constitutional* principles can be, and typically are, reflected in the statutes that characterize successive constitutional regimes. For the New Deal constitutional order, the social security system and Roosevelt's

proposed Second Bill of Rights are as important as any Supreme Court decisions. For the Great Society, no Supreme Court decisions match the Civil Rights Act of 1964, the Voting Rights Act of 1965, and Medicare in expressing the regime's guiding principles. Of course a constitutional order's principles guide some judicial decisions as well, but we lose some purchase on how our institutions are organized if we confine our attention to the courts.

Chapter 1 describes the institutional arrangements in Congress and the presidency, with a short glimpse at developments in state government. The most important feature of the modern constitutional order is divided government, which places important constraints on what the national government can do. I examine why divided government has arisen, how it has affected relations between presidents and Congress, and how it has affected the internal organization of Congress. Here I rely heavily on works by political scientists. Unfortunately for my project, often the political scientists differ among themselves over describing and explaining developments in national political institutions. Acknowledging the existence of controversy when it exists, I have chosen to invoke those analysts who seem to me most insightful.

Chapter 2 examines the Supreme Court's most important decisions over the past decades. For reasons I discuss in chapter 1, the Court was something of a "leading indicator" for the new constitutional order, repudiating the New Deal–Great Society constitutional order and developing the new order's constitutional principles somewhat in advance of the development of institutional arrangements that eventually provided the larger context for those principles. But, I argue, the Court at present fits reasonably well into the new order and is unlikely to foment a true constitutional revolution that would push the constitutional order into territory not yet occupied.

Chapters 1 and 2 adopt the rhetorical strategy of asserting that there *is* a new constitutional order. Chapter 3 takes up a number of challenges to a strongly put argument that we are in a new constitutional order. Perhaps we are in a sort of interregnum, a period *after* which we will enter a new constitutional order through Supreme Court appointments of the sort Balkin and Levinson fear or through the creation of unified government produced by presidential leadership. Or, perhaps what I call a new constitutional order is simply a general characteristic of American political development: We have occasional convulsions, Ackerman's constitutional moments, followed by periods of drift during which the constitutional aspirations that animated the American people earlier are inevitably chastened. What I call a *new* constitutional order, that is, may be the *usual* constitutional order. My position on these questions is simple: They may be correct, but we can clarify our thinking about our present

situation by considering the possibility that what we have is sufficiently stable, and distinctive, to be called a new constitutional order. In some ways, then, Chapters 1 and 2 should be sprinkled with phrases like, “This shows that we might be in a new constitutional order.” For rhetorical purposes, however, I have decided to keep such qualifications to a minimum even though they more accurately reflect my position than the stronger assertions I actually make.

Chapter 4 examines some recent developments in constitutional scholarship, particularly the work of Cass Sunstein, arguing that these works present a constitutional jurisprudence compatible with, and perhaps designed for, the new constitutional order. Chapter 5 moves beyond the established contours of existing doctrine to examine the ways in which the new domestic constitutional order may have to adjust to a new international context or, to use the trendy word, to globalization. The development on which I focus is international interest in promoting universal human rights, and the implications such an interest might have for the domestic law of federalism, because federalism has been an important focal point in the development of the new order’s constitutional doctrine. A brief conclusion describes some interesting developments in regulatory theory, which might provide the basis for a modest progressive reformist element in the new constitutional order.

I conclude by mentioning a second difficulty that attends my reliance on political science materials and sheds light on some general problems associated with this book’s project. Before the 2000 elections, political scientists confidently presented models that predicted relatively large margins of victory for Vice President Al Gore. The models relied on predictions based on theories according to which voters responded almost exclusively to economic conditions, their assessment of the prior administration’s performance, and the like, and not at all to the candidates’ personal characteristics or the ways they campaigned. The models were an embarrassing failure; they all predicted correctly that the vice president would receive a majority of the votes cast for the two major parties, but that minimal success was overshadowed by their failure to predict how close the election would be.¹⁶ The reason is that the “science” in political science cannot take human willfulness—campaign decisions, voter reactions to specific personalities and events—and mere chance into account. But, as we all know, willfulness and chance play a large role in the day-to-day workings of politics. At best, then, I can describe large trends that seem likely to prevail but that might be changed at any moment by unpredictable events or human decisions.

My analysis describes the structures within which people make decisions based on their own preferences, beliefs, and values. These structures provide incentives and opportunities, but political actors may resist the

incentives or fail to grasp the opportunities.¹⁷ Divided government plays a large role in what follows, but voters may simply decide to reject or reconstitute the new regime, for example by providing large-scale support to a third party or by changing their preferences in ways that produce a unified ideological government.

Law professor Jack Balkin, a scholar whose intellectual formation occurred during the New Deal–Great Society constitutional order, comments indirectly on these issues in reflecting on the Supreme Court’s decision in *Bush v. Gore* that “[d]uring the last five years or so, I have been consistently wrong about what the Court was willing to do to promote its conservative agenda. Repeatedly . . . I have thought to myself: ‘They can’t possibly do *that*. That would be *crazy*.’ And each time I have been proven wrong.”¹⁸ Balkin’s initial impressions were right in one sense: The modern Court’s positions are indeed crazy when assessed against the constitutional doctrine of the New Deal–Great Society order. Younger scholars, particularly those in harmony with the Federalist Society, have a better sense of where the Court is and where it may be going. The real question is whether the positions the Court has staked out to this point define the modern constitutional order’s limits. They might instead be harbingers of an even more revolutionary transformation. Undoubtedly the Court’s decisions are susceptible to aggressive, revolutionary readings that would reshape constitutional law even more dramatically than has as yet occurred. I believe that a revolutionary change in constitutional doctrine is unlikely, because the modern Court’s doctrine is compatible with the regime principles that characterize the new constitutional order’s other institutions. But I am quite aware of the observation (by either Yogi Berra or Neils Bohr—no one appears to be sure) that prediction is hazardous, particularly about the future. I rely, in contrast, on another observation (by either Damon Runyon or H. L. Mencken—again the source is unclear): “The race is not always to the swift, nor the battle to the strong, but that’s the way to bet.”